No. 12-357

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

PAUL A. CLYNE
111 Washington Avenue · Suite 602
Albany, NY 12210
(518) 694-8195

Attorney for the Petitioner

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1. The Property in Question is the "Recommendation by a Salaried Employee of a Governmental Agency, in a Single Instance" and not Investment Monies or a Contract

Throughout its reply brief, the Government tempts the Court to forget that the property that the petitioner was charged with attempting to obtain was the "General Counsel's Recommendation to Approve the Commitment," and nothing more. The Government did not indict the petitioner for attempting to extort management fees (Br. Opp. 3) or for putting into motion a series of events by which the pension fund's assets would be invested in FA Technology Ventures (Br. Opp. 14). Indeed, at a conference before the Court's charge to the jury, the Government specifically stated that the petitioner was not charged with attempting to obtain pension fund assets, but rather was charged with attempting to obtain a recommendation from the General Counsel.

The Government's decision to not indict the petitioner for an investment contract or management fees was sensible given the evidence adduced at trial. The e-mails never demanded money or a contract. The proof established that the alleged victim, Mr. Bierman, had no role in the approval of investments and had only advised on an investment decision one other time in his career. FA Tech Ventures was far removed from an investment contract. Viewing the evidence in the light most favorable to the Government, the Government proved what it

pleaded; that what the petitioner sought to obtain was a recommendation from the General Counsel.

The Government is unable to argue that the petitioner could sell, transfer, or exercise a recommendation for money. Instead, the Government persists in its shape-shifting property theory, where the property is not the thing pleaded in the indictment, but rather the right to do or not do something and a forced exercise of the right. The Government further invites the Court to ignore the purported obtaining of something from the General Counsel (a recommendation), and speculate upon the potential downstream consequences, obtained from someone else, of a changed recommendation (Br. Opp. 14) The Government claims that it is a "fact-specific" determination that the petitioner's state of mind was that he "believed that such control (over a recommendation) would yield an investment." (Br. Opp. 14). Such a statement is absurd and misleading. There was no finding of fact by the jury relating to investments or money. The Government's attempt to re-diagram the alleged offense and now claim that the property value to the petitioner comes from investment funds, 1) operates to constructively amend the indictment, and 2) is contrary to the plain language of the Hobbs Act.

"Ever since *Ex-Parte Bain*, 121 U. S. 1. was decided in 1887 it has been the rule that after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself." *Stirone v. United States*, 361 U.S. 212, 217 (1960). Given that the petitioner was not indicted for extorting investment monies or a contract and there was no finding of fact by the jury

on the matter, the Government's argument is reduced to the deduction that the petitioner had a financial motive to act.

However, "hardly any part of penal law is more definitely settled than that *motive is irrelevant*" (Professor James Hall, *General Principles Of Criminal Law* 88 (2d ed. 1960) (emphasis added) (citing *State v. Logan*, 126 S.W.2d 256 (Mo. 1939) (per curiam)). As demonstrated infra., according to case law cited by the Court in *Scheidler v. National Organization For Women, Inc.*, 537 U.S. 393, 405-6 (2003)), it is possible for a coercive threat to have a financial motive and still be deemed a coercion, not an extortion.

Moreover, the plain language of the Hobbs Act requires that the defendant obtain property *from another, with his consent.* The property that is the subject of the extortion must be obtained from the victim of the threats. The fact the person making the threats may ultimately realize a financial gain from his coercive act does not establish that the defendant obtained "property" from the victim.

The property question to be analyzed in this case must stop at the four corners of the indictment. In determining whether the property in question can be sold, transferred, or exercised (*Scheidler II at 405*) and is a "source of wealth" (*United States v. Tropiano*, 418 F.2d 1069, 1075 (2d Cir. 1969) *cert. denied* 397 U.S. 1021 (1970)), the inquiry must be restricted to the item that the petitioner was indicted and convicted on. The question addressed should be that presented by the petitioner:

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).

2. The Court Should Grant Certiorari to Resolve the Conflicts with *Scheidler* and Define the Outer Boundaries of Intangible Property

The Government claims that the petitioner has demonstrated no conflict with *Scheidler II* (Opp. Br. 16). *Scheidler II* clearly demarcated the crime of extortion, from the lesser, non-federal crime of coercion. Compelling another to change a recommendation clearly falls within the *Scheidler II* definition of coercion, "the use of force or threat of force to restrict another's freedom of action." *Scheidler II* at 405. The making of a recommendation is an action, and forcing a person to change a recommendation is a restriction on their freedom of action.

The Government claims (Opp. Br. 17). that the instant case is unlike the examples of business coercions cited by *Scheidler* at 405, 406. Contrary to this assertion, these cases are parallel to the instant case, and serve as illustrations to how the Court intended to differentiate between coercion and extortion. Each of the cases involves the coercion of a business with a clear financial motive, but without the obtaining of property necessary to support a conviction for extortion. [*People v. Ginsberg*, 262 N.Y. 556 (1933), a coercion conviction was affirmed

based on the defendant's threats to injure the victim's property if the victim store owner did not become a member of local trade association and remove certain signs from his store windows. In *People v. Scotti*, 266 N.Y. 480 (1934), defendants were found guilty of coercion for compelling the victim manufacturers, through threats and force, into entering agreements with labor unions. And in *People v. Kaplan*, 240 A.D. 72 (N.Y. App. Div. 1934), coercion was established where defendants had used violence and retaliatory activity (expelling victims from a labor union) to compel the victims into dropping certain lawsuits.] This Court noted in *Scheidler II* that at the time Congress passed the Hobbs Act, it was based on the New York extortion statute, and further noted that at that time, coercion was clearly defined in the New York Penal Code as a separate, lesser offense.

The decision below clearly conflicts with *Scheidler II's* requirement that property be something that can be sold, transferred, or exercised. The Government, unable to argue that a recommendation can be sold or transferred, recasts the "recommendation" as a "right to make a recommendation" and then concocts the concept of a "simultaneous" acquisition and exercise of that right by the petitioner. (Opp. Br. 13) Under this concept of simultaneous exercise, any and every action in the universe becomes an exercisable right. Under the simultaneous exercise theory, the *Scheidler II* petitioners could have been held to have acquired the abortion clinics "right to use its property free from outside threats" and simultaneously exercising that right by forcing the clinic to put the property into disuse.

The Second Circuit has, in the instant case, discovered a curious new species of intangible property - a property that cannot be sold, transferred, or exercised; confers no legal or enforceable rights upon its holder; and has no vested monetary value in the present or the future to either the victim or the obtainer. The Second Circuit made the astonishing pronouncement that the purported property right need not be a source of wealth to the target of an extortion. (Pet. App. 12a, 13a). According to the Government, this property right need not be a direct source of wealth to the petitioner, but derives its value from other events that the petitioner believes might occur if they are "set in motion." (Opp. Br. 14).

The Court in *Scheidler* declined to address the outer limits of intangible property. "We 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."[1] *Scheidler* at 402. The instant case stakes new ground in the outward expansion of the perimeters of intangible property.

The court should grant certiorari to settle this important question of federal law.

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[1] *Scheidler* at 402 (emphasis added) reiterates this point stating, "Accordingly, the dissent is mistaken to suggest that our decision reaches, much less rejects, lower court decisions such as *United States* v. *Tropiano*... " The Government selectively edits this quotation in its brief, leaving out the important statement that *Scheidler* does not "reach" a decision on *Tropiano*. (Opp. Br. 11 footnote 1).

3. A Recommendation Does not Provide a Revenue Stream and Speculation On Downstream Opportunities is in Conflict with the 9th Circuit's Decision in *United States v. McFall*

The Government states that the "Petitioner does not explain how the facts of this case do not involve business decisions implicating a revenue stream..." (Opp. Br. 11) For the benefit of the Government and the Court, Petitioner will explain how this case does not involve a revenue stream from the victim to another person.

As previously noted, the plain language of the Hobbs Act requires that the defendant obtain property *from another, with his consent.* The property that is the subject of the extortion must be obtained from the victim of the threats. Nothing of any objective pecuniary value belonging to the General Counsel was diverted from the General Counsel to the petitioner or another person. The General Counsel was a salaried government employee. The making of a single recommendation has no impact on his income one way or the other. The petitioner was not indicted or convicted of depriving the General Counsel of his right to practice law or make other recommendations. The act of making a recommendation by the General Counsel in a single instance is not a "product that a lawyer sells," (Opp. Br. 11) as if he were a fortune teller who charges by the palm. A recommendation is not "stock in trade" which this Court has held to be "actual inventory, property held for sale to customers or depreciable property used in a trade or business." *Corn Products Refining Co. v. Commissioner of*

Internal Revenue, 350 U.S. 46, 51-52 (1955). There was no proof adduced at trial as to the rate at which the General Counsel was compensated per recommendation. The Government's slang-like use of the phrase "stock in trade" artificially imbues a recommendation with the properties of a transferrable commodity. The Government's reliance upon *Carpenter v. United States,* 484 U.S. 19 (1987) (Opp. Br. 10) is misplaced, because the property in question in *Carpenter* was the confidential news content gathered by a newspaper that could be transferred and sold to other news outlets.

Similarly, a recommendation is not a source of wealth to the petitioner. He cannot possess the recommendation, and cannot transfer or sell it. The Government joins with the Second Circuit to mis-diagram the property in question, asking it to draw a line further out to speculative amounts of investment monies. In the words of the Second Circuit, "opportunities have value" (Pet. App. 13a) which is very different from saying that "a recommendation has value," the finding which is required to affirm the verdict. As discussed supra., the property to be analyzed and the monetary value to be discovered must be vested in the recommendation, not in potential downstream opportunities.

This same analysis was specifically rejected by the Ninth Circuit in *United States v. McFall,* 558 F.3d 951, 957 (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 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. [Schediler]. at 405, 123 S.Ct. 1057. *It is not enough to gain some speculative benefit* by hindering a competitor." (emphasis added)

The Government is incorrect to assert that there is no conflict with *McFall* (Opp. Br. 17), a disagreement which was acknowledged by the Second Circuit. *United States v. Cain*, 671 F.3d 271, 283 n.4 (2d Cir. 2012) (Pet. App. 13A). Just as in *McFall,* the purported monetary value of the recommendation is derived entirely from speculative benefits.

4. The Government is Unable to Present any Law to Support the Claim that the "Right to Make Business Decisions Free from Outside Threats" is Extortable Property

The Government makes the dubious claim that the Courts of Appeals have "uniformly held at the right to make business decisions free from outside threats may constitute property," (Opp. Br. 10 footnote; 11-12) and yet the Government can point to no cases outside of the Second Circuit, which were decided post-*Scheidler II,* in which the underlying extorted property was not money. The Government's

case citations break generally out into three categories:

(i) Abortion protest cases which do not survive *Scheidler* The Government cites to *United States v. Arena,* 180 F.3d 380 (2d Cir. 1999), which *Scheidler* specifically cited as having too expansive a definition for the obtaining of property. *Scheidler II* at 403, footnote 8.[2] *Arena* and similar cases cannot be held to survive *Scheidler*.

(ii) Cases Where the Underlying Property is Money. The government presents several cases as standing for the "right to do business free from outside threats" as property, without candidly disclosing the underlying facts of these cases, each of which were classic extortions where the item demanded was money. These include *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 40% percentage of anticipated revenue from a contract as a condition of getting the contract); *United States v. Lewis,* 797 F.2d 358 (7th Cir. 1986), cert. denied, 479 U.S. 1093 (1987) (A threat to poison Tylenol capsules if a $1 million bounty is not paid); *United States v. Santoni,* 585 F.2d 667 (4th Cir. 1978), cert. denied, 440 U.S. 910 (1979) (public officials required contractors to kick back a percentage of their contract fees to in exchange for assurances of future contracts and the evasion of inspections); *United*

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[2] The Government also cites *Libertad v. Welch,* 53 F.3D 428, 444 N.13 (1st Cir. 1995); *Northeast Women's Ctr, Inc. v. McMonagle* 868 F.2D 1342, 1350 (3d Cir.), Cert. Denied, 493 U.S. 901 (1989)

States v. Zemek, 634 F.2d 1159 (9th Cir. 1980), cert. denied, 450 U.S. 916, and 452 U.S. 905 (1981), (extortion of money under the threat of violence); *United States v. Stephens*, 964 F.2d 424 (5th Cir. 1992) (conspiring with members of a police department to extort money from travelers passing through the town, in exchange for the dismissal or reduction of DWI charges);

(iii) Second Circuit Cases with Inflated Definitions of Intangible Property. The Government also cites *United States v. Gotti*, 459 F.3d 296 (2d. Cir. 2006) cert. denied 551 U.S. 1144 (2007). The Second Circuit has emerged as the source of intangible rights inflation, viewing itself seemingly immune from the dictates of this Court's decision in *Scheidler*. The Second Circuit is originator of intangible rights as property in *United States v. Tropiano*, 418 F.2d 1069 (2d Cir. 1969) *cert. denied*, 397 U.S. 1021 (1970). The intangible property acquired in *Tropiano* was a non-competition agreement that was a legally enforceable, transferable asset and was ultimately valued when the business was sold.

In the past decade, the Second Circuit has expanded the boundaries of intangible property to include "the right of [ ] union members to free speech and democratic participation in the affairs of their labor organization as guaranteed by [Sections 411 and 481 of the Labor-Management Reporting Disclosure Act ("LMRDA"), 29 U.S.C. § 401 et seq.];" *Gotti* at 302. See also See *United States v. Muscarella*, 2004 U.S. Dist. LEXIS 19476, No. 03 CR. 229, 2004 WL 2186561, at * 6 (S.D.N.Y. Sept. 28, 2004); *United States v. Cacace*, No. 03 CR. 0072,

2004 WL 1646760 at * 2-*3 (E.D.N.Y. July 14, 2004). cf. *United States v. Bellomo*, 176 F.3d 580 (2d Cir. 1990);

The concept of "free speech rights" and "democratic participation" as property surely tests the limits of common sense, places strains upon the English language, and erases any distinction between property and liberty interests. As vague and expansive as the alleged property in *Gotti* and its kindred are, the case is still narrower than the instant case because the "free speech" and "democratic participation" rights are conferred and protected by the LMRDA statute and therefore it is possible to *exercise* those rights in a legal sense. To the contrary, the alleged property in the instant case – a recommendation – is not protected by statute and cannot be exercised in the legal sense.

5. Conclusion

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

Paul A. Clyne
111 Washington Ave · Suite 602
Albany, New York 12210
Tel: (518) 694-8195

Attorney for Petitioner