12-357

No. _____

IN THE

Supreme Court of the United States

GIRIDHAR C. SEKHAR,

Petitioner,

-v.-

UNITED STATES OF AMERICA

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the "recommendation" of an attorney, who is a salaried employee of a governmental agency, in a single instance, is intangible property that can be the subject of an extortion attempt under 18 U.S.C. §1951(a)(the Hobbs Act) and 18 U.S.C. §875(d).

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The opinion of the United States Court of Appeals for the Second Circuit affirming the judgment of conviction of the district court is reported at 683 F.3d 436 (2d Cir. June 26, 2012) and appears in the Appendix at 1a. The opinion of the district court denying Petitioner's motion to dismiss the indictment is not reported and appears in the Appendix at 14a. The opinion of the district court denying petitioner's motion for a judgment of acquittal is not reported and appears in the Appendix at 68a.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 2012. (Pet. App. 1a-13a) This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §1951(a) provides:

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

18 U.S.C. §1951(b)(2) defines extortion as follows:

> "The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

18 U.S.C. §875(d) provides:

> "Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to injure the property or reputation of the addressee or of another or the reputation of a deceased person or any threat to accuse the addressee or any other person of a crime, shall be fined under this title or imprisoned not more than two years, or both."

STATEMENT OF THE CASE

A. Proceedings in State Court

In October, 2009, Giridhar Sekhar was the managing partner of a venture capital firm called FA Technology Ventures. At the time, the New York State Comptroller, the sole trustee of the New York public employee pension fund (Common Retirement Fund), was considering whether to invest pension fund assets in a fund being raised by FA Technology Ventures. If the Comptroller believes an investment

is worthwhile, the Comptroller issues a document called a "Commitment". The Commitment, however, does not commit the Comptroller to making the investment and provides the recipient with no legally enforceable rights. Rather, a Commitment, as the evidence at trial established, is a non-binding letter of intent that cannot be enforced, the Comptroller need not act upon it, and it may be unilaterally withdrawn. (Pet. App. 2a)

Luke Bierman was formerly the General Counsel to the New York State Comptroller; a salaried employee of the Comptroller who did not maintain a law practice. In October, 2009, Mr. Bierman circulated a memorandum recommending against investing in the FA Technology Ventures fund. (Pet. App. 3a) On November 17, 2009, Mr. Bierman, received an e-mail that recited that it was sent by an employee of the Comptroller's Office and requested that Mr. Bierman provide a personal e-mail address so that the sender could reveal what the sender characterized as unethical conduct on the part of one or more employees of the comptroller's Office. (Pet. App. 4a) Mr. Bierman provided a personal e-mail address and the next day received an e-mail that alleged that Mr. Bierman had inappropriately blackballed an investment fund. (Pet. App. 4a)

According to the e-mail, Mr. Bierman acted unethically in blackballing the recommendation of the investment staff on the fund and also accused him carrying on an affair with an individual in the Comptroller's Office. The e-mail directed Mr. Bierman to tell the Comptroller that he had had a change of heart and to recommend moving forward

with this fund. The e-mail threatened that if the demand was not complied with, the information regarding the alleged paramour would be disclosed to among other people, Mr. Bierman's wife. (Pet. App. 4a)

Over the next several days, Mr. Bierman received a number of follow-up e-mails inquiring about the status of his recommendation and reiterating the threat. In none of the e-mails did the sender make a demand that money or other tangible property be delivered up to the sender or a third person. Headers contained in the e-mails revealed that the e-mails were sent from at least three different IP addresses. One of the IP addresses was traced to a computer with a physical location at Mr. Sekhar's residence in Brookline, Massachusetts. Another e-mail was traced to the offices of FA Technology Ventures. (Pet. App. 4a)

A search warrant was executed at Mr. Sekhar's residence on December 3, 2009, and following an investigation, Mr. Sekhar was charged in state court in Albany County, New York with the crime of Attempted Grand Larceny in the First Degree by extortion. See, N.Y. Penal Law §§155.05(2)(e) and 155.42 (McKinney 1965, 1986). That charge was eventually dropped by prosecutors in state court and Mr. Sekhar was charged with Attempted Coercion in the First Degree. See, N.Y. Penal Law §135.65 (McKinney 2008). (Pet. App. 28a) The case proceeded in state court until October of 2010, when it was dismissed and a felony complaint charging one count of Interstate Transmission of Extortionate Threats in violation of 18 U.S.C. §875(d)

was filed in U.S. District Court for the Northern District of New York. (Pet. App. 35a)

B. Proceedings in District Court

On December 3, 2010, a grand jury sitting in the Northern District of New York returned an indictment charging Mr. Sekhar with one count of Extortion under 18 U.S.C. §1951(a) (The Hobbs Act) and six counts of Interstate Transmission of Extortionate Threats under 18 U.S.C. §875(d). (Pet. App. 5a) Throughout the proceedings in Federal Court, Mr. Sekhar maintained that the conduct that the Government alleged Mr. Sekhar engaged in does not constitute attempted extortion, because no property was ever demanded or attempted to be obtained from the victim. The indictment alleged that Mr. Sekhar attempted to obtain a "Commitment, the Comptroller's approval of the Commitment, and the General Counsel's recommendation to approve the Commitment, with the General Counsel's consent". (Pet. App. 5a) Mr. Sekhar moved to dismiss the indictment as insufficient on its face, because it did not allege that defendant attempted to obtain property from the general counsel that was a source or element of wealth that could be sold, transferred or exercised as required by *Scheidler v. National Organization for Women*, 537 U.S. 393 (2003). The Government opposed Mr. Sekhar's motion and alleged that the "property" was the "General Counsel's right to make business decisions free from interference", notwithstanding the fact that the indictment alleged that the property was a "recommendation". By Decision and Order dated March 28, 2011, the District Court (McAvoy, J.) denied Mr. Sekhar's

motion to dismiss the indictment for facial insufficiency. (Pet. App. 25-26a)

In it's decision denying Mr. Sekhar's pretrial motion to dismiss that portion of the indictment that alleged that the property that Mr. Sekhar attempted to obtain was the General Counsel's recommendation to approve the Commitment, the District Court made a finding that the recommendation was property, because the General Counsel had an intangible property right to make *professional* decisions without outside pressure and because it related to the Commitment, which the District Court believed was something that could be sold, transferred, or exercised for value. (Pet. App. 24a) However, the evidence adduced on the Government's case was that the Commitment was not something that could be sold, transferred, or exercised for value.

At trial, Mr. Sekhar moved for a judgment of acquittal after the Government's case and after all the proof was submitted to the jury on the ground that the Government failed to prove that Mr. Sekhar had attempted to obtain property from the General Counsel. The District Court reserved decision on Mr. Sekhar's motions. In a pre-charge conference, the District Court indicated that it intended to charge the jury to the effect that intangible property rights include the right to make various business decisions free from outside pressure. Mr. Sekhar objected to the court's proposed charge on the ground that it constructively amended the indictment. Over Mr. Sekhar's objection, the District Court charged the jury consistent with its stated intention at the pre-charge conference. (Pet. App. 75a) At no time did the District Court define what a "business decision" was,

nor was there any proof adduced that the victim was actively engaged in the business of practicing law for profit.

Based upon the foregoing charge, the jury returned a verdict convicting Mr. Sekhar of one count of Attempted Extortion and five counts of Interstate Transmission of Extortionate Threats. Mr. Sekhar was acquitted of one count of Interstate Transmission of Extortionate Threats. A special verdict form was submitted to the jury by the District Court that directed the jury to specify in its verdict what property the defendant attempted to obtain. On all counts where a guilty verdict was returned, the jury specified that the "property" sought to be obtained was "the General Counsel's recommendation to approve the Commitment". (Pet. App. 5a)

Following the verdict, Mr. Sekhar moved for a judgment of acquittal arguing that a "recommendation" is not property; that there was no proof adduced that the General Counsel was engaged in a business enterprise such that defendant could be said to have deprived the General Counsel of a property right relating to "business decisions" of the General Counsel. Defendant argued that there was no property right belonging to the General Counsel relating to the recommendation that defendant attempted to obtain. The District Court denied Mr. Sekhar's motion. (Pet. App. 93a) Mr. Sekhar was Mr. Sekhar to fifteen months incarceration in the Federal Bureau of Prisons on each count he was convicted of with each sentence running concurrently. Mr. Sekhar is currently serving his sentence.

C. Proceeding in the Court of Appeals

In the Court of Appeals for the Second Circuit, Mr. Sekhar challenged both the denial of his pretrial motion to dismiss the indictment as facially insufficient and the denial of his Rule 29 motion for a judgment of acquittal on the same grounds: that thing that the indictment alleged Mr. Sekhar attempted to obtain, a recommendation, is not property. The Court of Appeals, however, characterized the issue before it as whether the general counsel's *right to make recommendations* constituted property; not whether a recommendation, a thing that as a matter of fact and law can not be sold, transferred, or exercised, constituted property. The Court of Appeals determined that the victim, who was employed as an attorney with a state agency, had a property right in his ability to make recommendations to his employer free from threats. (Pet. App. 8a-9a)

According to the Court of Appeals, the General Counsel's right to make a recommendation is a property right because a lawyer's "stock in trade is the sale of legal services", citing to a case decided by the Court of Appeals for the First Circuit dealing with the issue of what are appropriate costs chargeable to plaintiffs in a mass tort litigation case. See, *Massaro v. Chesley (In re San Juan Dupont Plaza Hotel Fire Litig.)*, 111 F. 3d 220 (1st Cir. 1997) In *Massaro*, the First Circuit, in disallowing certain photocopying costs, cited in a footnote to an American Bar Association ethics opinion to the effect that it is unethical conduct for an attorney to charge his client more than the actual costs of photocopying because "[t]he lawyer's stock in trade is the sale of

legal services, not photocopy paper, tuna fish sandwiches, computer time or messenger services". See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93-379.

But the Court of Appeals for the Second Circuit went much further than finding a "property right" in the advice given by an attorney. The Second Circuit made the astonishing pronouncement that in an extortion prosecution under the Hobbs Act, the purported property right that is the subject of the extortion need not be a source of wealth for the target of the extortion: That is, it need not be property in the victim's hands. According to the Second Circuit, '[t]he concept of property . . . does not depend upon a direct benefit being conferred on the person who obtains the property.'" Rather, according to the Court of Appeals, what makes the conduct extortion is that the thing extorted would have had some value to the defendant if it were acquired by the defendant and the coercive act was done "in order to profit". (Pet. App. 12a, 13a) Had the recommendation been made by the General Counsel and a Commitment issued, neither Mr. Sekhar nor his company would have obtained anything of intrinsic value that could be sold, transferred or exercised. Rather, according to the court of appeals:

> "[A] positive recommendation by the General Counsel would have increased the chances the Comptroller would issue a Commitment; a Commitment was necessary for FA Tech III to receive a Pension Fund investment; and an investment would have resulted in

> management fees for FA Technology and profit for Sekhar, as a managing partner. And the evidence showed that Sekhar understood that line of causation. Accordingly, there was sufficient evidence to conclude that Sekhar, in order to profit, attempted to exercise the General Counsel's property right to make recommendations. The government was not required to prove that Sekhar would actually have been enriched had he succeeded in exercising that right. Opportunities have value." (Pet. App. 13a)

REASONS FOR GRANTING THE WRIT

The instant case is another of several cases decided after this Court's decision in *Scheidler v. National Organization for Women*, 537 U.S. 393 (2003)[1] wherein the primary, indeed, the determinative issue on the appeal is the one that this Court elected to not address in *Scheidler II*: What constitutes intangible property, and to what degree can it be the subject of extortion under the Hobbs Act. The decision of the Court of Appeals for the Second Circuit expands the boundaries of intangible property beyond recognition and undermines the central holding of *Scheidler II* that extortion and

[1] The *Scheidler* case cited above is the second in a series of related cases decided by this Court. It is sometimes referred to as *Scheidler II*. Both the District Court and the Court of Appeals for the Second Circuit refer to this Court's decision in *Scheidler v. National Organization for Women*, 537 U.S. 393 (2003) as *Scheidler II*. For the sake of consistency Petitioner will likewise refer to this case as *Scheidler II*.

coercion are separate and distinct offenses, only one of which is reached by the Hobbs Act.

In *Scheidler II,* this Court took the opportunity to correct a legal theory that had been advanced by prosecutors and adopted in some Circuits to the effect that in order to establish a violation of the Hobbs Act, the Government need only prove that the defendants interfered with or deprived the victim of some identifiable property right. *Scheidler II* effectively overruled a number of circuit court decisions (e.g. *United States v. Arena*, 180 F.3d 380 [2d Cir. 1999] *cert. denied* 531 U.S. 811 [2000]) that had sustained Hobbs Act convictions where the Government failed to prove that the defendant (besides merely depriving the victim of property) acquired the property for himself or another person. In order to support a conviction under the Hobbs Act, the Government's evidence must establish not only that the defendant deprived the victim of property, but also that the defendant acquired the property for his own use.[2]

This Court in *Scheidler II* did not however, address the issue of whether the intangible "property" that the victim was purportedly deprived of was in fact property. Indeed, this Court specifically cautioned in a footnote that "the dissent is mistaken to suggest that our decision reaches, much less rejects, lower court decisions such as

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[2] The term "extort" as used in 18 U.S.C. §875(d) has been held to have the same meaning as "extortion" under the Hobbs Act. See, *United States v. Jackson*, 180 F.3d 55 (2d Cir. 1999). Thus, in order to sustain a conviction under 18 U.S.C §875(d), the Government must prove that defendant acted with the intent to extort property from the victim.

United States v. Tropiano, 418 F. 2d 1069 (2d Cir. 1969), in which the Second Circuit concluded that the intangible right to solicit refuse collection accounts 'constituted property within the Hobbs Act definition'". *Scheidler v. National Organization for Women*, 537 U.S. 393, 402 (2003) Rather, this Court observed that "[w]e need not now trace what are the outer boundaries of extortion liability under the Hobbs Act, so that liability might be based on obtaining something as intangible as another's right to exercise exclusive control over the use of a party's business assets". *Scheidler v. National Organization for Women*, 537 U.S. 393, 402 (2003)

In the instant case the Second Circuit's decision undermines this Court's holding in *Scheidler II* that extortion under the Hobbs Act requires proof of both a deprivation of property from the victim and an acquisition of the same property by the defendant or another by radically changing the definition of "property" in three fundamentally erroneous respects: First, the Court of Appeals sanctioned the District Court's constructive amendment of the indictment by converting the property that was the subject of the charge from the "General Counsel's recommendation to approve the Commitment" into the General Counsel's "right to make a recommendation". Second, the Court of Appeal's application of a "stock in trade" analogy to the advice given by any lawyer effectively transforms the result of any coercive act into "property", if the defendant does the coercive act to effect a business, professional or work related "decision". Third, the Court of Appeals held that the Government need not establish that the "property" which is the subject of the extortion have any value to the victim; that in order

to constitute property, the thing sought to be obtained need only be of some benefit to the defendant. The Second Circuit eliminated *Scheidler II*'s requirement that the defendant attempt to obtain something of value that is capable of being sold, transferred or exercised by redefining intangible property to include any indirect benefit to the defendant. Under the Second Circuit's reading of the Hobbs Act, any coercive act, done with the intent to obtain a benefit, from any source whatsoever, becomes extortion because the actor is "exercising" the victim's "property right" to make a particular decision in order to obtain something of value from someone or some place else. The Court of Appeal's decision effectively eliminates the distinction between the offense of extortion and the separate offense of coercion which is not a crime under federal law and it stands in conflict with this Court's decision in *Scheidler v. National Organization for Women*, 537 U.S. 393 (2003). The Second Circuit's decision exponentially expands the reach of prosecutors to pursue federal charges in what are essentially state court coercion cases. The Court of Appeal's decision also stands in conflict with the decision of the Court of Appeals for the Ninth Circuit in *United States v. McFall*, 558 F.3d 951 (9th Cir. 2009) wherein it was held that coercing a competitor to refrain from bidding a contract is not extortion because the defendant was only seeking to obtain some speculative benefit for himself by hindering a competitor rather than seeking something from the victim that the victim had a vested right in.

The instant case presents an important question of federal law that has not been, but should be, settled by this Court: What constitutes intangible

property under the Hobbs Act and 18 U.S.C. §875(d). In addition, the Second Circuit has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter: Whether the obtaining of something that is of no direct benefit to the defendant constitutes the obtaining of property under the Hobbs Act.

I. A Recommendation is not Property That Can be the Subject of an Extortion Prosecution Under the Hobbs Act or 18 U.S.C. 875(d) and the Second Circuit's Determination that it is Conflicts with this Court's decision in *Scheidler v. National Organization for Women*, 537 U.S. 393 (2003).

A. The Circuit Court's Improper Substitution of "The General Counsel's Right to Make a Recommendation" for "Recommendation" as the Property That was the Subject of the Indictment Laid the Foundation for the Court to Find That Mr. Sekhar Attempted to Obtain a "Property Right" from the General Counsel That Could be "Exercised" by Mr. Sekhar.

The crime of extortion as defined in the Hobbs Act is the "obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." There exists a crucial distinction between the crimes of coercion and extortion. The crime of coercion is committed when an individual is compelled or induced by another person to engage in conduct that he has legal right to abstain from engaging in, or to abstain from engaging in conduct

that he has a legal right to engage in, upon a threat that if the demand is not complied with, the actor or another will cause physical injury to another, expose a secret, damage property, cause criminal charges to be instituted, etc.. See e.g. New York Penal Law §135.60. The crime of extortion is committed when the victim is coerced into doing the act of delivering property to another person.

The distinction between the crimes of coercion and extortion was discussed at length by this Court in *Scheidler v. National Organization For Women, Inc.*, 537 U.S. 393 (2003) (*Scheidler II*). The Court observed that the definition of extortion under Hobbs Act derived in large part from New York's Field Code, which recognized extortion as a species of larceny that involved both the deprivation of property from the victim and the acquiring of the property by the defendant or another. In *Scheidler II*, this Court pointed out that eliminating the requirement that property be obtained from the victim not only was in conflict with the express requirement of the Hobbs Act, it also had the effect of eliminating the recognized distinction between extortion and the separate crime of coercion, which the Court observed "involves the use of force or threat of force to restrict another's freedom of action". *Scheidler v. National Organization For Women, Inc.*, 537 U.S. 393,406 (2003) Extortion, on the other hand involves the obtaining, from another, of something of value that can be exercised, transferred or sold. *Id.* at 405

In the instant case, the Second Circuit has profoundly deviated from the holding of *Scheidler II* and has created a new and different definition of

extortion that effectively transforms the result of any coercive act into property, eliminating any distinction between the crime of extortion, which Congress has chosen to criminalize, and the crime of coercion, which Congress has not. Over the objection of Mr. Sekhar that the indictment was being constructively amended, the District Court charged the jury that intangible property included "the right to make various business decisions free from outside pressure". According to the Court of Appeals:

> "Here, as the district court concluded, Sekhar attempted to deprive the General Counsel of his right to make a recommendation consistent with his legal judgment and attempted to exercise that right by forcing the General Counsel to make a recommendation determined by *Sekhar*." (Pet. App. 12a)

By recasting the subject of the indictment as the General Counsel's "right to make a recommendation", the circuit court is able to construct a situation where the act of purportedly obtaining the General Counsel's right to make a recommendation, operates to simultaneously exercise that right.

Under the Second Circuit's analysis, Mr. Sekhar attempted to deprive the General Counsel's "property right" to make a recommendation in one matter, the FA Technology Ventures investment and at the same time attempted to "exercise" the right by controlling it, thereby obtaining the right for himself.

However, the exercise of a right contemplates more than a mere direction to do an act. The

exercise of a property right contemplates the ability to enforce the intended result. The evidence at trial does not support a finding that Mr. Sekhar attempted to exercise any identifiable, legally recognized property right in the possession of the General Counsel that could be enforced. A property right gets "exercised" in the legal sense. Options, for instance, are exercised, thereby creating rights that can be enforced in law or equity. Here, the General Counsel's "right to make a recommendation" does not get exercised by the General Counsel in the manner of an option or other legally enforceable rights. Rather, the Second Circuit substitutes the property term of art, "exercise", for the more mundane and legally less significant "do the act of" in order to have the effect of the General Counsel's decision making be deemed property.

By substituting the "right to make recommendations" for "recommendation", the *Scheidler II* conception of property as something capable of being "sold, transferred, or exercised" becomes meaningless, because any coercive act can be mutated into property by dissecting it into two parts: the obtaining of someone's right to do something (or not do something) and the simultaneous exercise of that right by dictating the act to be done. A recommendation by its very nature is non-binding and unenforceable and would no vest no right in the person on whose behalf the recommendation was made. It can't be sold transferred or exercised. The District Court and subsequently the Second Circuit, improperly and effectively amended the indictment to charge that the property sought was not a recommendation, but rather the General Counsel's right to recommend,

and thus were able to find a simultaneous attempt to exercise the right by virtue of the coercive act. Under the Second Circuit's construction, the coerced act is deemed to be both the property (property right) and the exercise thereof, potentially turning every coercion into extortion.

By attempting to "exercise" the General Counsel's right to recommend, Mr. Sekhar would not have, had he been successful, deprived the General Counsel of anything. Nor would he have acquired anything resembling property. If what Mr. Sekhar would have acquired had he been successful was the General Counsel's recommendation, he would have acquired nothing that could be sold, transferred or exercised in the legal sense. Under the Second Circuit's analysis, any attempt to coerce an individual to do an act, is an attempt to exercise a right; and as discussed *infra*, by the simple expedient of characterizing the act as "stock in trade", the right becomes a property right, that then becomes the subject of a Hobbs Act extortion charge.

B. By Holding That a Lawyer's Advice is "Stock in Trade," the Second Circuit Improperly Imbues Such Advice With the Characteristics of a Tangible Commodity that can be Bought, Sold, and Transferred, When in Reality What a Lawyer Provides is a Non-Transferable Intangible Service.

In order to find a property right in the General Counsel's right to make a recommendation, the Second Circuit cites to a number of cases that ostensibly stand for the proposition that an individual has a property right in making "business decisions" free from interference. See, *United States*

v. Vigil, 523 F.3d 1258, (10th Cir. 2008) *cert. denied* 555 U.S. 886 (2008) (public official forcing the victim to hire a specific employee and pay the employee a percentage of anticipated revenue from a contract as a condition of getting the contract), *United States v. Gotti*, 459 F.3d 296 (2d. Cir. 2006) *cert. denied* 551 U.S. 1144 (2007) (defendants required victim to install illegal gambling machines on the victim's business premises or pay defendants $1,000 per month); *United States v. Tropiano*, 418 F.2d 1069 (2d Cir. 1969) *cert. denied* 397 U.S. 1021 (1970) (defendants obtained the victim's property right to solicit customer accounts). In reality, the subject of the indictment in the forgoing cases was a revenue stream - money - that was diverted from the victim to some other person.

This Court has never held that there exists an intangible property right to make "business decisions" free from interference. In *College Savings v. Florida Prepaid Postsecondary Education Expense Board*, 527 US 666 (1999), this Court held that the activity of conducting business is itself, not property. Indeed, in *Scheidler II*, this Court cited to case law decided by New York courts involving coercion aimed at businesses that was clearly understood to be coercion and not extortion, at the time Congress passed the Hobbs Act, which was based on New York law. See, *Scheidler v. National Organization For Women, Inc.*, 537 U.S. 393, 405-406 (2003); *People* v. *Ginsberg,* 262 N. Y. 556 (1933); *People* v. *Scotti,* 266 N. Y. 480 (1934); *People* v. *Kaplan,* 240 App. Div. 72 (1934)

Nevertheless, the Second Circuit, in finding an intangible property right in the General Counsel's right to make a recommendation held:

> "'The right to pursue a lawful business . . . has long been recognized as a property right . . . .' *Tropiano*, 418 F.2d at 1076. There is a property right to 'conduct a business free from threats,' *United States v. Arena*, 180 F.3d 380, 394 (2d Cir. 1999), abrogated in part on other grounds by *Scheidler II*, 537 U.S. at 403 n.8, and 'to make various business decisions . . . free from outside pressure,' *Gotti*, 459 F.3d at 327.
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> "The General Counsel's job was to provide legal advice to the Comptroller. A 'lawyer's stock in trade is the sale of legal services.' *Massaro v. Chesley (In re San Juan Dupont Plaza Hotel Fire Litig.)*, 111 F.3d 220, 237 n.19 (1st Cir. 1997) (internal quotation marks omitted). What is sold is 'time and advice.' *United States v. Bertoli*, 994 F.2d 1002, 1023 (3d Cir. 1993) (internal quotation marks omitted). Accordingly, the General Counsel had a property right in rendering sound legal advice to the Comptroller and, specifically, to recommend--free from threats—whether the Comptroller should issue a Commitment for FA Tech III." (Pet. App. 8a-9a)

It is not without significance that the Second Circuit characterized the General Counsel's work as

a "job" and not a business. The General Counsel was not engaged in the practice of law as a business enterprise. Yet the circuit court finds that the General Counsel had a property right to make a recommendation because, hypothetically, "lawyer's stock in trade is the sale of legal services".

In support of such a proposition the Court of Appeals cites to *Massaro v. Chesley (In re San Juan Dupont Plaza Hotel Fire Litig.),* 111 F.3d 220, 237 n.19 (1st Cir. 1997) a mass tort lawsuit wherein the issue on appeal was the appropriateness of certain costs charged to litigants in the action. In a footnote, the court references and quotes from an American Bar Association Committee on Ethics and Professional Responsibility Formal Opinion 93-379 that directs as follows:

> "On the other hand, in the absence of an agreement to the contrary, it is impermissible for a lawyer to create an additional source of profit for the law firm beyond that which is contained in the provision of professional services themselves. The lawyer's stock in trade is the sale of legal services, not photocopy paper, tuna fish sandwiches, computer time or messenger services."

In reality, a lawyer in practice provides legal services for which he is usually compensated on an hourly basis, the same as a plumber, an auto mechanic or psychiatrist. A lawyer has no stock in trade in the sense that his legal advice is a commodity that can be sold and re-sold in the open market. A lawyer provides services. Moreover, the

General Counsel was not engaged in the practice of law as a business, selling his legal services to paying clients. The hypothetical lawyer that the Circuit Court alludes to in its decision does not exist in this case. It is an abstraction, a device, that the Court of Appeals employs to transmogrify a "recommendation" into a "right to make a recommendation" and then into a *property* right; the "right to make a recommendation free from threats". Under the Second Circuit's analysis, coercing a prostitute into touching someone in a sexual manner is extortion because the prostitute's stock in trade is the sale of sexual favors. Coercing a doorman to open a door is extortion because a doorman has a right to conduct his business free from threats.

In contradistinction to the Second Circuit's misuse of the stock in trade analogy in the case of a lawyer who is a salaried employee of a state agency is this Court's use of the analogy in connection with confidential news gathered for publication. In *International News Service v. Associated Press*, 248 U.S. 215 (1918) this Court held that news gathered for publication constituted property. This Court stated:

> "[N]ews matter, however little susceptible of ownership or dominion in the absolute sense, is stock in trade, to be gathered at the cost of enterprise, organization, skill, labor, and money, and to be distributed and sold to those who will pay money for it, as for any other merchandise." *International News Service v. Associated Press*, 248 U.S. 215, 236 (1918).

News gathered for publication is a commodity to be sold on the open market. In *Carpenter v. United States*, 484 U.S. 19 (1987) this Court held that confidential business information of a newspaper is property under the mail and wire fraud statutes, to which the newspaper had the exclusive right to the use of. The "right" of the General Counsel to make a recommendation, on the other hand, bears no resemblance to any recognized intangible property right. It is not a debt, chose in action, contract, copyright, trademark, patent, or intellectual property. It cannot be sold, transferred or exercised in a legal sense. The Second Circuit's holding that the General Counsel's right to make a recommendation in a single instance is a property right deriving from a purported right to make business decisions free from interference and the notion that any lawyer's advice is his stock in trade, is an outrageous expansion of the concept of intangible property.

C. The Second Circuit's Holding That Under the Hobbs Act, the Thing Sought to be Obtained From the Victim Need Not be a Source of Wealth for the Victim and Therefore Not be Property in the Victim's Hands is Contrary to the Holdings of this Court and the Second Circuit's Own Precedents.

Perhaps even more astonishing and outrageous is the Second Circuit's holding that the subject matter of the extortion attempt need not be a source of wealth for the target of the extortion. To anyone with a modicum criminal law experience, the pronouncement of the court is profoundly disturbing.

Extortion is a species of larceny. Larceny involves the deprivation of property from the victim and the appropriation of the same property by the defendant, either to himself or to a third person. The property of the victim moves from the victim's possession into the possession of another, unchanged in its nature, character or identity. In *United States v. Tropiano*, 418 F.2d 1069 (2d Cir. 1969) *cert. denied* 397 U.S. 1021 (1970) the Second Circuit defined intangible property as something that is a source or element of wealth. In *Tropiano*, the property right obtained from the victim by the defendants was the right to solicit business in a particular area which was undoubtedly a source of wealth for the victim. The non-competition agreement extorted from the victim by the defendants became an asset of the defendants' business that was valuated when the business was sold.

Yet in the instant case the circuit court held that the thing which is the subject of an extortion attempt need not be property (a source or element of wealth) in the hands of the victim. Under the Second Circuit's analysis, something that has no economic or pecuniary value to the victim and therefore, is not property, becomes property when it is obtained by the defendant because, it could trigger other events that may result in a financial benefit to the defendant.

The Second Circuit's holding that the thing sought to be obtained need not be property in the victim's hands is in direct conflict with the clear language of the Hobbs Act which defines extortion as "the obtaining of ***property from another*** with his consent", induced by threats. Extortion is a form of

larceny. The victim is forced by threats to part with property that belongs to him and transfer it to someone else. Nothing of the sort occurred in the instant case.

The decision of the Court below redefines extortion in the instant case as the obtaining of something that is not property, from another, with his consent, induced by threats in order to profit, regardless of the source of the profit. In *Cleveland v. United States*, 531 U.S. 12 (2000) this Court rejected the argument that the federal mail fraud statute, which criminalized false statements made in furtherance of a scheme to defraud money or property, reached false statements made to state regulators in an application for a state permit to operate video poker machines. This Court reasoned that in order to be convicted under the mail fraud statute, a defendant must obtain something that is "property" in the hands of the victim. To the extent that a license or permit to operate the machines was not property in the state's hands, the defendant could not be guilty of obtaining property from the victim, even though the license once obtained could be deemed property in the defendant's hands. The same analysis should apply to the Hobbs Act.

As this Court observed in *Cleveland*, state laws covering false statements in licensing application applied to defendant. Equating the issuance of a license or permit with a deprivation of property would effect a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress, and would subject a wide range of conduct traditionally regulated by state and local authorities to federal mail fraud prosecution.

The same can be said of the Second Circuit's interpretation of the Hobbs Act. A state law attempted coercion case, like the instant case, can suddenly become a Hobbs Act attempted extortion case if the coercion is done "in order to profit".

D. The Second Circuit's Formulation of Property Under the Hobbs Act as Anything That Could be of Speculative Benefit to the Defendant, and Which Need Not Derive Directly From The Thing Obtained From the Victim, is in Conflict with a Decision of the Ninth Circuit Court of Appeals and can be Traced to a Misunderstanding by the Second Circuit of this Court's Decision in United States v. Green, 350 US 415 (1956).

Under the Second Circuit's analysis in the instant case, there is no requirement that the thing obtained be a source of wealth, that is, property, for the victim. Indeed, under the Second Circuit's analysis, the Hobbs Act does not even require that the thing obtained be a source or element of wealth for the defendant, because, according to the Court of Appeals:

> ""[t]he concept of property . . . does not depend upon a direct benefit being conferred on the person who obtains the property.'" *Gotti*, 459 F.3d at 320 (quoting *Tropiano*, 418 F.2d at 1075-76). An extortionist does not necessarily profit by exercising the rights thus obtained; it is enough that 'defendants exercise the rights in question in order to profit themselves.' Id. at 326."

The phrase "does not depend upon a direct benefit being conferred on the person who obtains the property" derives from this Court's decision in *United States v. Green*, 350 U.S. 415 (1956) a case cited by the *Tropiano* court.

However, this Court did not opine that "the concept of property" does not depend on a direct benefit being conferred on the person who obtains the property. Rather, this Court pointed out that a Hobbs Act extortion does not require that the individual who threatens the victim actually receive the property that the victim is deprived of. In *Green*, the defendants were union officials who used threats of violence to coerce contractors into hiring superfluous laborers. The victims were contractors who were deprived of money paid to these laborers. The defendants argued that because they did not receive the money, they were not guilty of extortion.

The district court granted the defendant's motion to arrest judgment because it believed that the statute required that the person making the threats actually receive the property from the victim. Appeal was taken directly to this Court which reversed the district court. In addressing the erroneous conclusion that the district court reached regarding the necessity of the defendants receiving the property, this Court observed that "extortion as defined in the statute in no way depends upon having a direct benefit conferred on the person who obtains the property. *Green*, at 420. To the extent that this Court has previously pointed out that the Hobbs Act was based on New York's extortion law, the absence of a requirement that the defendant receive the property is consistent with New York law.

See, New York Penal Law §155.05(2)(e) (McKinney 1965).

The Second Circuit's pronouncement that "concept of property" does not require a direct benefit to the defendant radically changes the definition of intangible property. Heretofore, intangible property was recognized as something that could be considered a source or element of wealth. If it is a source of wealth or an element of wealth it is of direct benefit to the one who possesses or obtains it. Under the Second Circuit's rule, "intangible property" does not have to be a source or element of wealth for either the victim or the defendant and need not be something of direct benefit to the defendant once obtained by him. All that matters is that the defendant does some coercive act "in order to profit".

In the instant case, the Second Circuit finds that the defendant sought to control the General Counsel's recommendation making ability in a single instance. According to this Court's decision in *Scheidler II*, in order to be convicted of a Hobbs Act extortion, the defendant must pursue something of value that that can be exercised, transferred or sold. The recommendation making ability of the General Counsel, if it were possible to obtain such a thing, once obtained could not be sold, transferred, or exercised. It would not be a source of wealth to the defendant, a non-lawyer. Under the Second Circuit's analysis, because the "concept of property" does not depend upon a direct benefit being conferred on the person who obtains the property, any indirect or speculative benefit that can be deemed of value to

the defendant is property: According to the Second Circuit:

> "[A] positive recommendation by the General Counsel would have increased the chances the Comptroller would issue a Commitment; a Commitment was necessary for FA Tech III to receive a Pension Fund investment; and an investment would have resulted in management fees for FA Technology and profit for Sekhar, as a managing partner. And the evidence showed that Sekhar understood that line of causation. Accordingly, there was sufficient evidence to conclude that Sekhar, in order to profit, attempted to exercise the General Counsel's property right to make recommendations. The government was not required to prove that Sekhar would actually have been enriched had he succeeded in exercising that right. Opportunities have value." (Pet. App. 13a)

This same analysis was specifically rejected by the Ninth Circuit in *United States v. McFall*, 558 F.3d 951 (9th Cir. 2009) where it was held that obtaining a speculative advantage by coercing a competitor from bidding a job is not extortion under the Hobbs Act. The Ninth Circuit stated:

> "The district court concluded that McFall's 'improper attempt to secure a business advantage' satisfied the Hobbs Act's obtaining element, but this

> formulation fails to account for *Scheidler's* principal point: To violate the Hobbs Act, an alleged extortionist must actually appropriate (or attempt to appropriate) the victim's property such that it can be exercised, transferred or sold. Id. at 405. It is not enough to gain some speculative benefit by hindering a competitor." *McFall*, 558 F.3d 951, 957 (9th Cir. 2009)

In the instant case, Mr. Sekhar did not attempt to obtain anything of value that could be exercised, transferred, or sold. The recommendation of the General Counsel, had it been made, would not have resulted in Mr. Sekhar obtaining something that could be exercised, transferred, or sold. All that Mr. Sekhar would have acquired was some speculative benefit.

In *United States v. Cain*, 671 F.3d 271 (2d Cir.2012) *cert. denied sub nom* __ U.S.__, 132 S.Ct. 1872, 182 L.Ed.2d 655 (2012) the Second Circuit affirmed the defendant's extortion conviction under the Hobbs Act where the defendant used a pattern of violence and intimidation to force business competitors to abandon their businesses, ostensibly in order to gain business for himself. In a footnote, the Second Circuit acknowledged its disagreement with the Ninth Circuit's analysis in *McFall*, which the Second Circuit stated was based upon "our own reading of *Scheidler* and our own precedents in *Tropiano* and *Gotti*." *Cain*, 671 F.3d 271, 283 n.4 (2d Cir. 2012) The decision of the Second Circuit in the instant case specifically references its disagreement with the Ninth Circuit's holding in *McFall* that " [i]t

is not enough to gain some speculative benefit by hindering a competitor". (Pet. App. 13a) The clear import of the Second Circuit's rulings is that a defendant need only seek to obtain a "speculative benefit" in order to be convicted of extortion under the Hobbs Act. Thus, the Second Circuit has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter: Whether the obtaining of something that is of no direct benefit to the defendant constitutes the obtaining of property under the Hobbs Act.

E. The Question Presented is Important.

The Second Circuit has generated a body of case law that effectively overrules *Scheidler II* and its requirement that under the Hobbs Act, the Government must prove that the defendant deprived the victim of property and acquired the same property for himself or another. Under the Second Circuit's reading of *Scheidler II*, a defendant need not deprive the victim of anything of value and need not obtain anything that is of direct benefit to the defendant. Rather, the defendant need only coerce, with the motive to profit. The Second Circuit's reading of *Scheidler II* eliminates the obtaining of property as an element of the offense by redefining property as the right to make a particular decision and obtaining as the forced "exercise' of that right.

Under the Second Circuit's reading of *Scheidler II*, nearly any state law coercion case can easily be transformed in to a Hobbs Act extortion by characterizing the decision involved in the coercion as a business decision; even when the victim is not actually engaged in business. This is clearly at

variance with this Court's pronouncement in *Scheidler II* that: "If the distinction between extortion and coercion, which we find controls these cases, is to be abandoned, such a significant expansion of the law's coverage must come from Congress, and not from the courts". *Scheidler v. National Organization for Women*, 537 U.S. 393, 409 (2003) In the instant case, the Second Circuit has effected just such a significant and unwarranted expansion of the coverage of the Hobbs Act. Mr. Sekhar was defending himself in state court against a charge of attempted coercion when the Federal Government adopted the case and in essence, manufactured a Federal offense by fundamentally changing the definition of property.

In *Scheidler II*, this Court declined to address the issue of what types of intangible interests can constitute property under the Hobbs Act. The instant case presents an opportunity for this Court to address this important question of federal law that was left undecided in *Scheidler II*. Similarly, the instant case affords this Court the address a conflict in decisions by two Courts of Appeals on an important issue of federal law: Whether the obtaining of something that is of no direct benefit to the defendant constitutes the obtaining of property under the Hobbs Act.

CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted,

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