No. 00-1786

In the Supreme Court of the United States

BRUCE M. FREY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

MICHAEL CHERTOFF
Assistant Attorney General

DANIEL S. GOODMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals properly affirmed petitioner's conviction for attempted extortion in violation of 18 U.S.C. 1951.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

No. 00-1786

BRUCE M. FREY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. A1-A5) is unpublished, but the judgment is noted at 248 F.3d 1160 (Table). The district court's orders denying petitioner's motion to dismiss (Pet. App. B1-B27) and denying petitioner's motion for judgment of acquittal (Pet. App. C1-C25) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 2001. The petition for a writ of certiorari was filed on May 29, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted of attempted extortion, in violation of 18 U.S.C. 1951, and was sentenced to 23 months' imprisonment. The court of appeals affirmed in an unpublished order. Pet. App. A1-A5.

1. James Lambert operated a hunting and fishing equipment store in Grand County, Indiana, and was licensed to sell firearms. Firearms sales were the mainstay of the store's business. In January 1994, police were called to Lambert's home and, while there, engaged in a struggle with Lambert over a gun. The officers found illegal drugs in Lambert's possession. Lambert was later charged with four felony counts, including criminal recklessness and possession of a controlled substance. Lambert's attorney was unable to negotiate a plea agreement that would not require Lambert to plead guilty to a felony. A felony conviction would result in the loss of his license to sell firearms at his store. Pet. App. A2; see 18 U.S.C. 922(a) and (g), 923(d).

Prior to trial, Lambert asked petitioner, whom he knew to be an attorney, for assistance with his criminal case. Pet. App. A2-A3.[1] Petitioner returned to Lambert's store several days later and told Lambert that he had "checked in" with the local prosecutors and that he would be able to "do something" about the charges. In exchange for a favorable disposition of the charges, however, petitioner demanded $20,000 from Lambert. *Id.* at A3. Petitioner stressed to Lambert "over and

[1] Petitioner "resign[ed] from practice while disciplinary charges were pending [against him]." *In re Frey*, 2001 WL 66365 (T.C. Jan. 19, 2001).

over" the importance of avoiding a felony conviction if Lambert wished to retain his firearms license. *Ibid.* Petitioner told Lambert to use a mutual acquaintance as a "go-between" and instructed Lambert not to inform his counsel of record, David Payne, about their arrangement. *Ibid.*

Lambert eventually told Payne about petitioner's demand. Pet. App. A3. Payne contacted the state police, who directed Lambert to make payments of $20,000 to petitioner and his go-between, Thomas Hubbard. *Ibid.* On January 22, 1997, a federal grand jury indicted petitioner on one count of attempted extortion, in violation of 18 U.S.C. 1951. Pet. App. A4. For pertinent purposes, "extortion" includes "the obtaining of property from another, with his consent, induced by wrongful use of * * * fear." 18 U.S.C. 1951(b)(2).

2. Petitioner moved to dismiss the indictment, arguing that, even if true, the allegations did not establish a violation of 18 U.S.C. 1951. The district court denied that motion. Pet. App. B1-B27. In particular, the court rejected petitioner's argument that the indictment did not sufficiently charge extortion, because it did not allege that Lambert paid petitioner $20,000 out of fear of economic harm. *Id.* at B11-B26. As the court explained, petitioner's argument, "reduced to its core, seems to be that this entire situation involved merely some unsavory and perhaps unethical, but not illegal, dealings between [petitioner] and Lambert." *Id.* at B25. The court reasoned that that issue "turns on Frey's (and Lambert's) intentions" and "depends largely on credibility determinations" and thus was an issue "to be made to a jury and not one to be determined by the court" in ruling upon a motion to dismiss. *Ibid.* The court further held that, on its face, the indictment was more than "sufficient to adequately inform [petitioner]

of the crime with which he was charged and allow him to prepare his defense." *Id.* at B26.

A jury found petitioner guilty of attempted extortion in violation of the Hobbs Act. Pet. App. A4. Petitioner moved for a judgment of acquittal, arguing that the government had failed to prove the requisite use of fear. The district court denied that motion. *Id.* at C1-C25. The court explained that the government was not required to prove that petitioner could cause economic harm to a victim, but merely that he exploited or preyed upon the victim's fear of such harm. *Id.* at C17-C18. In so ruling, the district court distinguished cases that "involved payments for an economic advantage" from cases, such as this, that "involved payments to avoid a ruinous economic harm." *Id.* at C16. Moreover, the court found that the evidence supported the government's theory that Lambert "had the actual fear of losing his livelihood on account of a possible felony conviction" (*id.* at C20), and that petitioner preyed upon that fear (*id.* at C21-C22).

3. The court of appeals affirmed in an unpublished order. Pet. App. A1-A5. The court explained that petitioner's "arguments on appeal, though framed as both sufficiency-of-the-evidence and constitutional challenges, boil down to a contention that this court has incorrectly interpreted the Hobbs Act." *Id.* at A4. The court rejected that contention, explaining that its cases "make clear * * * that in a case of extortion by wrongful use of fear of economic harm, the victim's fear need not be created by the extortioner"; rather, "the extortioner need only exploit" the victim's fear, which "can be preexisting." *Ibid.* The court further found that there was sufficient evidence for a reasonable jury to find that "[petitioner] exploited Lambert's fear." *Id.* at A5. In particular, the court explained that Lambert

testified that "he was 'extremely' aware" that a felony conviction would basically shut down his firearms business, and that petitioner "stressed repeatedly the importance of avoiding" a felony conviction. *Ibid*.

ARGUMENT

The unpublished order of the court of appeals does not conflict with any decision of this Court or of another court of appeals. The evidence supports petitioner's conviction for attempted extortion. Further review is not warranted.

1. Petitioner renews his contention (Pet. 5-15) that the court of appeals incorrectly interpreted the Hobbs Act and argues that its decision conflicts with the decisions of other circuits. That contention is without merit. No court of appeals has held that a defendant's exploitation of a victim's reasonable fear of economic harm cannot constitute extortion under Section 1951 if the defendant is not the source of the feared economic harm. The different outcomes in the cases cited by petitioner depend on the facts of the underlying prosecutions, and not on any circuit conflict over the proper interpretation of the Hobbs Act.

The Hobbs Act defines "extortion" as obtaining property from another with his consent, "induced by wrongful *use of* * * * fear." 18 U.S.C. 1951(b)(2) (emphasis added). As the court of appeals below explained, "in a case of extortion by wrongful use of fear of economic harm, the victim's fear need not be *created by* the extortioner." Pet. App. A4 (emphasis added). Rather, a defendant's attempt to exploit such fear is sufficient. See, *e.g.*, *United States* v. *Knox*, 68 F.3d 990, 996 (7th Cir. 1995) ("Mr. Carreiro need not personally have caused Mr. Hoppe's fear; that he exploited that fear is sufficient to establish a violation of the Hobbs

Act."), cert. denied, 516 U.S. 1119 (1996); *United States* v. *Lisinski*, 728 F.2d 887, 891 (7th Cir.) ("The extortionist need not be responsible for the situation in which the victim finds himself."), cert. denied, 469 U.S. 832 (1984).[2]

The Second Circuit cases cited by petitioner (Pet. 8) do not stand for a contrary proposition. Indeed, in *United States* v. *Capo*, 817 F.2d 947, 951 (1987) (en banc), the Second Circuit recognized that it was *not* necessary for the defendant to create the fear in the minds of his victims, so long as the defendant intended to exploit the victims' fear of economic loss. The holding in *Capo* that the defendants' activities were not proscribed by the Hobbs Act turned instead on the fact that the victims were hoping for an economic benefit, not fearing an economic harm, and thus "the evidence of fear of economic loss was insufficient." *Id.* at 952. Likewise, in *United States* v. *Garcia*, 907 F.2d 380, 382 (2d Cir. 1990), the court concluded that the evidence "was insufficient to support an extortion conviction based on a fear of economic loss," and thus there was no need for the court to consider whether a Hobbs Act defendant must create the fear that he exploits. In

---

[2] Petitioner confuses a victim's fear of an underlying economic harm with a defendant's exploitation of the victim's fear. For example, petitioner erroneously cites *United States* v. *Granados*, 142 F.3d 1016 (7th Cir. 1998), for the proposition that the victim in a Hobbs Act prosecution must reasonably "fear the defendant's extortionate means." Pet. 6. *Granados*, however, makes clear that the "fear" component of a Section 1951 extortion prosecution involves the victim's fear of the underlying economic harm, not the fear of the extortion: "Thus the *sine qua non* of a § 1951 violation is the wrongful use of the victim's fear, regardless of whether the defendant created the fear or even intended to create the fear." *Granados*, 142 F.3d at 1021.

this case, the evidence overwhelmingly supported the government's claim that Lambert feared economic harm, and that petitioner exploited that fear. Pet. App. A5.

Similarly, the Fifth Circuit case cited by petitioner (Pet. 10), *United States* v. *Tomblin*, 46 F.3d 1369 (1995), does not stand for the proposition that the economic harm feared by a Hobbs Act victim must be caused by the defendant. Consistent with the Seventh and Second Circuits, the Fifth Circuit stated in *Tomblin* that "the defendant need not create the fear, so long as the defendant *uses* it to extort property." *Id.* at 1384 (emphasis added). Likewise, the Sixth Circuit has upheld a Hobbs Act conviction in which the defendant exploited the victims' fear of tax problems resulting from an IRS audit. *United States* v. *Valenzeno*, 123 F.3d 365 (1997). As the Sixth Circuit explained in *United States* v. *Williams*, 952 F.2d 1504 (1991), a Hobbs Act extortionist "need not be responsible for the state of fear in which the victim finds himself," so long as the extortionist "exploits that fear and thereby wrongfully obtains money or property." *Id.* at 1513. The Fourth Circuit has similarly held that a victim's fear of economic harm is "sufficient to sustain a Hobbs Act violation" even if the fear is not "the consequence of a direct or implicit threat by the defendant." *United States* v. *Billups*, 692 F.2d 320, 330 (1982), cert. denied, 464 U.S. 820 (1983).

United States v. *Livingston*, 665 F.2d 1003, 1005 (11th Cir. 1982), is also distinguishable. There, the defendant offered to sell information about embezzlement that was occurring at a company. The Eleventh Circuit reversed the Hobbs Act conviction, because there was no evidence that the defendant was participating in the embezzlement, and there was no implied

threat that he or anyone else would continue the embezzlement unless a payment were made to him. In other words, unlike this case, *Livingston* did not involve a threat that the economic harm feared by the victim would continue if the victim did not pay the extortionist. See *United States* v. *Blanton*, 793 F.2d 1553, 1560 (11th Cir.) (distinguishing *Livingston* on the ground that the defendant in that case "merely offered to sell information about an on-going embezzlement perpetrated by others"), cert. denied, 479 U.S. 1021 (1986).[3]

2. Petitioner also suggests (Pet. 22) that the evidence was insufficient for a reasonable jury to find that he engaged in attempted extortion in violation of the Hobbs Act. The court of appeals properly rejected that fact-bound claim. Pet. App. A5. The evidence showed that petitioner believed that Lambert feared that a

[3] Nor is the district court case cited by petitioner (Pet. 13-15) at odds with the court of appeals' decision below. In *United States* v. *Ruedlinger*, 990 F. Supp. 1295, 1301 (D. Kan. 1997) (emphasis added), the court noted that "[t]here is little question that the fear necessary for an extortion charge need *not* be the product of the defendant's action." The court added that "an extortion charge requires that the defendant must have the power to hurt the victim in economic terms or the victim must believe that the defendant has the power to hurt him in economic terms." *Ibid.* But the victim school districts in *Ruedlinger* could not have reasonably believed that the defendants had the power to affect them economically if the victims refused to buy insurance from the defendants. In contrast, the victim in the present case, Lambert, could reasonably have believed that petitioner had connections with the local prosecutor's office and thus could control Lambert's economic destiny if Lambert did not yield to petitioner's demand for money (*e.g.*, by preventing a misdemeanor plea agreement). See Pet. App. A3. In any event, there is no indication that the Tenth Circuit has adopted *Ruedlinger*'s interpretation of the Hobbs Act, and this Court does not sit to resolve conflicts with district court opinions.

felony conviction would shut down his business, and that petitioner knew of that fear and sought to exploit it "over and over" by inducing Lambert to pay him $20,000. *Id.* at A3. Moreover, the evidence showed that Lambert's fear of economic loss was reasonable. See *ibid*; Gov't C.A. Br. 14-19. There is, in short, no reason for further review of petitioner's Hobbs Act conviction in this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

MICHAEL CHERTOFF
Assistant Attorney General

DANIEL S. GOODMAN
Attorney

AUGUST 2001