NO. 14-___

In the
Supreme Court of the United States

SAMUEL OCASIO,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

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

PETITION FOR WRIT OF CERTIORARI

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September 25, 2014

QUESTION PRESENTED

The Hobbs Act defines extortion, in relevant part, as "the obtaining of property from another, with his consent, . . . under color of official right." 18 U.S.C. § 1951(b)(2). This Court has held that a public official violates that statute when he "obtain[s] a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Evans v. United States*, 504 U.S. 255, 268 (1992).

The question presented, on which the Fourth and Sixth Circuits explicitly disagree, is:

Does a conspiracy to commit extortion require that the conspirators agree to obtain property from someone outside the conspiracy?

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PETITION FOR A WRIT OF CERTIORARI

This petition presents a clean split between the circuits on a question of statutory interpretation concerning the Hobbs Act. That question is whether a conspiracy to extort "property from another" requires the government to show that the conspirators agreed to obtain property from someone *outside* the conspiracy. Expressly disagreeing with the Sixth Circuit, the court below held that the answer is no; a defendant may be convicted of conspiring to extort "property from another" even when the "another" is a co-conspirator. The Sixth Circuit held the opposite, reasoning that the conspirators must have agreed to obtain property from someone *outside* the conspiracy. The Sixth Circuit's decision accords with the plain text of the statute and respects this Court's admonition that, "under our constitutional system . . . federal crimes are defined by statute rather than by common law." *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 490 (2001). The decision below, on the other hand, threatens a dangerous expansion of the law of extortion beyond what its text can bear. Certiorari should be granted.

OPINIONS BELOW

The opinion of the court of appeals is reported at 750 F.3d 399. *See* App. 1–29. The relevant orders of the district court are unreported. *See* App. 30–44.

JURISDICTION

The court of appeals rendered its decision on April 29, 2014. A timely petition for rehearing was denied on May 28, 2014. On July 18, 2014, the Chief Justice extended the time for filing a petition to and including September 25, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Hobbs Act, 18 U.S.C. § 1951, provides in relevant part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, . . . shall be fined under this title or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> * * *
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

STATEMENT OF THE CASE

Petitioner was charged with committing extortion under the Hobbs Act by receiving a bribe in exchange for official acts. In a published opinion, the court of appeals held that, in addition to committing the substantive offense of extortion, petitioner conspired to commit extortion with those who allegedly paid the bribe. App. 1–29. In so doing, the Fourth Circuit created a conflict of authority with the Sixth Circuit, which has held that a conspiracy to commit extortion requires an agreement to obtain property from someone *outside* the conspiracy. *United States v. Brock*, 501 F.3d 762 (6th Cir. 2007).

1. This case concerns a kickback scheme. Two brothers, Hernan Alexis Moreno Mejia ("Moreno") and Edwin Javier Mejia ("Mejia"), jointly owned and operated the Majestic Auto Repair shop in Rosedale, Maryland, near Baltimore. App. 2. Over the course of several years, Moreno and Mejia began paying Baltimore police officers to encourage car-accident victims to send their vehicles to the shop for repair. App. 5–6. As Moreno explained at trial, the benefit of this scheme was that police officers are "the first people to go to [accident] scenes," and could effectively route business to Moreno and Mejia that might otherwise go to other repair shops. C.A.4 J.A. 337. Referral fees started out at $150 apiece, but eventually increased to $300. App. 6. By 2011, some sixty officers were making referrals to the brothers, accounting for some 95%–100% of their business. C.A.4 J.A. 337, 351.

In March 2011, following an extensive investigation, the Federal Bureau of Investigation

arrested Moreno, Mejia, and seventeen Baltimore police officers, including petitioner Samuel Ocasio. C.A.4 J.A. 18. Moreno and Mejia accepted plea agreements in exchange for their cooperation with the government, as did most of the officers involved. App. 3.

Petitioner, along with Officer Kelvin Quade Manrich (whom petitioner did not know), pleaded not guilty and demanded a jury trial. The two men were tried jointly, even though they had nothing in common apart from this prosecution: None of the specific acts of extortion alleged against Ocasio involved Manrich in any way (or vice versa). The two men patrolled different areas of the city, and until their arrests had never heard of each other. C.A.4 J.A. 80, 221–22. As explained below, the justification for the joint trial was that both men were charged with involvement in the same conspiracy.

2. The government's legal theory was that officers who accepted money from Moreno and Mejia committed extortion in violation of the Hobbs Act, 18 U.S.C. § 1951(a). That provision defines extortion, in relevant part, as the wrongful "obtaining of property from another, with his consent, . . . under color of official right." *Id.* § 1951(b)(2). Under this Court's decision in *Evans v. United States*, 504 U.S. 255 (1992), a public official commits extortion whenever he "obtain[s] a payment to which he was not entitled, knowing that the payment was made in return for official acts"—in other words, if he takes a bribe. *Id.* at 268.

The superseding indictment charged petitioner and Manrich with conspiracy to commit extortion

(Count One) and with three counts each of substantive extortion (in petitioner's case, Counts Five through Seven). App. 3–5. Each substantive count referred to a specific incident on which one of the defendants allegedly accepted a payment from Moreno and Mejia in exchange for referring an accident victim to them. *Id.*

The crux of this petition concerns the legal validity of Count One—the conspiracy charge. That count alleged that petitioner conspired "with Moreno and Mejia to obstruct, delay, and affect commerce and the movement of any article and commodity in commerce by extortion, that is, to unlawfully obtain under color of official right, money and other property from Moreno, Mejia, and [the Majestic Repair Shop], with their consent . . . in violation of [the Hobbs Act]." App. 4. In other words, it accused the defendants of conspiring *with their bribers* to obtain property *from the bribers themselves*.

Petitioner argued below that Count One fails to state an offense. App. 13–15. Petitioner relied primarily on the Sixth Circuit's decision in *United States v. Brock*, 501 F.3d 762 (6th Cir. 2007) (Sutton, J.), which held that, in order to conspire to obtain property "from another," conspirators must agree to obtain property from someone outside the conspiracy.

Citing the Fourth Circuit's decision in *United States v. Spitler*, 800 F.2d 1267 (4th Cir. 1986), the district court rejected that argument. The court refused petitioner's proposed jury instruction that he must be acquitted if "the only person or persons from whom [he] conspired to obtain money . . . were also members of the conspiracy." App. 14 n.9; App. 30–31.

The district court also denied petitioner's motion for a judgment of acquittal on the same grounds. App. 14–15; App. 38–44.

3. As a result of the conspiracy charge, petitioner's trial saw a great deal of evidence (offered to prove the conspiracy) that otherwise would not have been admitted. That included not only evidence of Manrich's conduct (Counts Two through Four), but evidence that petitioner made additional referrals to Moreno and Mejia (that is, additional acts of substantive extortion) that were not charged in the indictment. App. 18 n.11. The jury also heard extensive evidence about an occasion on which petitioner sent *his own car* to Moreno and Mejia's shop for repair, and allegations that Moreno and Mejia fraudulently added damage to that car and then sought reimbursement from petitioner's insurer, GEICO, which in turn sought subordination of the claim from Erie Insurance Co. App. 12–13.

On the final day of trial, Manrich withdrew from the proceedings and pleaded guilty. App. 15. The district court instructed the jury that because Manrich's acts of extortion were charged as overt acts in furtherance of the conspiracy, it could consider those acts when deliberating on the conspiracy charge. App. 18 n.11.

The jury found petitioner guilty on all counts, and the district court sentenced him to eighteen months of imprisonment and three years of supervised release. App. 15. It also ordered him to make restitution to two parties under the Victim and Witness Protection Act ("VWPA"), 18 U.S.C. § 3663. *First*, it ordered petitioner to make restitution to the

Baltimore Police Department in the amount of $1,500.00. App. 15. That amount reflected $300 for each of five separate acts of referring accident victims to Moreno and Mejia—including the three acts charged as substantive extortion counts in the indictment *plus* two others that were not charged but about which evidence was submitted at trial. App. 32–37. *Second*, the district court concluded that the fraudulent insurance claim filed with Erie was part of the conspiracy, and therefore ordered petitioner to pay Erie $1,870.58 in restitution. App. 15–16.

4. In a published opinion, the court of appeals affirmed petitioner's conviction and sentence, except that it vacated the restitution award to Erie as unauthorized by statute.[1] App. 25–28. As for the conspiracy charge, the Fourth Circuit reaffirmed the approach it announced in *Spitler* and explicitly rejected the Sixth Circuit's "contrary" holding in *Brock*. App. 19–25.

As the panel explained, *Spitler* concerned an employee of a state contractor who was convicted of conspiring with a state official to extort the contractor's employer. App. 20; *see Spitler*, 800 F.2d

[1] The court explained that, under the VWPA, a district court may not order restitution where the harm to be remedied "does not result from conduct underlying an element of the offense of conviction, or conduct that is part of a pattern of criminal activity that is an element of the offense of conviction." App. 27 (quoting *United States v. Blake*, 81 F.3d 498, 506 (4th Cir. 1996)). Because petitioner was neither charged with nor convicted of insurance fraud, the court held that petitioner could not be ordered to pay restitution "as though he w[ere] . . . convicted of that offense." App. 28.

at 1278–79. The defendant argued that he could not be convicted of conspiracy to commit extortion because he was really a *victim* of that conspiracy—*i.e.*, the person through whom the corrupt state official had exerted coercive influence against the contracting company—and could not be charged with conspiracy merely by virtue of his "acquiescence" in the coercion. *See id.* The Fourth Circuit rejected that defense. According to the panel below, *Spitler* "recognized the extremes of a spectrum of conduct ranging from 'mere acquiescence' (which is not punishable under conspiracy principles) to active solicitation and inducement" (which is). App. 20–21. Under *Spitler*'s approach, the question is whether the payor played an active role in the conspiracy. *Id.*

Applying that rule, the panel held that "a person like Moreno and Mejia, who actively participates (rather than merely acquiesces) in a conspiratorial extortion scheme, can be named and prosecuted as a coconspirator even though he is also a purported victim of the conspiratorial agreement." App. 22.

The panel also considered and rejected arguments based on what it described as the Sixth Circuit's "contrary *Brock* decision." App. 21. The panel acknowledged that *Brock* "focused on the language of the Hobbs Act," App. 22, reasoning that "an agreement to obtain 'property from *another*' . . . [means] an agreement to obtain property from someone outside the conspiracy," *id.* (quoting *Brock*, 501 F.3d at 767), and that the textual requirement that the conspirators agree to obtain "'property from another' and do so 'with his consent'" does not "appl[y] naturally to the conspirators' own property

or to their own consent," *id.* (quoting *Brock*, 501 F.3d at 768). The panel concluded, however, that the Act's "from another" language "provides only that a public official cannot extort himself," App. 23, and that *Spitler*'s active-participation requirement ensured that the "consent" element would not make a conspiracy out of every act of extortion, App. 23–24.

The panel therefore "refuse[d] . . . to abandon our *Spitler* precedent and adopt the Sixth Circuit's analysis in *Brock*." App. 25. In a footnote, the panel "further observe[d]" that it believed petitioner's *Brock* theory "factually flawed" because, in addition to Moreno and Mejia, "dozens of [other] BPD officers" had participated in the extortion scheme, and the jury "was entitled to find each of those BPD officers to be Ocasio's coconspirator, regardless of whether Ocasio even knew him." App. 25 n.14. Notably, however, the government had never advanced that theory—not in the indictment (which does not allege it), at trial, in closing arguments to the jury, in the jury instructions, or in its briefs on appeal.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision is incorrect and explicitly conflicts with a decision of the Sixth Circuit about the interpretation of a federal criminal statute. While the Sixth Circuit's approach respects Congress's prerogative to define federal crimes, the decision below is unmoored from the statutory text. The disagreement between the courts of appeals is important and warrants this Court's review.

I. The Fourth Circuit's Decision Explicitly Creates a Conflict with the Sixth Circuit's Interpretation of the Hobbs Act.

The decision below explicitly creates a conflict of authority with another court of appeals. In *United States v. Brock*, the Sixth Circuit held that to conspire to obtain "property from another, with his consent, . . . under color of official right," 18 U.S.C. § 1951(b)(2), conspirators must have "formed an agreement to obtain property from someone outside the conspiracy." 501 F.3d at 767. The panel below, however, expressly declined to follow the "contrary *Brock* decision." App. 21. Instead, it reaffirmed conflicting circuit precedent, holding that anyone who "actively participates (rather than merely acquiesces) in a conspiratorial extortion scheme can be named and prosecuted as a coconspirator even though he is also a purported victim of the conspiratorial agreement." App. 22 (citing *Spitler*, 800 F.2d 1267); *see also* App. 24 n.13 (question is whether payor was "an active participant in . . . the extortion scheme").

Those approaches are irreconcilable, as *Brock*'s materially identical facts illustrate. Like this case, *Brock* involved two brothers accused of paying bribes to a public official to benefit their jointly owned business. Michael and Jerry Brock co-owned a bail-bond company, Brock Bonding. They paid a county court clerk to remove their clients' bail-bond forfeiture hearings from the court's calendar. 501 F.3d at 765. As a result of this scheme, the Brock brothers were convicted of conspiracy to commit extortion under the Hobbs Act.

In a careful opinion by Judge Sutton, the Sixth Circuit reversed the Brocks' convictions. The court held that "[t]o be covered by the statute, the alleged conspirators—the Brocks and Simcox (the court clerk)—must have formed an agreement to obtain 'property from another,' which is to say, formed an agreement to obtain property from someone outside the conspiracy." *Id.* at 767 (quoting 18 U.S.C. § 1951(b)(2)). In that court's view, "[t]hese three people did not agree, and could not have agreed, to obtain property from 'another' when no other person was involved—when the property, so far as the record shows, went from one coconspirator (one of the Brocks) to another ([the clerk])." *Id.* The contrary conclusion, moreover, would coexist uneasily with § 1951's requirement that the property be obtained with the other person's "consent." *Id.*; s*ee also United States v. Gray*, 521 F.3d 514, 533–34 (6th Cir. 2008) (applying *Brock* to reverse several convictions for conspiracy to commit extortion).

The *Brock* court, aware of the Fourth Circuit's decision in *Spitler*, attempted to distinguish that

case. As noted above, the defendant in *Spitler* was the *employee* of a state contractor (a company called TEI) who conspired with a public official to extort money from TEI. 800 F.2d at 1269-70. *Brock* observed that because "Spitler . . . facilitated the extortion of TEI's property, not his own," 501 F.3d at 769, the case did not present the question whether a conspiracy charge could stand without the presence of a third party. By contrast, in *Brock* itself, (as indeed in this case) "the supposed point of the extortion conspiracy, so far as the evidence shows, was to extort the Brocks' cash payments, which apparently came out of the Brocks' bank accounts or Brock Bonding's bank account . . . not property from an unrelated entity outside the conspiracy." *Id.* (citations omitted).

In the opinion below, the Fourth Circuit rejected that distinction and *Brock* in favor of doubling-down on *Spitler*'s amorphous (and assuredly atextual) active-participation standard. As the panel explained, "[t]he propriety of Spitler's conspiracy conviction . . . rested not on whether some other victim could be identified, but on whether Spitler was a mere victim of—rather than an active participant in—the extortion scheme." App. 24 n.13. It further held that "[n]othing in the Hobbs Act forecloses the possibility that the 'another' can also be a coconspirator of the public official." App. 23. That holding undoubtedly creates a circuit split; the entire point of *Brock* is that the Hobbs Act *does* foreclose the possibility that "another" can be a member of the conspiracy. The decision below therefore squarely conflicts with *Brock*. Had petitioner been a police

officer in Detroit, there is little doubt the conspiracy charge would have been held invalid.

This Court should settle the circuits' disagreement. Because both the Fourth and Sixth Circuits have carefully examined and rejected each other's interpretations (and attempts to distinguish away differences have failed), there is no reason to imagine the conflict will be resolved without this Court's intervention.

II. The Decision Below Is Inconsistent with the Plain Text of the Hobbs Act.

In the dispute between the Fourth and Sixth Circuits, there is a clear winner: The Sixth Circuit's approach is moored in the text of the Hobbs Act, along with considerations of lenity and longstanding congressional practice in the area of bribery crimes. The Fourth Circuit's, by contrast, is a vague and malleable standard inappropriate for criminal statutes.

The text of the Hobbs Act requires that a conspiracy involve an agreement to obtain *someone else's* property. It defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). If two people agree that one will pay the other a bribe, no speaker of English would say they have agreed to "obtain property from another, with his consent."[2]

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[2] Imagine such a conversation: John, a policeman, says to Susan, a civilian, "Let us obtain property from another, by

That is so for two reasons. *First*, their agreement does not concern "another" at all—only themselves. The panel below dismissed this argument on the ground that the "from another" language in § 1951(b)(2) "provides only that a public official cannot extort himself." App. 23. The suggestion that *that* was Congress's purpose in including this phrase is absurd. No statutory language is necessary to confirm the metaphysical impossibility of paying oneself a bribe with one's own money.

Second, in no sense have they "conspired" to obtain anyone's "consent" as the statute requires. As *Brock* put it, "[h]ow do (or why would) people conspire to obtain their own consent?" 501 F.3d at 767. And "[t]he context in which the consent requirement appears confirms that it must be taken seriously" because "[t]he Hobbs Act prohibits not only extortion but robbery as well; what separates the two is the payor's consent," meaning that "[f]ailure to respect the consent requirement blurs the line between robbery and extortion." *Id.* at 767–68.

As *Brock* explained, a number of interpretive principles support its reading of the text. Most importantly, the Fourth Circuit's reading would transform every payment of a bribe into a criminal conspiracy, thus "effectively transform[ing] the

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getting her consent through promise of my official action." Susan then asks, "Who did you have in mind?" If John then replies, "Oh, I meant *you* should pay me," Susan would rightly be confused. No one speaks that way—and there is no reason to imagine Congress expected citizens reading a criminal statute to do so.

[Hobbs] Act into a prohibition on *paying* bribes to public officials." *Id.* at 768 (emphasis added). This Court has never construed the Act to impose criminal liability on the *payor* of a bribe, and certainly the substantive offense of extortion does not directly do so. As Judge Sutton pointed out, *see id.*, when Congress wishes to criminalize paying a bribe, it does so directly. *See, e.g.*, 18 U.S.C. § 201(b)(1) (making it an offense to "give[], offer[] or promise[] anything of value to any [federal] official"); *id.* § 210 (making it an offense to "pay[] or offer[] or promise[] any money or thing of value, to any person, firm, or corporation in consideration of the use or promise to use any influence to procure any appointive office or place under the United States for any person"); *id.* § 212(a) (making it an offense for "an officer, director, or employee of a financial institution" to loan or give money to a federal examiner "who examines or has authority to examine such . . . institution"); *id.* § 226(a)(1) (making it an offense to compromise the security of "any secure or restricted area or seaport" by "corruptly giv[ing], offer[ing], or promis[ing] anything of value to any public or private person"). "Having opted not to punish the giving of bribes directly, Congress should not be treated as having prohibited them through the sleight of indictment of an extortion conspiracy. Indeed, under the government's theory of prosecution, it is difficult to see what independent role these other federal statutes play." *Brock*, 501 F.3d at 768.

A related problem is that the government's theory also transforms every act of *receiving* a bribe into a conspiracy. Every act of taking a bribe punishable as extortion involves an agreement

between the payor and the payee and, thus, a conspiracy. That cannot be the law—any more than every sale of illegal drugs (which also involves an agreement between two parties) is automatically a conspiracy to distribute drugs. *See, e.g.*, *United States v. Hackley*, 662 F.3d 671, 679 (4th Cir. 2011); *United States v. Townsend*, 924 F.2d 1385, 1394 (7th Cir. 1991).

The Fourth Circuit attempted to solve that problem by engrafting onto the Hobbs Act an amorphous exception that applies when the payee does not actively participate in the conspiracy—meaning, one supposes, when he is not pleased with the corrupt bargain he has made. That has no basis in the text of the statute. *Accord Brock*, 501 F.3d at 771. Worse, it is an unworkable standard that borders on unconstitutionally vague. "Because all Hobbs Act prosecutions require the 'consent' of the payor, it will be difficult to ascertain what level of enthusiasm, ambivalence or regret is required to escape prosecution." *Id.*

The Fourth Circuit has no solution to that problem. It has explicitly declined to "declare a bright line at which a payor's conduct constitutes sufficient activity beyond the mere acquiescence of a victim so as to subject him to prosecution as an aider and abettor or a conspirator." *Spitler*, 800 F.2d at 1278. Yet a criminal statute that sets out no easily identified "bright line" between innocent and criminal conduct is fundamentally inconsistent with due process. *See Kolender v. Lawson*, 461 U.S. 352, 357 (1983). This Court has been careful to interpret federal criminal statutes to avoid those vagueness

concerns. *See, e.g.*, *Skilling v. United States*, 561 U.S. 358, 403–04 (2010).

At bottom, the Fourth Circuit's approach is designed to find a conspiracy when the court thinks the payor is a malefactor and none when he is not. But federal courts have no common-law power to punish wrongdoing not described in a statute, *see United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812), and in any case, "[b]ad men, like good men, are entitled to be tried and sentenced in accordance with law," *Sorich v. United States*, 555 U.S. 1204, 1208 (2009) (Scalia, J., dissenting from denial of certiorari) (quoting *Green v. United States*, 365 U.S. 301, 309 (1961) (Black, J., dissenting)).

III. The Question Presented Is Cleanly Presented and Important.

This Court should grant the petition and resolve the circuits' disagreement in this case.

The conflict is now entrenched and cleanly presented. Although there is only one court of appeals on each side of the disagreement, further percolation is not likely to resolve it. The opinion below explicitly considers and rejects the Sixth Circuit's opinion in *Brock* in favor of *Spitler*, App. 25, and *Brock* explicitly considered and rejected *Spitler*, 501 F.3d at 769–70. The dueling opinions, moreover, are thorough, comprehensive, and reflect fundamentally incompatible approaches.

It is clear that this case would have come out differently in the Sixth Circuit. Both here and in *Brock*, the alleged payors of bribes are two brothers and their jointly owned business. The Sixth Circuit

thinks that is not sufficient for conspiracy liability; the Fourth Circuit thinks it is.

Petitioner has a real stake in obtaining reversal of his conspiracy conviction. Although petitioner has been released from imprisonment, a live controversy remains about the effect of the conspiracy charge. As described above, the presence of the conspiracy charge was the basis for joining his trial with Manrich's in the first place, and also the purported justification for introducing evidence of uncharged bad acts. Because it affirmed the conspiracy conviction, the court of appeals had no need to address whether, as a consequence of the prejudicial joinder, the substantive counts must also be reversed. *See* App. 16 n.10. That question of spillover prejudice would be open to the court of appeals on remand should this Court reverse. In addition, two of the uncharged bad acts about which the jury heard evidence (uncharged allegations of substantive extortion) resulted in restitution awards that, without the conspiracy charge, would be vacated. *See* 18 U.S.C. § 3663.

In a footnote, the court of appeals expressed (for the first time in this litigation) the view that petitioner's co-conspirators perhaps were *not* Moreno and Mejia but other Baltimore Police Officers, thereby supposedly curing the *Brock* problem with the conspiracy charge. *See* App. 25 n.14. But that late-breaking suggestion does nothing to eliminate the conflict. *Brock* requires that the person from whom property is to be obtained be "someone outside the conspiracy." 501 F.3d at 767. The conspiracy charge alleged in the indictment is reproduced in the

court of appeals' opinion and is clear: Moreno and Mejia are alleged to be members of the conspiracy *and* those from whom property was to be obtained. *See* App. 4. Whether or not other Baltimore Police Officers are also members of the conspiracy, Moreno and Mejia are not "outside the conspiracy" as *Brock* requires. In any event, the court of appeals' observation should not make its opinion proof against this Court's review; the argument it advances was never made by the government, including at trial.

More fundamentally, if it is not corrected, the courts of appeals' decision in this case transforms every payment of a bribe into a conspiracy to commit extortion. The consequence would be to impose criminal liability on payors of bribes without explicit congressional authorization, and (with respect to both payors and payees) open the door in every extortion case to the expansive kinds of evidence and party-joinder rules that conspiracy charges make available to the government. Those consequences, both to the separation of powers and to the practical course of criminal justice, justify this Court's review.

Equally important is the broader principle at stake: The Hobbs Act is not authority for the creation of a federal common law of crimes, or for vague standards in the criminal law meant to substitute a court's judgment that a party is a bad actor for Congress's judgment about the elements of criminal offenses. "[U]nder our constitutional system . . . federal crimes are defined by statute rather than by common law." *Oakland Cannabis Buyers' Co-op.*, 532 U.S. at 490; *see also United States v. Lanier*, 520

U.S. 259, 267 n.6 (1997) ("Federal crimes are defined by Congress, not the courts.").

This Court has recently reaffirmed that bedrock principle. In *Sekhar v. United States*, 133 S. Ct. 2720 (2013), the Court reversed an opinion of the Second Circuit interpreting the crime of extortion to cover pressuring a company's general counsel to give a particular business recommendation. This Court divided on precisely why that conclusion should be reversed: The majority said it was because the general counsel's power to give his opinion is not something that could be "obtain[ed]," *id.* at 2726; Justice Alito, for three Justices, said it was because the recommendation was not "property," *id.* at 2728–29 (opinion concurring in judgment). But whatever the rationale, the unanimous point of agreement was that the Hobbs Act is a regular criminal statute, to be interpreted by reference to its words. That is what *Brock* did, and it is what the Fourth Circuit failed to do.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12-4462

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

SAMUEL OCASIO,
Defendant - Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore.
Catherine C. Blake, District Judge.
(1:11-cr-00122-CCB-13)

Argued: December 11, 2013
Decided: April 29, 2014

Before MOTZ, KING, and SHEDD, Circuit Judges.

Affirmed in part, vacated in part, and remanded by published opinion. Judge King wrote the opinion, in which Judge Motz and Judge Shedd joined.

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KING, Circuit Judge:

In 2012, a jury found defendant Samuel Ocasio, a former officer of the Baltimore Police Department (the "BPD"), guilty of four offenses relating to his involvement in a kickback scheme to funnel wrecked automobiles to a Baltimore auto repair shop in exchange for monetary payments. Ocasio was convicted on three Hobbs Act extortion counts, *see* 18 U.S.C. § 1951, plus a charge of conspiracy to commit such extortion, *see* 18 U.S.C. § 371. On appeal, Ocasio primarily maintains that his conspiracy conviction is fatally flawed and must be vacated. He also challenges a portion of the sentencing court's award of restitution. As explained below, we affirm Ocasio's conspiracy and other convictions, vacate the restitution award in part, and remand.

I.

A.

On March 9, 2011, Ocasio and ten codefendants were indicted in the District of Maryland in connection with the kickback scheme involving payments to BPD officers in exchange for referrals to a Baltimore business called Majestic Auto Repair Shop LLC (the "Majestic Repair Shop," or simply "Majestic"). Nine of the defendants were BPD officers, and the others were Herman Alexis Moreno and Edwin Javier Mejia, brothers who were co-owners and operators of the Majestic Repair Shop. The single-count indictment alleged, pursuant to 18 U.S.C. § 371, that the defendants, along with others "known and unknown," conspired to violate the Hobbs Act, 18 U.S.C. § 1951, by agreeing to

"unlawfully obtain under color of official right, money and other property" from Moreno, Mejia, and Majestic. *See* J.A. 18.[1] As such, the initial indictment both charged Moreno and Mejia with the conspiracy offense and identified them — as well as Majestic — as victims of the extortion conspiracy.

Seven months later, on October 19, 2011, the grand jury returned a seven-count superseding indictment charging only two defendants, Ocasio and another BPD officer, Kelvin Quade Manrich, who had not been named in the initial indictment. Thereafter, the conspiracy offense in the first indictment was dismissed as to each of the other defendants, in exchange for guilty pleas. Each defendant entered into a plea agreement with the government and pleaded guilty to a separately-filed superseding information, predicated on admitted involvement in the kickback scheme.[2] In connection with their guilty pleas, the brothers Moreno and Mejia agreed that they would testify at Ocasio's trial.

Count One of the superseding indictment — naming both Ocasio and Manrich — repeated the charge of conspiring to violate the Hobbs Act, in contravention of 18 U.S.C. § 371. Counts Two through Four charged Manrich with Hobbs Act

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[1] Citations herein to "J.A. __" refer to the contents of the Joint Appendix filed by the parties in this appeal.

[2] Several of the BPD officer-defendants were convicted of a single count of Hobbs Act extortion under 18 U.S.C. § 1951, while other defendants were convicted of two offenses, Hobbs Act extortion and conspiring to commit extortion. On July 11, 2011, Moreno and Mejia each pleaded guilty to Hobbs Act extortion and conspiracy.

extortion, that is, extorting Moreno by "unlawfully obtaining under color of official right, money and property," in violation of 18 U.S.C. § 1951(a). *See* J.A. 55. Finally, counts Five through Seven charged Ocasio with Hobbs Act extortion of Moreno on three specific occasions — January 17, 2010, January 10, 2011, and January 15, 2011.[3]

In Count One, the superseding indictment alleged the § 371 conspiracy offense against Ocasio and Manrich in the following terms:

> From in or about the Spring of 2008, and continuing through at least February 2011, [Ocasio and Manrich], and others both known and unknown to the Grand Jury, did knowingly and unlawfully combine, conspire, confederate, and agree together, with other [BPD officers], and with Moreno and Mejia to obstruct, delay, and affect commerce and the movement of any article and commodity in commerce by extortion, that is, to unlawfully obtain under color of official right, money and other property from Moreno, Mejia, and [the Majestic Repair Shop], with their consent, not due the defendants or their official position, in violation of [the Hobbs Act].

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[3] The Hobbs Act defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). References in this opinion to Hobbs Act extortion refer to extortion committed under color of official right, as charged against Ocasio and Manrich.

J.A. 50. According to Count One, the purpose of the conspiracy was for "Moreno and Mejia to enrich over 50 BPD Officers . . . by issuing payments to the BPD Officers in exchange for the BPD Officers' exercise of their official positions and influence to cause vehicles to be towed or otherwise delivered to Majestic for automobile services and repair." *Id.* at 51. Count One spelled out two overt acts in furtherance of the conspiracy — a December 14, 2010 phone call between Manrich and Moreno, plus a January 15, 2011 call between Ocasio and Moreno — and incorporated by reference, as additional overt acts, each of the six substantive Hobbs Act extortion counts.

B.

The prosecutions underlying this appeal were the result of an extensive investigation conducted by the BPD and the FBI. The BPD began its investigation in the summer of 2009. When federal authorities joined the investigation in late 2010, the BPD had identified approximately fifty of its officers as possibly involved in wrongdoing with the Majestic Repair Shop. In the winter of 2010, the FBI placed a wiretap on Moreno's telephone and began surveillance at both Majestic and at Moreno's residence. During the period from November 2010 to February 2011, the FBI recorded thousands of phone calls between Moreno and various BPD officers, including Ocasio and Manrich.

The trial evidence established a wide-ranging kickback scheme involving the Majestic Repair Shop

and BPD officers.[4] The scheme was fairly straightforward: BPD officers would refer accident victims to Majestic for body work and, in exchange for such referrals, the officers would receive monetary payments. The payments made to BPD officers by the Majestic Repair Shop for their referrals of wrecked vehicles were made by both cash and check, and ranged from $150 to $300 per vehicle. After the kickback and extortion scheme began, knowledge of it spread by word-of-mouth throughout the BPD.

The referral of accident victims to the Majestic Repair Shop by BPD officers in exchange for money violated the BPD's established procedures. The BPD General Orders specify that BPD officers shall not violate any state or federal laws or city ordinances, or solicit or accept any "compensation, reward, gift, or other consideration" without the permission of the Police Commissioner. *See* J.A. 49, 208–09. Pursuant to BPD General Order I-2, which specifies "towing procedures," if an accident victim in a non-emergency situation declines to contact her insurance company or other towing service (such as AAA), the BPD officer at the accident scene should call, through the BPD communications center, an already approved "Medallion towing company" to move the damaged vehicle.[5] In an emergency situation, i.e., when

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[4] Our factual recitation is drawn primarily from the trial record. In light of the guilty verdicts, we present the relevant facts in the light most favorable to the prosecution. *See Evans v. United States*, 504 U.S. 255, 257 (1992).

[5] A Medallion towing company is a pre-approved towing business that has a contract with the City of Baltimore to

conditions are hazardous or a wrecked vehicle could impede traffic or cause further injuries, BPD officers have the discretion to contact a Medallion towing company to request towing services without first securing the consent of the wrecked vehicle's owner or operator. Regardless of whether a Medallion towing company is called for a wrecked vehicle, the "owner or operator [retains] full discretion to determine the destination to which the vehicle [is] to be towed." *Id.* at 213. Majestic was not, at any point during the Count One conspiracy, a Medallion towing company.

1.

The Count One conspiracy commenced in late 2008 or early 2009. Officer Ocasio first became involved in the kickback scheme in about May 2009, when, after learning about the scheme from another BPD officer, he called Moreno to request a tow truck for an accident. Moreno and Ocasio met for the first time at the scene of that accident. From May 2009 until about February 2011, Ocasio referred numerous vehicles to the Majestic Repair Shop, and received a cash payment on each occasion. On several occasions, Ocasio — who usually worked the BPD's night shift — called Moreno from an accident scene and described the damaged vehicles. If Moreno wanted a vehicle towed to Majestic, Ocasio would convince the driver that she should use Majestic's services and then arrange for the wrecked vehicle to be towed to

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provide towing services in connection with automobile accidents.

Majestic.[6] After referring the wrecked vehicle to Majestic, Ocasio would call Moreno and request his cash payment of $300, usually by the next afternoon.

a.

Around midnight on January 17, 2010, Officer Ocasio responded to an accident scene in Baltimore. After determining that one of the wrecked vehicles was not driveable, Ocasio called the driver, a Mr. Taylor, to the BPD patrol car and gave him advice — that the Majestic Repair Shop should tow and repair Taylor's wrecked car. When Taylor told Ocasio that he had already called AAA, Ocasio convinced Taylor to cancel the AAA request and have his vehicle towed instead to Majestic. Ocasio then called Moreno to request a tow for Taylor. Almost immediately, Ocasio called Moreno again, asking him to delay his arrival at the accident scene because Ocasio's supervisor was nearby. Several minutes later, Ocasio called Moreno again to let him know that the coast was clear. Moreno, along with BPD Officer Leonel Rodriguez (who was already with Moreno when Ocasio called), arrived at the accident scene with a tow truck and towed Taylor's car to Majestic.[7] Ocasio called Moreno

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[6] Although the Majestic Repair Shop was primarily a body shop, rather than a towing company, it owned and operated a tow truck and worked with at least one other towing business. The vehicles referred to Majestic by BPD officers were either towed to Majestic by its own tow truck, or Moreno arranged for wrecked vehicles to be towed there by other towing services.

[7] Moreno explained to the jury that Officers Rodriguez and Ocasio were friends and associates, and Moreno identified Rodriguez as the BPD officer who probably introduced Ocasio to the kickback scheme. Despite knowing each other, Rodriguez

the following morning seeking his $300 cash payment for the referral.

b.

Several months later, in March 2010, a driver flagged Ocasio down around midnight to report that his vehicle had been vandalized. Ocasio, after ascertaining that the car could not be driven and was blocking a city street, recommended calling the Majestic Repair Shop. When the owner consented, Ocasio called Moreno to arrange for the tow. As a result, Moreno towed the vehicle to Majestic and performed repair work on it that was worth several thousand dollars. Ocasio called Moreno several times the next afternoon and arranged for his $300 cash referral payment.

On November 7, 2010, Officer Ocasio was again working the BPD's night shift. Around 4:00 that morning, Ocasio was called to an area of Baltimore where four parked vehicles had been hit by a fifth vehicle. Ocasio called Moreno to describe the four damaged vehicles and to *see* if Moreno would like any of them referred to the Majestic Repair Shop. During this call, Ocasio described the car that had collided with the parked vehicles, advising Moreno that it was "an Acura Legend" with "full cover," conveying to Moreno that the car at fault was a luxury vehicle and that its insurer would pay for the damages suffered by the other vehicles. *See* J.A. 416. Moreno expressed concerns to Ocasio about the values of the four damaged automobiles, questioning whether they

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and Ocasio acted as strangers when both were present at the January 17, 2010 accident scene.

would be worth towing and repairing. Ocasio then identified one of those cars as a 2006 Toyota, which interested Moreno because the Toyota was more valuable than the others. Ocasio advised Moreno that there was no need to tow the Toyota, however, because it could still be driven. In response, Moreno suggested that Ocasio "talk to" the owner of the Toyota and convince him to have it towed to Majestic. *Id.* at 419.

After Moreno and Ocasio agreed that the Toyota should be referred to the Majestic Repair Shop, Ocasio identified its owner, a Mr. Tran, through the computer in a BPD patrol car. Despite the early morning hour and the fact that the Toyota was in operating condition, Ocasio went personally to Tran's home and misrepresented the accident situation. Ocasio falsely advised Tran that the accident report had to be completed that very morning. Officer Rogich, another BPD officer who was at the scene, explained otherwise to the jury, stating that he "wouldn't have knocked on [the owners'] doors," and "would have just left" accident report forms on the windshields of the damaged cars or at the owners' doors. *See* J.A. 926. While in Tran's residence, Ocasio recommended that Majestic fix the Toyota. Ocasio then called Moreno, who arrived soon thereafter and convinced Tran to have the Toyota towed to Majestic for repairs. Moreno also gave Tran documentation reflecting that his Toyota had been towed to Majestic. Rather than towing the Toyota, however, Moreno drove it from the accident scene to Majestic. En route, Moreno stopped at a nearby convenience store and met Ocasio. While there, Moreno withdrew $300

in cash from a Majestic bank account, which was paid to Ocasio.

c.

In the early morning hours of January 10, 2011, Officer Ocasio was called to the scene of a hit-and-run accident in Baltimore to translate for an accident victim, Mr. Quintanilla, who did not speak English. Quintanilla's SUV had been damaged in the accident, and it had been pushed off the street into a yard. The first BPD officer to respond to the scene concluded that there was no need to tow the SUV. Ocasio, after asking Quintanilla if he knew where the SUV could be fixed, recommended that it be towed to the Majestic Repair Shop. Ocasio then called Moreno to describe the damaged SUV, and Moreno responded by sending one of his associates to tow it to Majestic. That afternoon, Ocasio called Moreno seeking his referral fee. On January 14, 2011, Ocasio picked up Moreno at Majestic and they travelled together to a nearby ATM. Moreno then withdrew $300 in cash from a Majestic bank account and paid it to Ocasio.

d.

On January 15, 2011, Officer Ocasio made yet another referral to the Majestic Repair Shop. Shortly after 2:00 a.m., Ocasio arrived at the scene of a hit-and-run accident, being one of several BPD officers to respond. Ocasio had not been assigned to the accident by the BPD dispatcher, however, and should have been on "special detail" in another area of Baltimore. The wrecked vehicle was badly damaged and could not be driven. Ocasio did not ask the car's owner if she had a towing company or speak to her

about having her vehicle towed and repaired. He nevertheless called Moreno and requested that a tow truck be sent to the accident scene. In response, Moreno sent an associate, who had the car's owner sign paperwork authorizing the tow for her wrecked vehicle. Moreno's associate also gave the vehicle's owner a Majestic business card. Later that morning, Ocasio sent Moreno a text message asking to "pick up the money today before I go to work." J.A. 538. Ocasio then went to Moreno's home and collected $300 in cash.[8]

2.

Officer Ocasio also personally utilized the services of the Majestic Repair Shop. On January 29, 2010, Ocasio's wife was involved in a traffic accident that caused only slight damage to the rear bumper of her SUV. As a result, Ocasio called Moreno and asked that his wife's SUV be towed to Majestic. Because Ocasio's insurance company (GEICO) was unlikely to pay for such minor repairs, Ocasio overstated the SUV's damage on a GEICO claim form. Moreno then caused additional damage to the SUV — which he subsequently repaired — consistent with the damage description that Ocasio had provided to GEICO on the claim form. Ocasio's insurance claim was paid in full and, because

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[8] The events of January 17, 2010, underlie the Hobbs Act extortion offense alleged against Ocasio in Count Five of the superseding indictment; the events of January 10 and 14, 2011, underlie Count Six; and, the events of January 15, 2011, underlie Count Seven. Counts Five, Six, and Seven are, in turn, incorporated into Count One as overt acts in furtherance of the extortion conspiracy.

Ocasio's wife was not responsible for the accident, GEICO was reimbursed by the other driver's insurer (Erie Insurance) for the damage falsely claimed by Ocasio with respect to the SUV. In addition to the standard $300 cash referral fee, Majestic paid Ocasio's insurance deductible and car rental fees that were not covered by the insurers. As Moreno explained at trial, Majestic made those payments in an effort to keep Ocasio happy, with the hope that he would continue referring damaged vehicles to Majestic.

On December 29, 2010, Ocasio again called on the Majestic Repair Shop's towing and repair services for his personal needs. When Ocasio's private vehicle broke down in Baltimore, he called Moreno for a tow. Moreno advised Ocasio that he would take care of the towing fee and sent a friend from another towing service to tow Ocasio's vehicle. Rather than have his automobile towed to Majestic's shop, however, Ocasio had it towed to his residence. The towing fee was $150, more than Moreno had anticipated. When Moreno asked Ocasio to split the towing fee, Ocasio agreed to do so, but thereafter reneged on that arrangement.

C.

Prior to Ocasio and Manrich's joint trial on the superseding indictment, the prosecution submitted its proposed jury instructions to the district court. In response, Ocasio made objections and submitted his own proposed instructions. Therein, Ocasio raised the primary argument that he pursues on appeal: that he could not be convicted of conspiring with Moreno and Mejia, because they were the victims of

the alleged Hobbs Act extortion conspiracy. Ocasio's argument relied on *United States v. Brock*, 501 F.3d 762 (6th Cir. 2007), wherein the Sixth Circuit concluded that the victim of a Hobbs Act conspiracy must be a person outside the alleged conspiracy, i.e., the victim cannot also be a coconspirator in the extortion scheme.[9] The prosecution objected to Ocasio's proposed *Brock* instruction, contending that his reliance on the *Brock* decision was foreclosed by applicable precedent.

The trial began in Baltimore on February 13, 2012. On February 22, 2012, after presenting twenty-four witnesses, the prosecution rested. Ocasio and Manrich each moved for judgments of acquittal. With respect to the Count One extortion conspiracy, Ocasio pursued his *Brock* argument that Count One rested on a legally impermissible theory under which he could not be convicted. The district court denied Ocasio's acquittal motion, as well as Manrich's, distinguishing *Brock* and concluding that this Court's

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[9] Ocasio's proposed instruction concerning his *Brock* argument stated:

> In order to convict a defendant of conspiracy to commit extortion under color of official right, the government must prove beyond a reasonable doubt that the conspiracy was to obtain money or property from some person who was not a member of the conspiracy. Therefore, if you find that the only person or persons from whom a defendant conspired to obtain money by extortion under color of official right was another person or other persons who were also members of the conspiracy, then you must find the defendant not guilty of the conspiracy.

J.A. 136.

decision in *United States v. Spitler*, 800 F.2d 1267 (4th Cir. 1986), controlled.

The following day, Manrich pleaded guilty to the charges lodged against him in the superseding indictment. Ocasio, however, proceeded with the trial and called five witnesses in his defense, three of whom were character witnesses. Ocasio himself did not testify. At the conclusion of the evidentiary presentations, Ocasio renewed his judgment of acquittal motion, which was again denied.

On February 24, 2012, prior to deliberations, the district court instructed the jury, including in those instructions the essential elements of the Hobbs Act conspiracy and extortion offenses lodged against Ocasio. The court did not instruct the jury on Ocasio's *Brock* argument. That afternoon, the jury found Ocasio guilty of all charges against him, that is, conspiring to commit Hobbs Act extortion, plus three counts of Hobbs Act extortion.

On June 1, 2012, the district court sentenced Ocasio to eighteen months in prison, to be followed by three years of supervised release. The court also ordered Ocasio to make restitution to the BPD in the sum of $1,500.00, the aggregate value of the cash payments Ocasio had received from the Majestic Repair Shop. The prosecution sought further restitution with respect to Erie Insurance, predicated on the proposition that Ocasio had defrauded GEICO, which in turn had been reimbursed by Erie (as insurer for the at-fault driver involved in the accident with Ocasio's wife). At sentencing, the court deferred ruling on the Erie restitution issue and took the matter under advisement. The criminal judgment,

without addressing the prosecution's restitution request with respect to Erie, was entered on June 5, 2012. On July 23, 2012, the court entered an amended judgment, directing Ocasio to make restitution to Erie in the sum of $1,870.58. That amount represented the difference between the total reimbursement made by Erie and the amount actually attributable to the Erie-insured motorist.

Ocasio timely noticed this appeal, and we possess jurisdiction pursuant to 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291.

II.

On appeal, Ocasio maintains that the Count One conspiracy conviction is fatally flawed. Under Ocasio's theory, conspiring to extort property from one's own coconspirator does not contravene federal law, and thus the conspiracy offense was not proven and the district court erred in denying him an acquittal on Count One. Additionally, Ocasio challenges the restitution award to Erie Insurance, contending that Erie is not a victim of any of his offenses of conviction.

A.

We first address and reject Ocasio's contention that his Count One conspiracy conviction is legally invalid.[10] We review de novo a district court's denial

[10] Ocasio further posits that the fatally flawed Count One conspiracy charge enabled a prejudicial trial joinder with his alleged coconspirator Manrich, and, as a result, he is also entitled to a new trial on the three substantive Hobbs Act charges (Counts Five through Seven). Because we reject the

of a motion for judgment of acquittal. *See United States v. Smith*, 451 F.3d 209, 216 (4th Cir. 2006). In conducting such a review, we must sustain a guilty verdict if, viewing the evidence in the light most favorable to the prosecution, it is supported by substantial evidence. *See id.* Moreover, we review de novo a question of law, including an issue of statutory interpretation. *See United States v. Ide*, 624 F.3d 666, 668 (4th Cir. 2010).

1.

Ocasio was convicted under 18 U.S.C. § 371 of conspiring with BPD officers**,** as well as Moreno, Mejia, and others known and unknown to the grand jury, to contravene the Hobbs Act by extorting three victims — Moreno, Mejia, and the Majestic Repair Shop. Section 371, the general federal conspiracy statute, provides that such an offense occurs when

> two or more persons conspire . . . to commit any offense against the United States . . . in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy.

Consistent with the statutory language, the trial court instructed that, in order to convict Ocasio of the Count One conspiracy, the jury was obliged to find that the prosecution satisfied the following elements:

> First, that two or more persons entered the unlawful agreement that is charged in the [superseding] indictment, starting in or

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premise that Ocasio's Count One conspiracy conviction is legally invalid, we must also deny his new trial request.

> about the spring of 2008, and this is the agreement to commit extortion under color of official right[;]
>
> Second, that the defendant, Mr. Ocasio, knowingly and willfully became a member of that conspiracy[;]
>
> Third, that one of the members of the conspiracy knowingly committed at least one of the overt acts charged in the [superseding] indictment; and
>
> [F]ourth, that the overt act, which you find to have been committed, was done to further some objective of the conspiracy.

J.A. 1176–77. The court explained that "the reasonably foreseeable acts, declarations, statements and omissions of any member of [a] conspiracy, in furtherance of the common purpose of the conspiracy, are considered under the law to be the acts of all the members, and all the members are responsible for such acts." *Id.* at 1186. The court further explained that, if the jury found Ocasio a member of the charged conspiracy "then any acts . . . or statements . . . in furtherance of the conspiracy by [persons] you also find to have been members of the conspiracy, may be considered against" Ocasio, "even if those acts were done, and the statements were made, in his absence and without his knowledge." *Id.*[11]

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[11] Of note, the district court made clear that the jury was to consider whether the prosecution had satisfied its burden of proof as to any and all of the overt acts charged in the superseding indictment, including those committed by Manrich. The court explained that, if the jury were to find that both

The statutory object of the Count One conspiracy was to violate the Hobbs Act, which provides, in pertinent part, that

> [w]hoever in any way or degree obstructs, delays, or affects commerce . . . by . . . extortion . . . in furtherance of a plan or purpose to do anything in violation of this section shall be [guilty of an offense against the United States].

18 U.S.C. § 1951(a). The Hobbs Act defines "extortion," in pertinent part, as "the obtaining of property from another, with his consent, . . . under color of official right." *Id.* § 1951(b)(2). In order to prove such a Hobbs Act extortion offense, the prosecution "need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Evans v. United States*, 504 U.S. 255, 268 (1992).

2.

Ocasio, relying on the Sixth Circuit's decision in *United States v. Brock*, 501 F.3d 762 (6th Cir. 2007), contends that his conspiracy conviction is fatally flawed because a public official cannot be convicted of conspiring to extort property from his own coconspirator. He seeks to distinguish our decision in

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Manrich and Ocasio were members of the conspiracy, then the jury could consider any acts done or statements made by Manrich "during the course of the conspiracy, and in furtherance of the conspiracy," in its "decision as to whether the government has proved all of the elements of the offenses charged against Mr. Ocasio." J.A. 1187-88.

United States v. Spitler, 800 F.2d 1267 (4th Cir. 1985) — the decision primarily relied upon by the district court to reject Ocasio's theory.

a.

We begin our analysis by discussing *Brock* and *Spitler*.[12] In the latter case, we ruled that *Spitler*, an employee of a state contractor, was properly convicted under the Hobbs Act for conspiring with a state highway official to extort money and property from Spitler's employer. *See* 800 F.2d at 1278–79. Spitler authorized his underlings to accede to the public official's demands for firearms, jewelry, and other items of value in exchange for approval of inflated invoices. Spitler posited on appeal that "as a victim of [the public official's] extortion he could not, as a matter of law, be convicted as an aider and abettor or a conspirator to the extortion merely by virtue of his acquiescence." *Id.* at 1275. We determined, however, that Spitler was no "mere extortion victim." *Id.*

In so ruling, *Spitler* recognized the extremes of a spectrum of conduct ranging from "mere acquiescence" (which is not punishable under conspiracy principles) to active solicitation and

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[12] In *Brock* and *Spitler*, the defendants were not prosecuted under 18 U.S.C. § 371, the statute specified in Count One, but under the conspiracy provision of the Hobbs Act, 18 U.S.C. § 1951. Although the elements of those offenses are similar, a § 371 conspiracy requires proof of an overt act, while a § 1951 conspiracy does not. The maximum penalties under the two statutes also differ: A conspiracy conviction under § 1951 carries a maximum of twenty years, four times that of a conspiracy conviction under § 371.

inducement (which plainly fall within the purview of the conspiracy statutes). *See* 800 F.2d at 1276–78. Writing for the panel, Judge Russell found it unnecessary to "paint with a broad brush and declare a bright line at which a payor's conduct constitutes sufficient activity beyond the mere acquiescence of a victim so as to subject him to prosecution as an aider and abettor or a conspirator." *Id.* at 1278. That was because the panel concluded that Spitler's involvement in the extortion scheme "constituted a far more active role" than the mere payment of money, in that Spitler had also "induced, procured, caused, and aided" the public official's ongoing extortion. *Id.* (internal quotation marks omitted).

Thereafter, in its contrary *Brock* decision, the Sixth Circuit ruled that the Hobbs Act's conspiracy provision did not reach conduct by private citizens who had concocted a bribery scheme to pay off a county clerk. Brock and his brother operated a bail bond business. When a client "skipped town" and the Brocks became liable on the bond, Brock asked the county clerk to "make the problem go away by removing the scheduled forfeiture hearing from the court's calendar." *See* 501 F.3d at 765 (internal quotation marks and punctuation omitted). Brock then paid the clerk for altering the court's schedule. Brock and his brother conducted the scheme with the county clerk over several years, securing the clerk's cooperation when their bonding clients absconded. The court of appeals determined that, because the Brocks were victims of the clerk's extortion scheme, they could not also be conspirators.

In so ruling, the *Brock* court focused on the language of the Hobbs Act, reasoning that a Hobbs Act conspiracy requires an agreement to obtain "'property from *another*,' which is to say, . . . an agreement to obtain property from someone outside the conspiracy." 501 F.3d at 767. Additionally, the court noted that the Hobbs Act "requires the conspirators to obtain that property with the other's *consent*," and questioned how or why extortion victims would "conspire to obtain their own consent." *Id.* As the court summarized, "the law says that the conspiracy must extort 'property from another' and do so 'with his consent,' neither of which applies naturally to the conspirators' own property or to their own consent." *Id.* at 768. Notably, the *Brock* court acknowledged *Spitler* but emphasized that it "did not consider the textual anomalies raised here." *Id.* at 769.

b.

As the district court determined, Ocasio's case is governed by our *Spitler* precedent. The *Spitler* rule is that a person like Moreno or Mejia, who actively participates (rather than merely acquiesces) in a conspiratorial extortion scheme, can be named and prosecuted as a coconspirator even though he is also a purported victim of the conspiratorial agreement. That rule comports with basic conspiracy principles: One who knowingly participates in a conspiracy to violate federal law can be held accountable for not only his actions, but also the actions of his coconspirators. *See, e.g.*, *United States v. Burgos*, 94 F.3d 849, 858 (4th Cir. 1996) (en banc). Put simply, as Judge Haynsworth aptly explained nearly thirty

years ago, a conviction for "conspiring to obstruct commerce in violation of the Hobbs Act may be founded upon proof of an agreement to engage in conduct which would violate the statute." *United States v. Brantley*, 777 F.2d 159, 163 (4th Cir. 1985).

Ocasio contends to the contrary. Relying on *Brock*, he argues that the Hobbs Act's "from another" language requires that a coconspirator obtain property "from someone outside the conspiracy." 501 F.3d at 767. At the outset, we note that the language of the Hobbs Act does not compel this conclusion: the "from another" requirement refers to a person or entity other than the public official. That is, it provides only that a public official cannot extort himself. Thus, where a defendant is charged with conspiring to commit Hobbs Act extortion, the prosecution must show that the object of the conspiracy was for the conspiring public official to extort property from someone other than himself. Nothing in the Hobbs Act forecloses the possibility that the "another" can also be a coconspirator of the public official.

Ocasio next contends that the law must require that a victim under the Hobbs Act be a person outside the conspiracy because, otherwise, every victim's "consent" could be considered his agreement to enter into a conspiracy with his victimizer, "thereby creating a separately punishable conspiracy in every § 1951(a) case." *See* Br. of Appellant 28. Ocasio's premise, however, is foreclosed by *Spitler*, which underscored the proposition that mere acquiescence in an extortion scheme is not conspiratorial conduct. Rather, "conduct more active

than mere acquiescence" is necessary before a person "may depart the realm of a victim and may unquestionably be subject to conviction for aiding and abetting and conspiracy." *Spitler*, 800 F.2d at 1276. Under *Spitler*, therefore, Ocasio is wrong to suggest that every extortion scheme will necessarily involve a conspiracy to commit extortion. A bribe-payor's mere acquiescence to the scheme suffices to render a bribe-taker guilty of extortion. But *Spitler* requires the bribe-payor's more active participation in the scheme to make him a coconspirator.[13]

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[13] The *Brock* court attempted to distinguish *Spitler* on the ground that the conspirators in *Spitler*, unlike those in Brock, did in fact obtain property from "'another' unrelated entity outside the conspiracy." *See Brock*, 501 F.3d at 769. Under this theory, Spitler's employer — and not Spitler himself — was the victim of the public official and Spitler's extortion scheme. The *Brock* court distinguished the case before it by describing the alleged conspiracy as one whose "supposed point . . . was to extort the Brocks' cash payments, . . . not property from an unrelated entity outside the conspiracy." *Id.*

In *Spitler*, however, we criticized the government for arguing that Spitler could be convicted as a conspirator because it was his employer who was the extortion victim. Specifically, we "question[ed] the soundness of the government's position because under its theory, a corporate officer who merely accedes to a public official's implicit or explicit demands to the corporation by authorizing an expenditure of corporate funds would be subject to prosecution under the Hobbs Act for aiding and abetting the extortion and for conspiracy to commit the extortion." *Spitler*, 800 F.2d at 1275. The propriety of Spitler's conspiracy conviction, Judge Russell explained, rested not on whether some other victim could be identified, but on whether Spitler was a mere victim of — rather than an active participant in — the extortion scheme.

In light of our precedent, we must affirm Ocasio's Count One conspiracy conviction. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) ("Our inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent." (internal quotation marks omitted)). We thus decline Ocasio's invitation to afford him relief under the rule of lenity. *See Chapman v. United States*, 500 U.S. 453, 463 (1991) ("The rule of lenity . . . is not applicable unless there is a grievous ambiguity or uncertainty in the language and structure of the Act, such that even after a court has seized every thing from which aid can be derived, it is still left with an ambiguous statute." (internal quotation marks omitted)). We also refuse, as we must, to abandon our *Spitler* precedent and adopt the Sixth Circuit's analysis in *Brock*. *See McMellon v. United States*, 387 F.3d 329, 332 (4th Cir. 2004) (en banc) (recognizing "the basic principle that one panel cannot overrule a decision issued by another panel").[14]

B.

Although we affirm Ocasio's convictions, we vacate the sentencing court's award of restitution to Erie Insurance. Ocasio maintains that Erie was not a

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[14] We further observe that Ocasio's *Brock* theory is factually flawed, in that it relies on an evidentiary premise — that his only coconspirators were Moreno and Mejia — that is entirely at odds with the record. To the contrary, the evidence established a wide-ranging conspiracy involving dozens of BPD officers who received money for referring wrecked vehicles to the Majestic Repair Shop. Under the evidence, the jury was entitled to find each of those BPD officers to be Ocasio's coconspirator, regardless of whether Ocasio even knew him. *See Burgos*, 94 F.3d at 858.

victim of any of his offenses of conviction. At best, he contends, Erie was the victim of an uncharged insurance fraud scheme. Our review of the court's restitution order is for abuse of discretion. *See United States v. Llamas*, 599 F.3d 381, 387 (4th Cir. 2010). We assess de novo any legal questions raised with respect to restitution issues, including matters of statutory interpretation. *See United States v. Ryan-Webster*, 353 F.3d 353, 359 (4th Cir. 2003).

The Victim Witness Protection Act (the "VWPA") provides in pertinent part that a district court, when sentencing a defendant convicted under Title 18, may order him to make restitution to any victim of the offenses of conviction. *See* 18 U.S.C. § 3663. The VWPA defines a "victim" as

> a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.

Id. § 3663(a)(2). The Supreme Court has explained that a restitution award must "be tied to the loss caused by the offense of conviction" and does not "permit a victim to recover for losses stemming from all conduct attributable to the defendant." *Hughey v. United States*, 495 U.S. 411, 418 (1990). Consistent therewith, we have recognized that the VWPA "authorizes restitution only for losses traceable to the offense of conviction." *United States v. Ubakanma*,

215 F.3d 421, 428 (4th Cir. 2000). In conspiracy prosecutions, however, "broader restitution orders encompassing losses that result from a criminal scheme or conspiracy, regardless of whether the defendant is convicted for each criminal act within that scheme," are permitted. *United States v. Henoud*, 81 F.3d 484, 488 (4th Cir. 1996). Nevertheless, an award of restitution is only appropriate if the act that harms the purported victim is "either conduct underlying an element of the offense of conviction, or an act taken in furtherance of a scheme, conspiracy, or pattern of criminal activity that is specifically included as an element of the offense of conviction." *United States v. Blake*, 81 F.3d 498, 506 (4th Cir. 1996). Accordingly, we explained that when

> the harm to the person [or entity] does not result from conduct underlying an element of the offense of conviction, or conduct that is part of a pattern of criminal activity that is an element of the offense of conviction, the district court may not order the defendant to pay restitution to that individual.

Id.

Applying the foregoing standard to these circumstances, we are unable to endorse the sentencing court's determination that Erie Insurance suffered any losses that resulted from the Hobbs Act extortion conspiracy charged in Count One. Indeed, nothing in the superseding indictment or in the trial evidence suggests that an object of that conspiracy was to commit insurance fraud. Nor does the record suggest that an insurance fraud scheme was part of a

pattern of criminal activity included as an element of the Count One conspiracy. Perhaps Ocasio could also have been convicted of defrauding Erie Insurance or conspiring to do so, but that did not occur. The United States Attorney and the grand jury did not see fit to charge Ocasio with an insurance fraud scheme, and it would thus be inappropriate to penalize him as though he was also convicted of that offense. Because Erie was not a "victim" under the VWPA, the district court's award of restitution to Erie Insurance must be vacated.[15]

III.

Pursuant to the foregoing, Ocasio's convictions and sentence, as reflected in the district court's judgment order of June 6, 2012, are affirmed. The court's amended judgment order of July 23, 2012, however, is vacated to the extent that it includes the award of restitution to Erie Insurance. We remand for such other and further proceedings as may be appropriate.

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[15] The information under which Moreno and Mejia were separately prosecuted and convicted alleged, in pertinent part, that (1) "Moreno and Mejia agreed with various BPD Officers to add damage to vehicles in order to increase Majestic's profit from the insurance company payments," and (2) "various BPD Officers would falsify [accident reports]" to make it appear that the damage added to the vehicle by Majestic had actually been caused by the underlying accident, thus enabling Majestic to seek additional reimbursements from various insurance companies. *See United States v. Moreno*, No. 1:11-cr-357, Information at 5 (D. Md. June 29, 2011), ECF No. 1. Notably, however, neither the initial nor the superseding indictments charging Ocasio include any allegation that he or any other conspirator falsified accident reports or insurance claims.

AFFIRMED IN PART,
VACATED IN PART,
AND REMANDED

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA

vs.

SAMUEL OCASIO, et al. — CRIMINAL NO. CCB-11-0122

DEFENDANTS

JURY TRIAL EXCERPTS

February 23, 2012

Before: The Honorable Catherine C. Blake
United States District Judge

ORAL RULING DENYING DEFENDANT'S
PROPOSED JURY INSTRUCTIONS

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[89]

MR. CROWE: . . . The defense, as you know, requested the reasonable doubt instruction, the standard instruction from Sand. I'm aware of the Fourth Circuit law, but nonetheless, we object to that instruction not being given.

Secondly, with respect to the conspiracy, we had asked that under the *Brock* case, the Court instruct the jury that it must, in order to convict Mr. Ocasio of the conspiracy, it must determine that the effort was to obtain payment of money, property or services from somebody who was not part of the conspiracy.

That's because of the requirement that the property be obtained from another.

Thirdly, we believe that the *Brock* case also supports, and that the Court should have given an instruction that with respect to the substantive counts, five through seven, that the property also needed to have been obtained from another. That is somebody who was not a party to the agreement. I would particularly note that with respect to the substantive counts, that the indictment charges simply that the money was obtained from Mr. Moreno, and neither Majestic, nor for that matter, Mr. Mejia was mentioned.

THE COURT: All right. Thank you.

I have rejected the *Brock* instruction for reasons briefly explained, and which the government has also outlined from its point of view in a memorandum.

On the beyond a reasonable doubt instruction, it is my understanding, and I don't believe you disagree, Mr. Crowe, that at present, the state of the Fourth Circuit law is that it is not appropriate to attempt to define beyond a reasonable doubt, at least not unless and until the jury requests an instruction, and in that case, it may or may not be determined to be proper, but not as an initial matter.

So those will remain the instructions. There were a few sort of typographical things that I noticed in the course of giving them that I will change, and I will add the paragraph that we discussed about Mr. Manrich.

* * * *

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA

vs.

SAMUEL OCASIO, et al. — CRIMINAL NO. CCB-11-0122

DEFENDANTS

SENTENCING HEARING EXCERPTS

June 1, 2012

Before: The Honorable Catherine C. Blake
United States District Judge

ORAL RULING IN REGARDS TO RESTITUTION

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[17]

MS. KELLY: Your Honor, I think the theory that is advanced in these line of cases is that which the Government believes is the accurate one, that this is a betrayal of trust, and that there is a loss to the police department when Mr. Ocasio, instead of patrolling and working and doing the things he's supposed to do as a police officer, is instead waiting at accident scenes for tow trucks to arrive longer than he should, or making calls to Officer Rodriguez to tell him how to get Alex to get there, and that there is a loss to the City for Mr. Ocasio's services

that he should be providing to the City while he is instead engaged in what he was doing.

For instance, the night of Victor Reillo's car, I mean, hours of his shift were spent coordinating Mr. Moreno getting to the Southeast District to pick up Victor Reillo's car instead of doing whatever else Mr. Ocasio is supposed to be doing when he's working. I think there was testimony that, the night that Mr. Ocasio went to the scene for Quintanilla's car, that the other officer who testified, Horace — I can't remember his last — McGriff. Officer McGriff testified that he was pretty much ready to go, and Mr. Ocasio is hanging around.

I think that there is just absolutely a loss to the Baltimore Police Department when Mr. Ocasio is calling Alex Moreno instead of doing his job, and I don't think that $1,500 to the Baltimore Police Department is an outrageous amount or some unreasonable amount for Mr. Ocasio to repay.

In response to Mr. Crowe's sentencing memorandum, he had advanced the argument that Mr. Ocasio should not have to repay the $300 that Alex Moreno paid him for bringing his own car, and the $300 that he had paid for bringing Victor Reillo's car, and, again, I think the Government's taken a real restrictive view of this. I think there is an argument to be made that Alex Moreno is making those payments to him so that Mr. Ocasio will keep sending him cars, and that $600, while it might not be in exchange for his official duty, it's almost like lulling. It's almost like encouragement to stay part of my scheme. I think that $600 could absolutely be

included in both the loss amount and the restitution amount.

I think the Government has taken a fair, restrictive view of the five incidents that were proven or evidence was put on at trial, three of which were substantive counts of the Indictment, and I think it would be fair to say that the Baltimore Police Department, in dealing with what Mr. Ocasio did, has lost $1,500. How about the pay of Detective Matthew Smith who sat at this trial for two weeks and in investigating this case? I mean, the entire IAD has been part of this, you know, massive investigation, the massive conspiracy in which Mr. Ocasio was a part of, and to suggest the Baltimore Police Department didn't lose some value is unfair, and, when it's fairly impossible to come up with an exact value, the amount of the gain is an acceptable way to value it, and the Government believes that that's a fair way to look at it.

THE COURT: Mr. Crowe?

MR. CROWE: Ms. Kelly has made a number of points, and I hope my recollection both as to what she said and what happened at the trial is correct. My recollection is that, with respect to Mr. Quintanilla, he was the gentleman whose car was damaged and was in the backyard of his residence, that my client was called because they needed a Spanish-speaking interpreter. In fact, Mr. Quintanilla had an interpreter when he testified in court.

With respect to the $300 on Mr. Ocasio's car, that is not a matter that the Government has said that they thought should be taken into account until

Ms. Kelly did so just a minute ago. We certainly did say that the payment for Reillo was not something which should be considered restitution, because it was not money that he gave for referring Mr. Reillo under color of official right. It was a referral as a friend, and I think it would be sort of silly to say that Reillo did it for that reason, and Mr. Reillo, of course, was a Government witness.

With respect to the statement that, you know, Detective Matthew Smith has been here in court and has caused the Baltimore Police Department quite a bit of money, I don't doubt that an awful lot of money has gone into the investigation in this case, but I think the evidence — I mean, I think that the loss, quite clearly that's not a proper measure of restitution, that restitution is just simply the loss, not what you had to do to investigate the claim or to prosecute it. Otherwise, you know, restitution would be the tail that wagged the dog in a lot of criminal cases.

THE COURT: Okay. Well, on the restitution question, which is a little bit distinct from the amount of loss question under the guidelines as I read the various cases that were cited both by the Government and Mr. Crowe, I find sufficient support to award to the Baltimore Police Department the amount of $1,500 that results from the five admitted payments of $300 each to Mr. Ocasio for referring civilians — not a friend, not himself — to Majestic in contravention of his duties to the Baltimore Police Department.

I think that this order of restitution would properly be entered under 18 U.S.C. § 3663, the

Victim-Witness Protection Act, I believe it's called, as a matter of the Court's discretion, rather than the mandatory act. I do believe that the actions that Mr. Ocasio took were a betrayal of trust and not what he should have been doing to fulfill his duties to the Baltimore City Police Department. If one were to even attempt to calculate it, I would certainly agree with the Government that there is at least that amount of value of time that Mr. Ocasio should have been spending on his correct and legitimate duties owed to the City rather than on participating in this scheme for his personal gain.

So I think, either looked at in a purely monetary loss to the City from the time monetary value to his services, or on the principle that he should be required to disgorge what he got by wrongfully using his public position to that public employer, as I say, under either or both — a combination of theories, I think an order of restitution to the Baltimore Police Department for the sum of $1,500 is correct.

Forfeiture, I'm not sure that I see the basis for or that we need to try to press in this case.

MS. KELLY: Usually there would be a money judgment — a forfeiture order for a money judgment for the $1,500, but, in such a low amount, I don't think it's necessary in this case.

MR. CROWE: If there is no issue, there is no issue.

MS. KELLY: Yeah.

MR. CROWE: That's fine.

THE COURT: Okay. I believe, for an award under the Victim-Witness Protection Act, 18 U.S.C. § 3663, I'm also required to make some findings about Mr. Ocasio's ability to repay that. I don't know if that's really a dispute. I think he clearly has the ability at some point down the road to earn enough money to gradually, on a reasonable payment schedule, pay back that $1,500, but —

MR. CROWE: We agree, Your Honor, and will not contest that.

* * * *

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA

vs.

SAMUEL OCASIO, et al.
DEFENDANTS

CRIMINAL NO.
CCB-11-0122

JURY TRIAL EXCERPTS

Feb. 22, 2012

Before: The Honorable Catherine C. Blake
United States District Judge

ORAL RULING DENYING
MOTION FOR JUDGMENT OF ACQUITTAL

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* * *

[170]

THE COURT: Defense have any motions?

MR. MARR: Your Honor, the Court please, on behalf of the defendant, Kelvin Manrich, I move for a judgment of acquittal, and I place that on the record. I have no further argument.

THE COURT: All right. Thank you. Mr. Crowe.

MR. CROWE: Your Honor, on behalf of my client, I also make a motion for judgment of acquittal, both on the conspiracy count and all of the substantive counts. I think even taking all inferences

in favor of the government, the government still has not made out a prima facie case.

With respect to the conspiracy count, in particular, we have raised the issue in the *Brock* case.

The *Brock* case has that certainly a conspiracy to commit a 1951(a) violation has to be something indicating that money came from another.

The indictment in this case charges that the proceeds from the conspiracy were extracted from three people. That is Moreno, Mejia, and Majestic.

I think the fact that the indictment has the two individuals, as well as the company, which was solely a creature, is enough to distinguish it from other cases which do not agree with *Brock*.

I'm sure the Court has also read the Fourth Circuit's opinion in Medford, which kind of ducks the issue, because the indictment did not say that the source of the money was part of the conspiracy. It had not been raised below. Therefore, based on plain error —

THE COURT: I'm sorry. I'm having a little trouble hearing you.

MR. CROWE: Based on the plain error analysis, that it wasn't going to look any further in the question. So there's clearly no Fourth Circuit law on that.

Although the argument is a little more strained as to a substantive count, we believe that for a 1951(a) conviction, it also has to be money which was

extracted from somebody, you know, from somebody else who is not part of the conspiracy.

In that context, I would point out that the indictment is a little bit peculiar, in that it charges, my recollection is that in all the substantive counts, it charges that the money was extorted from Moreno, not from Moreno or Mejia or Majestic, but simply from Moreno. Mr. Moreno was clearly part of the conspiracy.

THE CLERK: Excuse me.

(Pause.)

THE COURT: All right. You may continue.

MR. CROWE: One final point is that Count 7 I believe is the count which deals with the car that involved Latitia Neal. I don't see any interstate commerce there. The car was simply towed to Majestic. The car was deemed total. There was nothing done with the car other than to give it back.

You almost have to go to a case like *Wickard versus Filburn* to find there is so little interstate commerce. Thank you, Your Honor.

THE COURT: All right. Thank you. Would the government like to respond?

MS. GAVIN: Yes, Your Honor. The government would refer obviously the Court to the argument made in the motion in limine at the beginning of this case with respect to the *Brock* decision and why that case has not been followed in this circuit, or I believe anywhere else, and that it is simply not applicable in this district to this case.

I would also point out that with respect to the substantive counts, the defendants are each charged also with aiding and abetting, which I think also certainly, under the *Evans* case, makes it very clear that an individual can be charged in this way. The payor can also be charged with the substantive count of extortion here under both the direct and aiding and abetting in the substantive counts.

So we would refer the Court to that, as well as the arguments made in the motion in limine.

THE COURT: All right. Thank you.

Well, I do appreciate that the issue was raised in advance in limine, so I have looked at the cases.

I think certainly as to the substantive counts, even if one otherwise agreed with the reasoning in *Brock*, it is hard to extend that to the substantive counts, particularly in light of the Supreme Court's holding in *Evans versus United States*.

The Fourth Circuit did have a chance to rule on this recently, but found it not necessary in the *Medford* case because there were other people or other entities at least not charged in the conspiracy from which money had been taken. So we don't have a recent decision of the Fourth Circuit.

We do have Judge Bennett's opinion in the *Curry* case and a case from the District of Alaska, and an older Fourth Circuit case, that all would appear to reject the argument or the decision in *Brock*.

I think we also do have in this case something very similar to the earlier — I think it's the *Spitler* case — the earlier Fourth Circuit case which was

discussed in *Brock*, and it found distinguishable because in that case, there was a company which was actually the source of the payment. Even though it was a similar situation I think to this, where it was a high level agent or employee of the company that was taking the company money and using it to make the payments, the Sixth Circuit in *Brock*, therefore, found that to distinguish the *Spitler* case. I think that's very similar to what we have here.

Regarding Count 7, the interstate commerce, the effect on interstate commerce, of course, that has to be shown as minimal. I do believe there is sufficient evidence in the case for the jury to find that that fairly low threshold has been met, if they choose to do so.

So at this point, I am denying the motions for judgment on all counts.

* * * *

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA

vs.

SAMUEL OCASIO, et al.
DEFENDANTS

CRIMINAL NO.
CCB-11-0122

JURY TRIAL EXCERPTS

Feb. 23, 2012

Before: The Honorable Catherine C. Blake
United States District Judge

ORAL RULING DENYING
RENEWED MOTION FOR JUDGMENT OF ACQUITTAL

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* * *

[46]

THE COURT: Okay. Then we are at the conclusion of all the evidence in the case.

Mr. Crowe, I assume you are renewing your motion?

MR. CROWE: We renew the motion for judgment of acquittal on the grounds previously stated.

THE COURT: All right. For the same reasons as previously stated, I am denying your motions. I am specifically rejecting the *Brock* argument in the

context of this case. I think there is sufficient evidence as to all the elements of the four offenses to go forward to the jury.

* * * *

Appendix F

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12-4462
(1:11-cr-00122-CCB-13)
Filed: May 28, 2014

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

SAMUEL OCASIO,
Defendant - Appellant.

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

Appendix G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA

v.

SAMUEL OCASIO
DEFENDANT

Case Number:
CCB-11-0122

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed on or
After November 1, 1987)

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* * *

THE DEFENDANT:

* * *

[x] was found guilty on counts One (1s), Five (5s), Six (6s) & Seven (7s) of the Superseding Indictment after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Numbers
18:371	Conspiracy	2008–2/2011	1s
18:1951(a) & 2	Extortion Under Color of Official Right; Aiding and Abetting	1/17/2010,	5s
		1/10/2011 & 1/15/2011	6s 7s

The defendant is adjudged guilty of the offenses listed above and sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 as modified by *U.S. v. Booker*, 125 S. Ct. 738 (2005).

* * *

[x] Original Indictment is dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

June 1, 2012
Date of Imposition of Judgment

/s/
Catherine C. Blake
United States District Judge

* * *

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 18 months as to Counts 1s, 5s, 6s & 7s to run concurrent to each other.

[x] The court makes the following recommendations to the Bureau of Prisons: that the defendant be placed in a facility consistent with his security level and needs that is as close as possible to Harford

County, Maryland so that he may be close to his family.

* * *

[x] The defendant shall surrender, at his own expense, to the institution designated by the Bureau of Prisons at the date and time specified in a written notice to be sent to the defendant by the United States Marshal which shall be no earlier than **Monday, July 30, 2012**. If the defendant does not receive such a written notice, defendant shall surrender to the United States Marshal:

[x] before 2 p.m. on Monday, August 6, 2012.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years as to Counts 1s, 5s, 6s & 7s to run concurrent to each other.

* * *

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$400.00	$ Waived	$1500.00

* * *

[x] The determination of restitution as to GEICO is deterred.

[x] The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	**Total Loss***	**Restitution Ordered**	**Priority or Percentage**
Clerk, U.S. District Court 101 W. Lombard Street Baltimore, Maryland 21201	$1,500.00	$1,500.00	
****** Restitution amount subject to change***			
TOTALS	$1,500.00	$1,500.00	

* * *

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A. [x] In full immediately; or

* * *

[x] on a nominal payment schedule of $100.00 per month during the term of supervision.

* * * *

Appendix H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA

v.

SAMUEL OCASIO
DEFENDANT

Case Number:
CCB-11-0122

AMENDED JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed on or
After November 1, 1987)

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* * *

Reason for Amendment:

[x] Correction of Sentence on Remand

THE DEFENDANT:

* * *

[x] was found guilty on counts One (1s), Five (5s), Six (6s) & Seven (7s) of the Superseding Indictment after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Numbers
18:371	Conspiracy	2008–2/2011	1s
18:1951(a) & 2	Extortion Under Color of Official Right; Aiding and Abetting	1/17/2010,	5s
		1/10/2011 & 1/15/2011	6s 7s

The defendant is adjudged guilty of the offenses listed above and sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 as modified by *U.S. v. Booker*, 125 S. Ct. 738 (2005).

* * *

[x] Original Indictment is dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

July 1, 2014
Date of Imposition of Judgment

/s/
Catherine C. Blake
United States District Judge

* * *

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 18 months as to Counts 1s, 5s, 6s & 7s to run concurrent to each other.

[x] The court makes the following recommendations to the Bureau of Prisons: that the defendant be placed in a facility consistent with his security level and needs that is as close as possible to Harford

County, Maryland so that he may be close to his family.

* * *

[x] The defendant shall surrender, at his own expense, to the institution designated by the Bureau of Prisons at the date and time specified in a written notice to be sent to the defendant by the United States Marshal which shall be no earlier than **Monday, July 30, 2012**. If the defendant does not receive such a written notice, defendant shall surrender to the United States Marshal:

[x] before 2 p.m. on Monday, August 6, 2012.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years as to Counts 1s, 5s, 6s & 7s to run concurrent to each other.

* * *

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$400.00	$ Waived	$1500.00

* * *

[x] The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Clerk, U.S. District Court 101 W. Lombard Street Baltimore, Maryland 21201	$1,500.00	$1,500.00	
TOTALS	$1,500.00	$1,500.00	

* * *

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A. [x] In full immediately; or

* * *

[x] on a nominal payment schedule of $100.00 per month during the term of supervision.

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