

12-3446

To Be Argued By:
DAVID E. NOVICK

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-3446

UNITED STATES OF AMERICA,
Appellee,

-vs-

MICHAEL N. KENNEDY,
aka NICOLAE HELERA,
Defendant,

EMANUEL NICOLESCU,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

DEIRDRE M. DALY
Acting United States Attorney
District of Connecticut

DAVID E. NOVICK
SANDRA S. GLOVER (*of counsel*)
Assistant United States Attorneys

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Statement of Jurisdiction

The United States District Court for the District of Connecticut (Mark R. Kravitz, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on August 17, 2012. Nicolescu's Appendix ("NA") 16. On August 24, 2012, Nicolescu filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). NA16, NA93. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

**Statement of Issues
Presented for Review**

1. Whether the trial evidence, viewed in the light most favorable to the guilty verdict, was sufficient to support the jury's finding that defendant Emanuel Nicolescu's extortion affected interstate commerce in any way, where the crime: involved extensive interstate planning and execution; if successful, would have involved the interstate transmission of \$8.5 million; and targeted a large sum of money belonging to someone who regularly engaged in interstate commerce.
2. Whether the district court committed procedural error in its application of the Sentencing Guidelines, specifically:
 - a. Whether the district court correctly enhanced Nicolescu's offense level by two for a leadership role, where Nicolescu was the only perpetrator with prior experience at the victim's estate; Nicolescu's DNA was found on the steering wheel of the victim's stolen Jeep; and Nicolescu was the only common link between the two other identified co-conspirators.
 - b. Whether the district court plainly erred in failing to apply a "beyond a reasonable doubt" standard to the

factual finding that there were two victims, and therefore two guidelines groups, in Count Two of the Indictment.

- c. Whether the district court correctly enhanced Nicolescu's offense level by two based on upon the \$8.5 million extortionate demand, pursuant to U.S.S.G. § 2B3.1(b)(7).
- d. Whether the district court plainly erred in failing to apply U.S.S.G. § 2X1.1, which concerns attempt, solicitation, and conspiracy not covered by a specific offense guideline, where the attempt and conspiracy here were covered by a specific offense guideline, and at any rate, Nicolescu would have been ineligible for the U.S.S.G. § 2X1.1(b) reductions for incomplete attempts and conspiracies.
- e. Whether the district court correctly enhanced Nicolescu's offense level by two based upon the bodily injury to both victims, where they were injected with and force-fed foreign substances, and one victim's injection resulted in significant pain and a severe bruise to her arm.

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

In the late night of April 15, 2007, the defendant, Emanuel Nicolescu, and at least two others, wearing masks and carrying weapons, entered the South Kent, Connecticut, home of Anne Bass, a wealthy New York philanthropist, and took Bass and her boyfriend, artist Julian Lethbridge, hostage. Over the ensuing several hours, Nicolescu and his co-conspirators attempted to extort \$8.5 million from the victims,

by injecting the victims with an alleged “virus,” and demanding the money in exchange for an “antidote.” As morning arrived, now conscious of the impending arrival of house staff, and the impracticality of securing money from out-of-state sources, Nicolescu and his confederates fled the estate in Bass’s Jeep. They abandoned the Jeep at a parking lot in New Rochelle, New York, where they were picked up by another co-conspirator, likely co-defendant Michael Kennedy.

On March 22, 2012, nearly five years later, Nicolescu was convicted by a jury for attempting and conspiring to extort Bass and Lethbridge, and for stealing Bass’s Jeep afterward. The circumstantial case against Nicolescu was overwhelming—Nicolescu’s DNA partially matched a sample from the stolen Jeep’s steering wheel; Nicolescu used a cell tower near the parking lot in New Rochelle at the same time Bass’s stolen Jeep was abandoned; Nicolescu’s knife, a handmade gift from his former father-in-law, was found inside an accordion case that washed ashore in Jamaica Bay, and which also contained other items linking it to the crime; and the evidence showed that Nicolescu’s former roommate, co-defendant Michael Kennedy, was near Bass’s estate on the night of the crime. Equally as significant, Nicolescu was a former employee of Bass, having been fired approximately one year before the crime.

Following the guilty verdict, Nicolescu was sentenced to 240 months' imprisonment. On appeal, Nicolescu argues that the evidence was insufficient to support the jury's finding that the attempt and conspiracy to commit extortion affected interstate commerce. As set forth below, there exists ample evidence in the trial record to support the jury's verdict.

Nicolescu also raises five challenges to the district court's guidelines calculation: (1) that the district court erred in applying a two-point guidelines enhancement for Nicolescu's leadership or organization of the offense; (2) that the district court erred in dividing the conspiracy count into two groups based on the two victims of the offense; (3) that the district court erred in applying a seven-level guidelines enhancement based on the \$8.5 million extortionate demand; (4) that the district court should have reduced Nicolescu's offense level by three under U.S.S.G. § 2X1.1(b)(2); and (5) that the district court erred in applying a two-level enhancement based upon bodily injury to a victim of Nicolescu's crime.

As to all of these claims, the district court correctly applied the enhancements, and at any rate would have imposed the same sentence even if the guidelines calculation had been different. In addition, with respect to Nicolescu's argument that the court should have applied § 2X1.1(b)(2), this claim was never raised by Nicolescu, and

the district court did not commit plain error in declining to apply § 2X1.1(b)(2).

Statement of the Case

On February 3, 2011, a federal grand jury sitting in Bridgeport, Connecticut, returned an indictment against defendant-appellant Emanuel Nicolescu and his co-defendant, Michael Kennedy. NA5, NA18-NA20. Nicolescu was charged in the indictment with one count of Attempt to Interfere with Commerce by Extortion, in violation of 18 U.S.C. § 1951; one count of Conspiracy to Interfere with Commerce by Extortion, in violation of 18 U.S.C. § 1951; and one count of Possession of a Stolen Vehicle, in violation of 18 U.S.C. § 2313(a). NA18-NA20.

A jury trial on the charges against Nicolescu was held between March 14 and March 22, 2012.¹ NA12. On March 22, 2012, the jury found Nicolescu guilty on all counts of the indictment. NA12. On August 17, 2012, the district court (Mark R. Kravitz, J.) sentenced Nicolescu principally to 240 months' imprisonment. NA16, NA90. Judgment entered on August 17, 2012. NA16. On August 24, 2012, Nicolescu filed a timely notice of appeal. NA16, NA93.

Nicolescu is currently serving the sentence imposed by the district court.

¹ Kennedy was not arrested until several months following Nicolescu's trial. NA17.

**Statement of Facts and Proceedings
Relevant to this Appeal**

A. Background

This case concerns a home invasion that occurred on April 15-16, 2007, at the South Kent, Connecticut, country home of Anne Bass. Bass frequently shared this home with her long-time companion, Julian Lethbridge. Bass has amassed substantial wealth, and has residences or land in Connecticut, New York, Colorado, Texas, and Nevis. Bass trades in art and antiques, and has investments all over the world. Other than her estate, Bass has no investments in Connecticut, and does not have \$8.5 million in liquid assets in Connecticut. Presentence Report (“PSR”) ¶ 6.

Bass’s Connecticut residence is located on a thousand-acre property, most of which she operates as Rock Cobble Farm, LLC. The farm’s activities include cattle raising, orchards, and gardening. Bass’s residence itself is comprised of two massive converted barn structures. Bass typically spends most of her summer in Connecticut, as well as many weekends during the rest of the year. Lethbridge often joins her at the estate, though, at least as of April 2007, he often returned to New York on Sunday night, whereas Bass often stayed until Monday. PSR ¶ 7.

In addition to the main residence, there are several other houses and other structures on the

property, including Lethbridge's art studio and a staff house. Bass employs an extensive staff on the property, both to maintain the cattle, gardens, and orchards, and also to handle the domestic needs of her main residence. While some of the staff commute daily to the property, others live during the work week at the staff house. PSR ¶ 9.

The domestic staff, as of 2006, was comprised of housekeepers, one or more cooks, a laundress, and a butler/houseman. The position of "houseman" or butler was eventually dissolved, but typically involved serving meals, buffing floors, running errands, and otherwise assisting in chores.

There were two Jeeps that were kept by Bass on the property for staff use. One of the Jeeps was used exclusively by the cook, who in 2006 and 2007 was Carole Wilson. The other Jeep was for the use of the butler. When there was no butler, the Jeep was often used by Lethbridge to transport art and other larger items back and forth to New York City, where he lived and had a studio and gallery.

Nicolescu worked as a butler at Bass's Connecticut estate beginning in early March 2006, and was fired on May 8, 2006. Nicolescu had use of the butler's Jeep during his employment, but crashed the Jeep in an unauthorized trip to New York City; a new Jeep was not purchased until

May 13, 2006, after Nicolescu was fired. PSR ¶ 10.

B. The home invasion

On the night of April 15, 2007, Bass and Lethbridge were staying at the Connecticut residence, along with Bass's grandson. PSR ¶ 12. They had traveled to the Connecticut residence from Bass's New York City residence the previous day, in the Jeep that was commonly used by Lethbridge. PSR ¶ 10.

Following dinner, the staff left the Connecticut residence at around 10:30 p.m. PSR ¶ 14. It was the custom not to set the alarm when Bass was present. PSR ¶ 13. Moreover, the staff door had been unlocked prior to their departure, and there are several closets in the first-floor entryway. PSR ¶ 13. At some point thereafter, Lethbridge retired to a second-floor sitting room, where he fell asleep, and Bass went to her third floor bathroom. PSR ¶ 14.

Sometime between 11:00 and 11:30 p.m., Bass, now wearing a white bathrobe, returned downstairs to the kitchen in order to get ice for a knee injury. PSR ¶ 14. As Bass approached the kitchen entrance from the living room, there was a loud noise from the main staircase area. She then saw three men, masked and dressed in all black and carrying guns and knives, coming up the staircase. The intruders were screaming in an incomprehensible "war cry." Bass immedi-

ately retreated inside the kitchen and closed the door; however, the perpetrators were there immediately, pulled the door open, and threw Bass to the floor. Bass's hands were bound behind her with a zip tie. Meanwhile, Lethbridge had woken up when he heard the noise, and came into the living room. The perpetrators saw him, confronted him with knives and guns, and ordered him to the ground, where his hands were bound. PSR ¶ 15.

Lethbridge and Bass were ultimately detained in Bass's bathroom, where they remained, bound and blindfolded, for the better part of the next several hours. PSR ¶¶ 16, 17. Both were subjected to physical abuse by the perpetrators. PSR ¶ 17. After some time, Bass's blindfold was removed and she observed one of the perpetrators cut open Lethbridge's shirt with a knife and inject his arm with a syringe. PSR ¶ 18. The same perpetrator then prepared another syringe, cut open Bass's shirt, and injected the contents of the syringe into her arm. PSR ¶ 18. Bass testified that the injection was painful, saying "it was excruciating and I honestly, it felt, I'm sure it didn't, but it felt like it hit the bone of my arm." GA319.

After the injections, Bass was re-blindfolded. One of the perpetrators, seemingly the one who gave the injections (though there is no way to confirm this), issued the perpetrators' demands. In substance, he told Bass and Lethbridge that

they had been injected with a virus, and the virus is almost always fatal within 20-24 hours. However, the threat continued, there is an antidote that can be administered within that time that will counteract the virus. The perpetrator then demanded \$8.5 million in exchange for administering the antidote. PSR ¶ 19.

A conversation ensued in which Bass and Lethbridge explained that Bass did not have ready access to \$8.5 million in cash in the early morning hours in Connecticut. They explained that Bass had not been to a bank in many years, and that her accountant in Texas paid all her bills. A request for such a sum of money would certainly raise red flags for the accountant. The perpetrator suggested that Bass tell the accountant the money was for real estate, but Bass explained that real estate is not purchased with cash, and that at any rate this would still raise red flags. They also established that Lethbridge had “only” \$50,000 in his account, which was not of interest to the perpetrators. PSR ¶ 20.

Lethbridge proposed having Bass’s accountant wire \$250,000 to Lethbridge’s account, which would probably not raise concerns with the accountant, and then the perpetrators could take Lethbridge to the bank the next day to retrieve the money. Bass indicated that she would need to stay at the house to care for her grandson. A perpetrator said that they would kidnap the child. Ultimately, the perpetrators reverted to

their demand for \$8.5 million, and said that it was the victims' problem how to get it. PSR ¶ 21.

Later, the perpetrators took Bass and Lethbridge to get dressed in "smart" clothes, so that they could go to the bank the following day. PSR ¶ 22. The victims were also made to drink an orange-colored solution, which caused a temporary allergic reaction in Bass. PSR ¶ 23.

Near the end of the ordeal, the victims were made to lie down on the floor in Bass's bathroom, and their feet were bound. Bass could not find a comfortable position in which to lie, and eventually she was picked up, taken down to her room, and thrown on the bed. Bass then heard the sounds of cleaning up. After a time, Bass fell asleep. When she woke up, and after nobody answered her calls, she got out of bed, worked her way over to the stairs (her hands and feet were still bound), but was unable to get up the stairs. She then worked her way to her desk, where she located a pair of scissors that she used to free herself. Shortly thereafter, she freed Lethbridge. Bass and Lethbridge ultimately realized that the perpetrators had left, and had taken Bass's Jeep. PSR ¶24.

The victims were treated at the hospital, and Bass ended up with a bruise around the injection site that covered most of her arm and lasted for more than a week. PSR ¶ 63, GA337, GA348 (According to Bass, "eventually my entire arm was black. It was pretty scary.")

C. The evidence against Nicolescu

According to Bass and Lethbridge, the perpetrators remained masked and gloved throughout the entire home invasion. As a result, there was no possibility of a direct identification by either Bass or Lethbridge. Moreover, the apparent presence of gloves limited the likelihood of forensic evidence in the house. Indeed, there were no usable fingerprints or DNA matches (other than to the victims) from the house. PSR ¶ 25.

As a result, the case upon which Nicolescu was convicted was a circumstantial one, made up of a number of pieces of evidence. The types of evidence can, very generally, be broken into six general parts: (1) Nicolescu's familiarity with the house; (2) Nicolescu's connection with co-conspirators; (3) the recovery of an accordion case in Jamaica Bay; (4) the presence of co-defendant Michael Kennedy's car within a short distance from the estate on the night of the crime; (5) a partial match between Nicolescu's DNA profile and samples taken from inside the stolen Jeep; and (6) evidence of Nicolescu and a co-conspirator's flight upon being questioned by authorities. PSR ¶ 26.

1. Nicolescu's familiarity with Bass's property

Nicolescu was briefly employed by Bass as a butler in 2006. Nicolescu's employment began on March 2, 2006, and he was fired May 8, 2006, for

misuse of the Jeep that he was entitled to use as part of his job. As an employee, Nicolescu had access to unique information about Bass's estate. That information included that: (1) the staff door was normally unlocked until the staff left at the end of the night; (2) the alarm would not be set while Bass was in residence; (3) the staff would typically all be on the second floor in the kitchen and dining room around dinner time; and (4) there are a number of large closets on the entry level in which multiple people could secrete themselves. PSR ¶28.

Moreover, those who worked on the estate knew that Bass often spends weekends in Connecticut, and that one could determine Bass's presence in the residence by simply checking for lights in the house. PSR ¶ 29. Employees knew of the unreliable cellular phone coverage in the main house, and thus the importance of procuring 2-way radios, or walkie-talkies, for communication with anyone on the outside of the house. PSR ¶ 30.

2. Nicolescu's connection with co-conspirators

The evidence at trial established a close personal relationship between Nicolescu and co-defendant Kennedy, as well as extensive communication with another co-conspirator, Stefan Barabas. There was extensive testimonial and documentary evidence of the close relationship

between Nicolescu and Kennedy. PSR ¶¶ 31-32. Kennedy, in turn, was shown to have purchased walkie-talkies and done research related to self-defense products, all within a short time before the home invasion. PSR ¶ 33. Finally, phone records also showed extensive communication between Nicolescu, Kennedy, and Barabas both before and after the home invasion. PSR ¶ 34.

3. Accordion case/knife

On April 21, 2007, less than a week after the home invasion, Jean and John Johnson discovered an accordion case washed up in back of their house, which sat on an inlet in Broad Channel, a part of Jamaica Bay in Queens. The case contained, among other items, an Airsoft pistol, a large knife, syringes, Sleepinal caplets, a stun gun, latex gloves, and a laminated card with phone numbers that turned out to be a Bass estate phone directory. The case was ultimately turned over to the Connecticut State Police. PSR ¶¶ 35-36.

Two principal connections were made at trial between the accordion case, Kennedy, and Nicolescu. First, Kennedy's father, Nicolae Helerea testified that Helerea was a professional accordion player and that Kennedy himself played some accordion. PSR ¶ 38. Second, Nicolescu's ex-father-in-law, Octavian Marginean, identified the large knife as one that Marginean had given

Nicolescu as a gift several years earlier. PSR ¶ 39.

4. Kennedy's car

Witnesses at trial testified to having seen a car at 8:30 p.m. nearby Bass's Connecticut residence. PSR ¶ 40. A partial plate taken by one of the witnesses tied the suspicious car to Kennedy, who was towed later that same night from a gas station located 19 miles from the Bass estate, back to Queens, New York. PSR ¶¶40-42. Kennedy reached Queens sometime around 4 a.m., and was towed to 69th Street, which was close to the street of Nicolescu's own residence. PSR ¶ 42.

According to phone records, Kennedy never tried to call Nicolescu before coming to 69th Street. Rather, he made several calls and texts to mutual friends Eduard Badulescu and Teodor Burca, before and after he called several different tow companies. In fact, between 5:30 p.m. and 5:06 a.m., there was no call activity whatsoever in which Nicolescu's phone made or answered a call, and no activity between 5:12 p.m. and 7:11 a.m. in which Barabas' phone either made or answered a call. PSR ¶ 43.

Around the date of the crime, Nicolescu had access to the Cadillac Escalade of his then-employer, J. Darius Bikoff. PSR ¶ 45. EZ Pass records showed Bikoff's transponder going over the Whitestone Bridge from Queens, towards the

Bronx (and Westchester) at 6:57 a.m. on April 16, 2007, and then re-crossing the bridge towards Queens at 7:25 a.m. PSR ¶ 45. Video surveillance at the Home Depot parking lot in New Rochelle, New York, showed Bass's stolen Jeep being abandoned there at approximately 7:06 a.m. The surveillance also showed what appeared to be a Cadillac Escalade entering the parking lot at 7:08 a.m., parking next to Bass's Jeep, and then leaving at 7:12 a.m. PSR ¶ 45. It was the government's theory at trial that Kennedy, who had been dropped off in Queens at around 4 a.m., drove the Escalade to pick up the occupants of the Jeep, and then returned to Queens. PSR ¶ 46.

5. Stolen Jeep/DNA

Bass's stolen Jeep was recovered from the New Rochelle Home Depot parking lot and processed for DNA. PSR ¶ 49. There was a strong partial match between Nicolescu's DNA profile and a sample taken from the steering wheel. PSR ¶ 49. The stolen Jeep was purchased several days after Nicolescu's termination in May 2006, and thus Nicolescu never had legitimate access to the Jeep. PSR ¶ 50.

In addition, an expert from AT&T testified that that Nicolescu's cellular phone checked voicemail at 7:16 a.m. on April 16, 2007, while using a cell tower that was located a short distance from the Home Depot in New Rochelle,

where the stolen Jeep was abandoned. PSR ¶ 51. This was around the same time Bass's stolen Jeep was being abandoned. PSR ¶51.

6. Flight

On September 23, 2010, law enforcement investigators served several warrants for DNA, including one for Nicolescu, and served several grand jury subpoenas, including for co-conspirator Barabas. The subpoenas anticipated grand jury appearances on October 5, 2010. *See* PSR ¶ 52.

Both Barabas and Nicolescu left New York for overseas a short time later. Nicolescu flew on USAir from New York to Germany on October 5, 2010, the day of the grand jury. Nicolescu's one-way ticket was purchased on the night of October 4, 2010. Barabas flew on September 28th, with his wife and their dog to Germany and then to Romania. The ticket was purchased on September 25th, and the return flight has never been used. Barabas' mother testified that her son told her he was going on vacation and he would call her, but she has not heard from him since then. PSR ¶ 53.

Nicolescu was arrested on January 23, 2011, when he flew from Romania back into Chicago to visit his girlfriend. PSR ¶ 53.

Additional relevant facts related to post-trial motions and sentencing are discussed in the appropriate sections below.

Summary of Argument

I. Nicolescu's claim, that the evidence at trial was insufficient to support the jury's verdict as to the "interstate commerce" element of the Hobbs Act, belies a record replete with both direct and indirect ways in which this crime impacted, or would have impacted if successful, interstate commerce. First, the home invasion, even though an attempt, was carried out in a way that had a direct, actual effect on interstate commerce. Though the crime occurred in Connecticut, it was carried out by New York residents who also had ties to Pennsylvania, it involved interstate research for certain tools of the offense, it involved the use of several tools that were purchased outside of Connecticut, and it involved interstate travel during the course of the commission of the offense.

Second, the case involved a significant *potential* direct effect, that is, if Nicolescu and his co-conspirators had succeeded in obtaining \$8.5 million from the victims, the offense would clearly have had a direct effect on interstate commerce. Neither victim held large amounts of money in Connecticut, and the record made clear that satisfaction of the extortionate demand

would have involved extensive interstate money transfers.

Finally, the record showed that the government also satisfied its burden of proof through the indirect “depletion of assets” method, that is, that the offense targeted a large sum of money from a victim who directly participates in interstate commerce, and thus the crime would have had, if successful, a cumulative effect on interstate commerce.

II. The district court properly considered and applied the Sentencing Guidelines. Specifically:

- a) The district court correctly enhanced the offense level by two for a leadership role, based on several circumstantial factors, including Nicolescu being the only perpetrator with prior experience at the Bass estate; Nicolescu’s DNA being found on the steering wheel of the stolen Jeep; and Nicolescu being the only common link between the two other identified co-conspirators.
- b) The district court did not plainly err in failing to apply a “beyond a reasonable doubt” standard to the factual finding that there were two victims, and therefore two guidelines groups, in Count Two of the Indictment. A district court should apply a heightened standard of proof when sentencing based upon uncharged or acquitted

criminal conduct—not, as here, where the two victims are clearly designated in the Indictment.

- c) The district court correctly enhanced Nicolescu’s offense level by two based on upon the \$8.5 million extortionate demand, pursuant to U.S.S.G. § 2B3.1(b)(7). Contrary to Nicolescu’s *pro se* brief, which incorrectly applies an “intended loss” standard from § 2B1.1 comment. (note 3(A)), it is ultimately irrelevant to this enhancement whether Nicolescu was likely to succeed in achieving the object of his demand.
- d) The district court did not plainly err in failing to apply to this case U.S.S.G. § 2X1.1, which covers attempt, solicitation, and conspiracy not covered by a specific offense guideline. Hobbs Act extortions, including attempts and conspiracies, are explicitly covered by U.S.S.G. § 2B3.2, and therefore § 2X1.1 is inapplicable. Nonetheless, even if the district court should have applied § 2X1.1, Nicolescu was clearly ineligible for the reductions in § 2X1.1(b) for incomplete attempts and conspiracies, because he and his co-conspirators had completed all acts they believed necessary for the successful completion of the extortion.
- e) The district court correctly enhanced Nicolescu’s offense level by two based upon the bodily injury of both Bass and Leth-

bridge. Both were injected with and forced foreign substances, and Bass's injection resulted in significant pain and a severe bruise to her arm. Moreover, even if Lethbridge did not suffer bodily injury, such error had no effect on the offense level.

Argument

I. There was sufficient evidence, viewed in a light most favorable to the government, to support the jury's verdict as to the "interstate commerce" element of Counts One and Two.

A. Relevant facts

On March 21, 2012, following the close of the government's evidence, Nicolescu moved under Federal Rule of Criminal Procedure 29 for a judgment of acquittal. GA501A-GA501B. The sole basis was that the "Commerce Clause element, as required under the Hobbs Act, has not been met by the Government." GA501B. The district court denied Nicolescu's motion for acquittal, without prejudice to renew the motion after the jury's verdict. GA501B. Nicolescu renewed his Rule 29 motion after resting, but before the verdict, and the district court did not rule at that time. GA501C. Nicolescu was found guilty on all three counts against him on March 22, 2012. NA12.

On March 29, 2012, Nicolescu renewed his Rule 29 motion. NA13, GA499-GA501. Again, his sole basis for the Rule 29 motion was the “failure of the government to prove the interstate commerce element required for conviction under the Hobbs Act.” GA502.

The district court again denied Nicolescu’s Rule 29 motion on July 25, 2012. NA15, GA524-GA528. Among other things, the district court cited the likelihood that the stolen funds would have come from another state; that the perpetrators discussed wiring funds from Texas or going to New York to retrieve money; and that Bass was someone who was directly and deeply involved in interstate commerce. GA527-GA528. The district court concluded:

In sum, the Government showed more than the “attempted robbery of . . . a Connecticut couple in their home on a Sunday night.” Def.’s Mem. of Law [doc. # 130] at 3. Instead, the Government offered evidence—evidence that a reasonable juror could well have credited—that Mr. Nicolescu attempted to extort such a large sum of money from such a significant commercial actor that his crime, if successful, would have had a far more than *de minimus* effect on interstate commerce. The Court sees no reason to disturb the jury’s determination that the Government proved the jurisdictional element of the

Hobbs Act beyond a reasonable doubt. Mr. Nicolescu’s Motion for a Judgment of Acquittal [doc. # 111] is therefore DENIED.

GA528.

B. Governing law and standard of review

1. Affecting interstate commerce

Title 18, United States Code, Section 1951(a) (also known as the “Hobbs Act”) reads, in relevant part:

Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by . . . extortion or attempts or conspires so to do . . . [is guilty of a crime].

Thus in order to meet its burden at trial, the government must prove beyond a reasonable doubt that the conduct of the defendant, or his associates acting in concert with him, “in any way or degree obstruct[ed], delay[ed], or affect[ed] commerce or the movement of any article or commodity in commerce.” *Id.*

This Court has long held that “[s]ince the [Hobbs] Act prohibits the specified conduct if it affects commerce ‘in any way or degree,’ it is well established that the burden of proving such a nexus is *de minimus* Even a potential or subtle effect on commerce will suffice.” *United States v. Arena*, 180 F.3d 380, 389-91 (2d Cir.

1999) (internal citations omitted) (holding sufficient effect on interstate commerce where evidence showed patients came from out-of-state and that the clinics used medications and supplies manufactured out of state). Likewise, in a prosecution for a conspiracy to commit a Hobbs Act violation, “all that need be shown is the possibility or potential of an effect on interstate commerce, not an actual effect.” *Id.* at 390 (internal quotations omitted).

This logic also extends to attempted violations of the Hobbs Act; for a defendant charged with attempt and conspiracy, “the relevant inquiry is not how much money was at the crime scene . . . but rather how much money [the defendant] intended to steal and what effect the theft of that amount would have had on interstate commerce.” *United States v. Wilkerson*, 361 F.3d 717, 731 (2d Cir. 2004); *see also United States v. Curcio*, 759 F.2d 237, 242 (2d Cir. 1985); *United States v. Jamison*, 299 F.3d 114, 119 (2d Cir. 2002) (“[T]his evidence fairly showed that the robbery, if successful, would have had a significant effect on interstate commerce.”); *United States v. Farrell*, 877 F.2d 870, 875 (11th Cir. 1989) (“Potential impact is measured at the time of the attempt, *i.e.*, when the extortion demand is made, based on the assumed success of the intended scheme.”).

The relevance of the intended amount of the defendant’s theft should not be mistaken, how-

ever, for a requirement for the government to prove intent to affect interstate commerce. Indeed, the government need not prove that it was the purpose of the defendant and his co-conspirators to affect commerce; rather, “it suffices that their conduct had that natural effect.” *Arena*, 180 F.3d at 390; *see also United States v. Silverio*, 335 F.3d 183, 187 (2d Cir. 2003) (“We know of no court that has an intent requirement for Hobbs act prosecutions . . . and we refuse to create one in this circuit.”).

This Court’s *de minimus* standard has survived the Supreme Court’s recent restrictions on Commerce Clause-based legislation. This circuit, following the lead of several other circuits, “expressly [held] that *Lopez* did not raise the jurisdictional hurdle for bringing a Hobbs Act prosecution.” *United States v. Farrish*, 122 F.3d 146, 148 (2d Cir. 1997). This Court in *Farrish* distinguished the Gun-Free School Zones Act invalidated in *United States v. Lopez*, 514 U.S. 549 (1995), which lacked a specific jurisdictional element and instead relied on the generalized effects of gun possession on interstate commerce, from the Hobbs Act, which “does contain such a jurisdictional element.” *Id.* at 149. Moreover, this Court declined to invoke *Lopez* to heighten the interstate commerce requirement; rather, this Court “reaffirm[ed] that to satisfy the jurisdictional element of the Hobbs Act, the Government need only show a ‘minimal’ effect on inter-

state commerce.” *Id.* This Court likewise held that the Supreme Court’s invalidation of part of the Violence Against Women Act, in *United States v. Morrison*, 529 U.S. 598 (2000), “does not affect our requirement that the Government need only show a minimal effect on interstate commerce to support Hobbs Act jurisdiction.” *United States v. Fabian*, 312 F.3d 550, 555 (2d Cir. 2002) (internal quotations omitted), *overruled on other grounds by United States v. Parkes*, 497 F.3d 220 (2d Cir. 2007).

The government may carry its burden to show a *de minimus* effect on interstate commerce either directly or indirectly. *See United States v. Jones*, 30 F.3d 276, 285 (2d Cir. 1994) (upholding interstate commerce effect in robbery of undercover officer “even though the effect is not immediate or direct or significant, but instead is postponed, indirect, or slight”). One indirect method of proof is typically referred to as the “depletion of assets” theory, whereby the government may carry its burden to prove an effect on interstate commerce by showing that the robbery or extortion would, if completed, deplete the assets of an entity engaged in interstate commerce. *See, e.g., United States v. Elias*, 285 F.3d 183, 189 (2d Cir. 2002) (“[A] robbery of a local distribution or retail enterprise may be said to affect interstate commerce if the robbery impairs the ability of the local enterprise to acquire—whether from out-of-state or in-state

suppliers—goods originating out-of-state.”); *United States v. Shareef*, 190 F.3d 71, 76 (2d Cir. 1999) (“[T]he government was free to show that Shareef’s extortionate underpayments to the laborers had the potential for impeding either activities of the laborers in interstate commerce or IWSS’s operations in interstate commerce.”); *United States v. Collins*, 40 F.3d 95, 99 (5th Cir. 1994). The effect that the depletion of assets has on interstate commerce may be slight, and may be proven without evidence that any specific commercial activity was affected; rather it need only be shown that there was a probability that some commercial activity would be impacted. *See Jones*, 30 F.3d at 285 (finding sufficient effect on commerce where the defendant robbed an undercover officer of \$9,000, since that would decrease the cocaine the officer could purchase in the future, and cocaine was a commodity traveling in interstate commerce).

Although originally applied to crimes against businesses, which are almost universally engaged in interstate commerce, the depletion of assets theory may in certain circumstances also support Hobbs Act prosecutions in which individuals are victimized. *See Collins*, 40 F.3d at 100. In *Collins*, the Fifth Circuit held that in Hobbs Act violations directed at individuals, the depletion of assets theory may support an interstate commerce nexus only if:

(1) the acts deplete the assets of an individual who is directly and customarily engaged in interstate commerce; (2) if the acts cause or create the likelihood that the individual will deplete the assets of an entity engaged in interstate commerce; or (3) if the number of individuals victimized or the sum at stake is so large that there will be some cumulative effect on interstate commerce.

Id. (internal quotations omitted).

In *United States v. Perrotta*, this Court rejected Hobbs Act jurisdiction based solely on a victim's status as an employee of a company engaged in interstate commerce, but suggested several factors that would support jurisdiction in a different case. 313 F.3d 33, 36 (2d Cir. 2002). Specifically adopting the *Collins* factors, as well as other case-specific factors, this Court ruled that:

There are instances where a robbery or extortion of an employee of a business engaged in interstate commerce would likely support Hobbs Act jurisdiction. The jurisdictional nexus could be satisfied by showing that the victim directly participated in interstate commerce; that the victim was targeted because of her status as an employee at a company participating in interstate commerce; that the harm or potential harm to the individual would deplete the

assets of a company engaged in interstate commerce; that the crime targeted the assets of a business rather than an individual; or that the individual was extorted of a sum so large, or targeted in connection with so many individuals, that the amount at stake cumulatively had some effect on interstate commerce.

Id. at 38 (internal citations omitted). This Court did not, however, raise the level of proof beyond the *de minimus* standard. *Id.* at 36.

Finally, although much of the recent Hobbs Act precedent concerns the application of the “indirect” depletion of assets theory, in many cases there will be sufficient *direct* effects, whether actual or potential, of the defendant’s conduct that a court need not even proceed to the depletion of assets theory. *Fabian*, 312 F.3d at 556 (“A robbery that specifically targets a large, discreet sum of money derived from interstate commerce affects interstate commerce. We need not rely on the depletion of assets theory in this case.”). In such cases, a court may look to the manner in which the Hobbs Act violation is carried out, rather than solely at the nature of the victim. *See, e.g., United States v. Lynch*, 437 F.3d 902, 910-11 (9th Cir. 2006) (relying on evidence of direct effects, rather than depletion of assets, where drug dealer robbery/murder victim was lured across state lines using interstate telephone lines, the defendants used victim’s stolen

ATM card, murder weapon was transported interstate, perpetrators traveled interstate in a rented vehicle, and perpetrators traveled interstate in victim's stolen truck); *United States v. Carcione*, 272 F.3d 1297, 1301-02 (11th Cir. 2001) (in robbery of wealthy individual, upholding Hobbs Act jurisdiction based on interstate travel before and after robbery, use of interstate phone calls to plan robbery, and the interstate transportation of the victim's stolen jewelry following the robbery); *United States v. Eaves*, 877 F.2d 943, 946 (11th Cir. 1989) (the movement of extortion payments in interstate commerce was sufficient as a jurisdictional prerequisite); *United States v. Atcheson*, 94 F.3d 1237, 1243 (9th Cir. 1996) (finding jurisdictional nexus where individual victim was extorted of money and banking information for out-of-state bank, and defendant took stolen jewelry across state lines).

Likewise, in *United States v. Mejia*, which considered the interstate nexus of the MS-13 gang as a racketeering enterprise, this Court noted that:

Transporting goods, such as firearms or stolen vehicles, across state lines is a classic example of engaging in interstate commerce. Use of an instrumentality of commerce, such as telephone lines, is also generally viewed as an activity that affects interstate commerce. Beyond these traditional examples, any other conduct having

even a *de minimis* effect on interstate commerce suffices.

545 F.3d 179, 203 (2d Cir. 2008) (internal citations omitted).

2. Sufficiency of the evidence

This Court “review[s] *de novo* a challenge to the sufficiency of the evidence and affirm[s] if the evidence, when viewed in its totality and in the light most favorable to the government, would permit any rational jury to find the essential elements of the crime beyond a reasonable doubt.” *United States v. Yanotti*, 541 F.3d 112, 120 (2d Cir. 2008) (internal quotation omitted). This Court has described the burden that a defendant faces when challenging the sufficiency of the evidence as a “heavy” one. *United States v. Reifler*, 446 F.3d 65, 94 (2d Cir. 2006).

In reviewing a conviction for sufficiency of the evidence, the court “view[s] the evidence in the light most favorable to the government, drawing all inferences in the government’s favor” *United States v. Sabhani*, 599 F.3d 215, 241 (2d Cir. 2010) (internal quotation omitted). “[I]t is the task of the jury, not the court, to choose among competing inferences that can be drawn from the evidence.” *United States v. Jackson*, 335 F.3d 170, 180 (2d Cir. 2003). The evidence must be viewed in conjunction, not in isolation; and its weight and the credibility of the witnesses is a matter for argument to the jury, not a

ground for legal reversal. *See United States v. Best*, 219 F.3d 192, 200 (2d Cir. 2000). “The ultimate question is not whether we believe the evidence adduced at trial established defendant’s guilt beyond a reasonable doubt, but whether *any rational trier of fact could so find.*” *United States v. Payton*, 159 F.3d 49, 56 (2d Cir. 1998).

C. Discussion

The facts in this case, viewing the evidence in the light most favorable to the government and drawing all reasonable inferences in favor of the government, provide more than sufficient evidence to support the jury’s finding of guilt, particularly as to the interstate commerce element of the Hobbs Act, and therefore Nicolescu’s convictions on Counts One and Two of the Indictment should stand. The evidence can be separated into “direct” and “indirect” effects on interstate commerce, either of which was sufficient to support the jury’s verdict. *See Fabian*, 312 F.3d at 556.

1. Direct effect

In this case, which was an attempt and conspiracy to extort \$8.5 million, as opposed to a completed crime, the Court may consider both (a) what effects the attempt and conspiracy actually had on interstate commerce; and (b) what effect the theft of \$8.5 million in this case potentially would have had if it had been successful.

See *Wilkerson*, 361 F.3d at 731. Both independently support Hobbs Act jurisdiction here.

a. Actual direct effect

First, this was not a spur-of-the-moment crime; rather, the evidence showed that it involved extensive planning and coordination among the co-conspirators, much of which took place outside of Connecticut. See *Carcione*, 272 F.3d at 1301 (“[T]he communication necessary to coordinate the robbery also affected interstate commerce.”); *Mejia*, 545 F.3d at 203 (“Use of an instrumentality of commerce, such as telephone lines, is also generally viewed as an activity that affects interstate commerce.”). Government Exhibit 265A summarized phone records that showed extensive calling between Nicolescu, co-defendant Michael Kennedy, and unindicted co-conspirator Stefan Alexandru Barabas. GA-GA549-GA563. It was well established that all three lived in New York, that they had ties to Pennsylvania, and that the crime occurred in Connecticut. See GA537-GA538 (Kennedy’s New York registration for car used in home invasion); GA539-GA542 (Kennedy’s Pennsylvania registration for car used in home invasion); GA545-GA548 (Nicolescu’s employment application showing New York address); GA403 (law enforcement interview with Barabas in Queens).

Likewise, Nicolescu and his co-conspirators engaged in interstate commerce to research and

purchase tools of the offense, and then transported those tools to Connecticut. *See Lynch*, 437 F.3d at 911 (“Pizzichiello testified that Lynch killed Carreiro in Montana with a firearm that Lynch had transported from Las Vegas to Montana. Lynch returned to Las Vegas from Montana with the firearm.”). Government Exhibit 265B summarized numerous phone calls by Kennedy to retailers in search of items of the type that would be used in the home invasion. GA564. Many of those retailers were located in Pennsylvania—of note, the evidence showed that while Kennedy was then living in Queens, New York with Eduard Badulescu, his car was registered in Pennsylvania. GA539. Kennedy ultimately purchased 2-way radios shortly before the home invasion from a store in Long Island City, New York. GA543. Moreover, several of the items recovered from the accordion case in Jamaica Bay were, on their face, manufactured outside of New York or Connecticut, and thus traveled in interstate commerce; for example, the Johnson & Johnson gauze pads and the Scorpion stun gun both indicate that they were manufactured in China, and the imitation pistol indicates it was made in Taiwan. GA531-GA536. Thus all three items traveled in interstate commerce before becoming a part of the conspirators’ home invasion toolkit.

The events of the night of the home invasion also show a direct effect on interstate commerce.

See Lynch, 437 F.3d at 911 (“Lynch and Pizzichello traveled from Montana through Utah and back to Nevada in Carreiro’s stolen truck.”); *Carcione*, 272 F.3d at 1301 (“[W]e note the travel of Appellant across state lines both before and after the robbery occurred.”); *Mejia*, 545 F.3d at 203 (“Transporting goods, such as firearms or stolen vehicles, across state lines is a classic example of engaging in interstate commerce.”). The evidence, and reasonable inferences drawn therefrom, established that on the night of the home invasion, Kennedy’s car was parked a short distance from Anne Bass’s home in South Kent. GA138-GA143, GA151, GA165-GA173. A short while later Kennedy, whose car broke down, made his way back into New York State and called several tow companies, eventually reaching Lisi’s Towing. GA555-GA556. This caused Lisi’s Towing to assign their driver Jonathan Grenier, who was sleeping at his home in Danbury, Connecticut, to respond to a gas station in Patterson, New York, from where he then towed Kennedy to an area near Nicolescu’s home, in Queens, and then returned to Danbury. GA183-GA209. The evidence also supports an inference that Kennedy was towed to Nicolescu’s home for reasons directly in furtherance of the criminal enterprise—that is, to obtain Nicolescu’s Cadillac Escalade to pick up Nicolescu and his other co-conspirators following the attempted extortion. *See* PSR ¶ 46. Moreover, the evidence also showed that the Jeep stolen by the con-

spirators, and used as the getaway car, was taken across state lines into New York, where it was abandoned in a Home Depot parking lot. See GA210-GA251.

b. Potential direct effect

Even more significantly, the attempted extortion, if completed, would have affected interstate commerce because neither Bass nor Lethbridge maintained significant liquid assets in Connecticut, and thus compliance with the extortionate threat would have necessitated the movement of large sums of money in interstate commerce. See *Wilkerson*, 361 F.3d at 731; *Atcheson*, 94 F.3d at 1243 (“[T]he criminals extorted from Mrs. Rosen information about how much money the Rosens had in their accounts in banks, one of which was headquartered in another state, and then used this information in their attempts to force Mr. Rosen to withdraw it and give it to them.”). Both Bass and Lethbridge testified that the intruders demanded \$8.5 million in exchange for the “antidote” to the “deadly virus” with which they had just been injected. GA60, GA319-GA320. Anne Bass testified that her accountant and banker were in Texas, and that she had investments in multiple locations around the world, but none in Connecticut. GA262-GA263. Thus the jury could reasonably have concluded that any demand for money would not be paid with assets in Connecticut. This point was further elucidated in the cross examination of Bass, who explained that,

while she approved the payment of all bills, the bills were sent to her accountant in Texas who paid them with checks written on an account at a Texas bank. GA365.

Moreover, the jury could reasonably have inferred that Nicolescu would have been well aware of this, as all staff was paid by Bass's Texas-based accountant. Indeed, Bass testified that her Texas accountant wrote and signed the payroll checks for her staff. GA367-GA368. That Nicolescu knew that Bass's finances were focused in Texas, and even New York, was further buttressed by Exhibit 265B, which showed Nicolescu calling Bass's Connecticut, New York, and ultimately Texas home, presumably (as both the defense and government seemed to agree in closing arguments) seeking tax-related documents. GA564A-GA564C.

In fact, when the actual extortionate demand for \$8.5 million was made, it begot an extensive discussion with the intruders regarding the location of Bass's money. Bass's "situation," Lethbridge explained to the intruders, "isn't like the same as yours and mine . . . [Bass has] probably never been inside her own bank in 20 years." GA64. It was established that Bass, while she certainly had \$8.5 million, did not have cash on-site to provide to the intruders, and that ultimately her accountant would need to be contacted to provide the money. GA67-GA68, GA322-GA323. The intruders then instructed her to tell

her accountant to send her the \$8.5 million. GA68.

Lethbridge and Bass made clear that a request for such a large amount of money would be met with suspicion by her accountant and/or banker, and thus they offered various alternatives to getting some, if not all, of the demanded funds. GA69-GA70, GA321. One alternative offered by Lethbridge was for Bass to call her Texas accountant in the morning, request that he wire \$250,000 to Lethbridge's New York City bank account, and then allow an intruder to take Lethbridge to his West Village bank branch to retrieve the money, along with \$50,000 Lethbridge already had. GA77-GA78, GA322-GA323. The intruders rejected this proposal, demanded the \$8.5 million again, and shortly thereafter left the room. GA80, GA323. However, the intruders seemingly revisited the idea of a bank visit later on. Lethbridge testified that

but at one point so they came back and they said to me, do you have any smart clothes. And I said, yes. And they said, well, you better go and change and put them on, because you got to go to the bank tomorrow. You've got to look presentable.

GA79; *see also* GA324-GA325, GA328. Although it was not clear to what bank they were referring at that point, based on the prior conversation, the jury could have reasonably concluded that the intruders intended to execute at least a ver-

sion of Lethbridge's suggestion involving a money transfer from Bass to Lethbridge's account. This would have involved the transfer of a substantial sum of money (whether \$8.5 million, \$250,000, or some other amount) between Texas and New York, and then Lethbridge being taken from Connecticut to New York to retrieve the money. Moreover, if Nicolescu and his co-conspirators had succeeded in their plan, they would certainly have employed interstate commerce to dispose of the \$8.5 million proceeds. *See Farrell*, 877 F.2d at 875-76 (in a wholly intrastate kidnaping and ransom case, holding that a demand for approximately \$1.5 million was sufficient to permit federal jurisdiction because the demand's size "implies that the utilization of the funds by the [defendants] would have affected interstate commerce to a legally cognizable degree.").

Ultimately, of course, the intruders abandoned their extortion scheme, likely in response to the difficulty of obtaining money, the impending arrival of staff, the presence of Bass's grandchild, and Bass's reaction to the solution she was forced to drink. Nonetheless, these impediments were obviously unexpected by the intruders, whose actions and words make it clear that their intended crime would have directly affected interstate commerce in several ways. *See Farrell*, 877 F.2d at 875 ("Potential impact is measured at the time of the attempt, *i.e.*, when the extor-

tion demand is made, based on the assumed success of the intended scheme.”).

2. Indirect effect

Although the jury had sufficient evidence of the direct effect of Nicolescu’s crime on interstate commerce, it is equally clear that the crime also would have affected interstate commerce indirectly through the depletion of assets theory. The depletion of assets theory applies in this case because “[the] victim directly participated in interstate commerce . . . [and] the individual was extorted of a sum so large . . . that the amount at stake cumulatively had some effect on interstate commerce” *Perrotta*, 313 F.3d at 38. As a result, money stolen from the victim here would have indirectly affected interstate commerce.

First, Bass, clearly targeted because of her considerable wealth, was someone who regularly engaged in interstate commerce. Bass owned five properties, including the Connecticut estate in South Kent, homes in Colorado, New York City, and Texas, and property in Nevis (a Caribbean island). GA6. She uses her wealth to make investments all over the world. GA263. She also invests in art and antiques from several different countries and regions. GA4-GA5, GA1089. She then lends those pieces to institutions around the world for exhibitions. GA5-GA6. She also uses her wealth to support numerous organ-

izations and causes in the United States and overseas. GA6-GA8. Those organizations include, among others, the Fort Worth Ballet Company, the Fort Worth Ballet School, other ballet and dance organizations, the Center for Khmer Studies in Cambodia, the Golden Children orphanage in Cambodia, the Aspen Institute of Art, the Paris Opera Ballet, and the Tate Museum in London. GA6-GA8, GA264. In sum, there was more than ample evidence adduced at trial to support the conclusion that taking \$8.5 million from Anne Bass would have at least a minimal, and likely a significant, impact on the extent of her engagement in interstate commerce.

In light of Bass's significant participation in interstate commerce, the government also sustained its burden to prove an indirect effect on interstate commerce because the amount of the extortion, if successful, was "so large . . . that the amount at stake cumulatively had some effect on interstate commerce." *Perrotta*, 313 F.3d at 38. A successful extortion here would have removed from the stream of commerce \$8.5 million, which would have been used by Bass to purchase things, make investments, or otherwise engage in financial transactions. While it may be true that a theft of mere thousands of dollars from an individual would be limited to affecting just that person's consumption, a theft of \$8.5 million

would have a greater cumulative effect on commerce.

3. Nicolescu's arguments

Nicolescu here conveniently ignores the direct effects of his offenses on interstate commerce, both potential and actual, and proceeds directly to the depletion of assets theory, citing the *Perrotta* factors. Def. Br. 11. Nicolescu incorrectly attempts to characterize the government's case as being based only upon a "cumulative effect" on interstate commerce of extorting \$8.5 million from a "very wealthy woman." Def. Br. 13. As discussed above, the Court need not even proceed to the *Perrotta* factors here, as the extortion was carried out in a manner that brought both actual and potential effects on interstate commerce, irrespective of the depletion of assets theory.

Even so, Nicolescu's argument with regard to *Perrotta* and the depletion of assets theory is unavailing. Contrary to Nicolescu's contention, the government did not base its case upon "wealth, standing alone." Def. Br. 13. Rather, the government elicited extensive evidence regarding the manner in which Bass used her wealth, to show that to deplete \$8.5 million of Bass's assets would have a cumulative effect on interstate commerce.

Nicolescu unconvincingly cites the Fourth Circuit's decision in *United States v. Buffey*, 899

F.2d 1402 (4th Cir. 1990). The government does not quarrel with the *Buffey* Court's conclusion that "[e]xtorting money to be devoted to personal use from an individual does not affect interstate commerce." *Id.* at 1406. In *Buffey*, the Court relied upon several factors that are not present in this case: the fact that the illicit nature of the extortion, regarding a sex tape of the victim, would likely spur the victim to satisfy the demand without resorting to means that affect interstate commerce; the relatively small size of the demand (\$20,000); and the ease of securing the relatively small sum of money. *Id.* at 1405. In contrast, the extortionate demand in this case was \$8.5 million, which would by necessity require Bass to engage in interstate commerce.

Likewise, Nicolescu's reliance on *United States v. Needham*, 604 F.3d 673 (2d Cir. 2010) is misplaced. In *Needham*, the defendant was part of a conspiracy that participated in more than a dozen robberies of drug dealers over a two-year period. *Id.* at 676. In one robbery, of a marijuana dealer in the Bronx, the conspiracy got away with \$600,000 in marijuana sale proceeds. *Id.* at 677. In holding that the amount of money, by itself, was insufficient to support Hobbs Act jurisdiction, the Court noted that the government had offered no other evidence at all of the impact on interstate commerce, including whether "the victims themselves crossed state lines in conducting their business, or [whether]

the robbery depleted assets that would have purchased goods in interstate commerce.” *Id.* at 681. In contrast, the government presented evidence in this case that Bass regularly used her wealth to participate in interstate commerce, and that \$8.5 million, more than ten times the *Needham* amount, would have had a cumulative effect on that participation.²

Finally, Nicolescu misstates the holding of a 1978 Seventh Circuit case, *United States v. Elders*, 569 F.2d 1020 (7th Cir. 1978). When the

² The decision in *Needham* was primarily focused on a wholly unique situation, one “that is highly unlikely to recur, as it arises from Hobbs Act convictions obtained while the law of this Circuit was in flux.” 604 F.3d at 675. The jury in *Needham* was instructed that an effect on interstate commerce can be presumed where the object of a robbery was illegal drugs or drug proceeds. That was subsequently rejected in *United States v. Parkes*, 497 F.3d 220, 230 (2d Cir. 2007), which held that the element must be found beyond a reasonable doubt by a jury, even in drug-related cases. Later, in *United States v. Celaj*, 649 F.3d 162, 169-70 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 1636 (2012), the Court, applying *Parkes*, upheld Hobbs Act jurisdiction in a robbery of a marijuana dealer, based solely on a stipulation that marijuana traveled in interstate commerce, along with the defendant’s “statement to the undercover police officer that he was in the business of stealing marijuana and his concession at trial that he had been a marijuana dealer.”

Court in *Elders* held that “the connection with or effect on interstate commerce must have been a least ‘realistic probability’ at the time of the extortionate act,” *id.* at 1024, it did not, as Nicolescu seems to argue, refer to the realistic probability of the extortion’s success. Rather, the connection at issue was between the extortionate act and interstate commerce—in the case of *Elders*, there was simply no evidence that the victim company, which “service[ed] trees in the Chicago area,” either “actively engaged in []or customarily purchased items through interstate commerce.” *Id.* at 1025. To interpret the passage as Nicolescu suggests would contradict the established law of this Court, which holds that “the relevant inquiry is not how much money was at the crime scene . . . but rather how much money [the defendant] intended to steal and what effect the theft of that amount of money would have had on interstate commerce.” *Wilkerson*, 361 F.3d at 73.

II. The district court properly calculated the guideline range, and at any rate, any errors did not affect the sentence imposed.

A. Relevant facts

A draft PSR was disclosed on April 27, 2012, and a final PSR was disclosed on May 15, 2012. NA13-NA14. Neither Nicolescu nor the government entered objections to the draft PSR. *See*

PSR Addendum. In the draft and final versions of the PSR, Nicolescu's Guidelines offense level was calculated to be 40. Regarding that calculation, the PSR made the following recommendations, among others: (1) Counts One and Two are each divided into two groups because of the presence of two victims, Bass and Lethbridge, PSR ¶ 58, which had the effect of adding an additional two offense levels, PSR ¶ 81; (2) two levels are added because "there is a preponderance of the evidence that [the defendant] was an organizer and leader of the criminal activity," PSR ¶ 65; (3) seven levels are added because the amount demanded was over \$5 million, pursuant to § 2B3.2(b)(2), PSR ¶ 61; and (4) two levels are added to the "Bass Group" because Bass suffered bodily injury as a result of Nicolescu's offense. The PSR did not mention application of U.S.S.G. § 2X1.1, and nor did Nicolescu mention that section in an objection to the PSR.

Nicolescu filed his sentencing memorandum on August 3, 2012, NA15, GA568-GA586. In that memorandum, he objected to the assessment of enhancements for possession of a firearm, leadership, and Bass's bodily injury. GA579-GA580. With regard to the \$8.5 million demand enhancement, Nicolescu did not contest its application, but moved for a downward departure, arguing that it overstated the seriousness of the offense. GA581-GA582. Nicolescu did not mention

either the PSR's application of the grouping rules nor the application of U.S.S.G. § 2X1.1.

On August 11, 2012, the government filed its sentencing memorandum, arguing for the application of both the leadership and \$8.5 million demand enhancements, the division of the conspiracy count into two groups for the two victims, and the application of the bodily injury enhancement to both the Bass Group and the Lethbridge Group. GA610-GA619.

Nicolescu then filed a "reply" sentencing memorandum, in which he, for the first time, objected to the two-level increase resulting from "Count Two being divided into two groups for sentencing purposes." GA629. Nicolescu argued only that the division was "violative of the defendant's Due Process Rights," because, he claimed, it amounted to a post-verdict amendment of the indictment. GA629.

Nicolescu also offered for the first time a brief argument against the use of the \$8.5 million extortionate demand as the basis for a § 2B3.2(b)(2) enhancement. Unlike his earlier memorandum, which argued that \$8.5 million overstated the seriousness of the offense, now Nicolescu denied the enhancement altogether, through application of the so-called "economic reality" principle in *United States v. McBride*, 362 F.3d 360, 374-78 (6th Cir. 2004). GA628-GA629. In short, Nicolescu argued that since Bass did not have access to \$8.5 million at her

South Kent home, he should not be held responsible for a demand in that amount. Rather, Nicolescu suggested a demand enhancement based upon the \$250,000 that Nicolescu alleged that Bass said she could obtain. GA628-GA629.

In addition to those new arguments, Nicolescu reiterated his earlier objection to the bodily injury enhancement as to Bass, claiming that “one injection with a needle is not ‘a significant injury . . . for which medical attention ordinarily would be sought.’” GA629. Nicolescu offered no further argument regarding the leadership enhancement, and again did not mention application of U.S.S.G. § 2X1.1.

Nicolescu’s sentencing hearing was held on August 17, 2012. NA28-NA89. During an initial canvas of Nicolescu concerning the PSR, defense counsel made brief note of his prior objection to the division of Count Two into two groups; however, he did not otherwise expand on that objection during the sentencing hearing. NA32. Nor did Nicolescu, at any point during the sentencing hearing, challenge the district court’s factual findings underlying the grouping rules. NA28-NA89.

The district adopted the factual statements in the PSR, without objection, as its findings of fact. NA35. After reviewing the minimum and maximum statutory penalties, NA35-NA36, the district court then proceeded to calculate the applicable advisory range under the Sentencing

Guidelines, NA38-NA40. In doing so, the district court ruled against the government, which had argued that Nicolescu should have received an enhancement for possession of a firearm during the offense. NA38-NA40. The district court, however, agreed with the government that increases for role in the offense, for the \$8.5 million demand, for bodily injury (as to both Bass and Lethbridge), and for multiple groups were appropriate. NA38-NA39.

The district court then entertained objections to its Guidelines calculation. First, Nicolescu reiterated his objection to the bodily injury enhancement. He relied, for the first time, on a Fourth Circuit case, *United States v. Lancaster*, 6 F.3d 208 (4th Cir. 1993) in which the Court found no bodily injury where guards experienced burning of the eyes and cheeks when sprayed with mace by a bank robber. NA41. Nicolescu also noted that this Court, in *United States v. Markle*, 628 F.3d 58 (2d Cir. 2010), had cited to *Lancaster* “with approval.” NA41. The government responded by arguing that the emphasis in *Lancaster* was the temporary nature of the mace—the guard was sprayed with mace, it stung, and then it was over. NA42. In contrast, the government argued, Bass’s injury lasted much longer, and her arm eventually turned almost completely black. NA42. The government also pointed out that in *Markle*, this Court found physical injury regarding one victim who only

experienced pain. NA42. With regard to Lethbridge, the government argued that he had both been injected with a topical analgesic that does not belong in the bloodstream, and force-fed sleeping pills that caused him to lose consciousness. NA42-NA43. After hearing these arguments, the court reiterated its finding of bodily injury as to both victims. NA43

Next, defense counsel discussed his objection to the role enhancement. NA44-NA46. In brief, counsel argued that since Nicolescu was charged both as a principal and as an accomplice, there was no way to know under what theory the jury found him guilty. NA45. Moreover, counsel argued that the role enhancement was based on insufficient evidence. NA45. The government responded by reminding the district court that, contrary to Nicolescu's argument, it was irrelevant under what theory the jury had found Nicolescu guilty. NA47. Rather, the government argued that the district court need only find evidence of leadership by a preponderance of the evidence, and that there was more than enough evidence on the record to make that determination. NA47. The government specifically reiterated the factors it had argued in its memorandum, that is, Nicolescu was the only co-conspirator who had prior knowledge of the Bass estate; it was Nicolescu's DNA on the stolen Jeep's steering wheel; it was Nicolescu's hand-made knife in the accordion case; and the phone

records showed Nicolescu to be the common link between co-conspirators Barabas and Kennedy. NA47. In finding that Nicolescu should be assessed two levels for being an organizer or leader, the district court specifically adopted the findings that had been advocated by the government. NA48.

Finally, the defense counsel attempted to explain his objection to the \$8.5 million demand enhancement. He argued, again citing to *McBride*, that although an amendment to the Sentencing Guidelines had eliminated the argument that the impossibility of “gaining the amount of property” would defeat the enhancement, *McBride* had nonetheless carved out an exception where the demand was, according to Nicolescu, “so completely irrational that you really couldn’t find intended loss.” NA48. The defendant then acknowledged that “the fact that Ms. Bass did have presumably capability of funding an 8.5 million dollar demand takes this out of the level of absolute irrationality,” but then “for . . . the record” argued that “it is completely irrational.” NA49. After hearing from the government, the court ultimately ruled that the seven-level demand enhancement should be imposed. NA50.

As before, Nicolescu did not raise, nor did the district court consider, the application of U.S.S.G. § 2X1.1.

Ultimately, after hearing the arguments of counsel, the statements of the victims and Nicolescu, and considering all written submissions, the court sentenced Nicolescu principally to 240 months' imprisonment. NA81. After some discussion, the district court acknowledged that the sentence was within the Guidelines range, but that it would have imposed the same sentence as a non-Guidelines sentence. NA86.

B. Standard of review

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court declared the United States Sentencing Guidelines “effectively advisory.” *Id.* at 245. After *Booker*, a sentencing judge is required to “(1) calculate[] the relevant Guidelines range, including any applicable departure under the Guidelines system; (2) consider[] the calculated Guidelines range, along with the other § 3553(a) factors; and (3) impose[] a reasonable sentence.” *United States v. Fernandez*, 443 F.3d 19, 26 (2d Cir. 2006).

On appeal, a district court's sentencing decision is reviewed for reasonableness, a review akin to abuse of discretion. *See Booker*, 543 U.S. at 260-62; *Gall v. United States*, 552 U.S. 38, 46 (2007); *see also United States v. Watkins*, 667 F.3d 254, 260 (2d Cir. 2012). “It is by now familiar doctrine that this form of appellate scrutiny encompasses two components: procedural review

and substantive review.” *Watkins*, 667 F.3d at 260 (quotation marks and citation omitted).

“A district court commits procedural error where it fails to calculate the Guidelines range (unless omission of the calculation is justified), makes a mistake in its Guidelines calculation, or treats the Guidelines as mandatory.” *United States v. Cavera*, 550 F.3d 180, 190 (2d Cir. 2008) (en banc) (citations omitted). A district court “errs if it fails adequately to explain its chosen sentence, and must include ‘an explanation for any deviation from the Guidelines range.’” *Id.* (quoting *Gall*, 552 U.S. at 51).

This Court reviews a district court’s interpretation of the Sentencing Guidelines *de novo*, and reviews the district court’s findings of fact for clear error. *See United States v. Cossey*, 632 F.3d 82, 86 (2d Cir. 2011) (per curiam). When a district court’s application of the Guidelines to the facts is reviewed, this Court takes an “either/or approach,” under which the Court reviews “determinations that primarily involve issues of law” *de novo* and reviews “determinations that primarily involve issues of fact” for clear error. *United States v. Vasquez*, 389 F.3d 65, 74 (2d Cir. 2004). This Court “will overturn [t]he sentencing court’s findings as to the defendant’s role in the offense . . . only if they are clearly erroneous.” *United States v. Batista*, 684 F.3d 333, 345 (2d Cir. 2012) (internal quotations omitted), *cert. denied*, 133 S. Ct. 1458 (2013).

Where, however, the applicability and/or sufficiency of factual findings in support of a Guidelines enhancement are raised for the first time on appeal, this Court reviews only for plain error. See *United States v. Villafuerte*, 502 F.3d 204, 207-08 (2d Cir. 2007); *United States v. Wagner-Dano*, 679 F.3d 83, 89, 90-95 (2d Cir. 2012).

Under plain error review, “an appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an ‘error’; (2) the error is ‘clear or obvious, rather than subject to reasonable dispute’; (3) the error ‘affected the appellant’s substantial rights, which in the ordinary case means’ it ‘affected the outcome of the district court proceedings’; and (4) ‘the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.’” *United States v. Marcus*, 130 S. Ct. 2159, 2164 (2010) (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)); see also *Wagner-Dano*, 679 F.3d at 94. “[T]he burden of establishing entitlement to relief for plain error is on the defendant claiming it” *Wagner-Dano*, 679 F.3d at 94 (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 82 (2004)).

Finally, even where an error is preserved, it may not require remand. In some cases, a “significant procedural error,” may require a remand to allow the district court to correct its mistake

or explain its decision, *see Cavera*, 550 F.3d at 190, but when this Court “identif[ies] procedural error in a sentence, [and] the record indicates clearly that ‘the district court would have imposed the same sentence’ in any event, the error may be deemed harmless, avoiding the need to vacate the sentence and to remand the case for resentencing.” *United States v. Jass*, 569 F.3d 47, 68 (2d Cir. 2009) (quoting *Cavera*, 550 F.3d at 197).

Any additional relevant law is included below, regarding each specific Guidelines section that is the subject of this appeal.

C. Specific enhancements

1. Role enhancement

a. Governing law

Under U.S.S.G. § 3B1.1, a defendant may receive an upward adjustment in his offense level if he played an aggravated role in the offense. Where the defendant is “an organizer, leader, manager or supervisor in any criminal activity [involving more than one participant],” the offense level increases by two. *See id.*, § 3B1.1(c).

A defendant is properly considered a manager or supervisor “if he exercised some degree of control over others involved in the commission of the offense . . . or played a significant role in the decision to recruit or to supervise lower-level participants.” *United States v. Blount*, 291 F.3d

201, 217 (2d Cir. 2002) (internal quotation marks, alterations and ellipsis omitted), *see also United States v. Hertular*, 562 F.3d 433, 448-49 (2d Cir. 2009). It is sufficient under § 3B1.1 for a defendant to have managed or supervised one other participant in the conspiracy. *United States v. Al-Sadawi*, 432 F.3d 419, 427 (2d Cir. 2005).

In distinguishing between an organizer and a manager, the district court should consider “the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.” U.S.S.G. § 3B1.1, comment. (n.4). “Whether a defendant is considered a leader depends upon the degree of discretion exercised by him, the nature and degree of his participation in planning or organizing the offense, and the degree of control and authority exercised over the other members of the conspiracy.” *United States v. Beaulieu*, 959 F.2d 375, 379-80 (2d Cir. 1992). In smaller criminal enterprises, “the distinction between organization and leadership, and that of management and supervision, is of less significance than in larger enterprises that tend to have clearly delineated di-

visions of responsibility.” U.S.S.G. § 3B1.1 comment. (background).

The government must prove by a preponderance of the evidence that a defendant qualifies for a role enhancement. *See United States v. Molina*, 356 F.3d 269, 274 (2d Cir. 2004). “[A] sentencing court, like a jury, may base its factfinding on circumstantial evidence and on reasonable inferences drawn therefrom.” *United States v. Gaskin*, 364 F.3d 438, 464 (2d Cir. 2004); *see also United States v. Garcia-Morales*, 382 F.3d 12, 19-20 (1st Cir. 2004) (“The evidence supporting the defendant’s role in the offense may be wholly circumstantial and the government need only prove that the defendant exercised authority or control over another participant on one occasion.”).

“Before imposing a role adjustment, the sentencing court must make specific findings as to why a particular subsection of § 3B1.1 adjustment applies.” *United States v. Ware*, 577 F.3d 442, 451 (2d Cir. 2009); *see also Molina*, 356 F.3d at 275. However, “[a] district court satisfies its obligation to make the requisite specific factual findings when it explicitly adopts the factual findings set forth in the presentence report.” *Molina*, 356 F.3d at 275.

b. Discussion

Here, the district court properly exercised its discretion in inferring Nicolescu’s leadership role

from the circumstantial evidence in this case. *See Garcia-Morales*, 382 F.3d at 19-20. Indeed, given that the evidence of Nicolescu's participation in the crime itself was wholly circumstantial, it is not surprising that the proof of his role in the offense is likewise.

The district court relied on several factors, in concert, to find that Nicolescu played a leadership and organizational role in the offense. First, as compared to co-conspirators Kennedy and Barabas, Nicolescu was the only one of the co-conspirators to have a connection to Bass. Nicolescu was a prior employee of Bass, having worked for her for two months, at her Connecticut home, approximately one year prior to the crime. PSR ¶ 27. The most significant logical inference to be drawn from Nicolescu's relationship with Bass is that he was the source of the idea for the robbery.

Additionally, the PSR sets out several of the pieces of information that were necessary for the home invasion, and to which Nicolescu would, among the perpetrators, have sole access:

At the most basic level, he had access to the entire house and property, especially while Bass and Lethbridge were not present. Maria Lukich testified that spare keys were kept in a drawer in the entry area, and that there was no careful log kept of who took those keys. Even so, keys were not necessary to effect this home in-

vasion. Nicolescu, as a former employee who engaged in serving Bass and Lethbridge, would know that (1) the staff door was normally unlocked until the staff left at the end of the night; (2) the alarm would not be set while Bass was in residence; (3) the staff would typically all be on the second floor in the kitchen and dining room around dinner time; and (4) there are a number of large closets on the entry level in which multiple people could secrete themselves.

Moreover, as a former employee, Nicolescu would likely know that Bass tended to spend weekends in Connecticut, and that if she was there Sunday night, it would often be without Lethbridge. Carole Wilson and Maria Lukich testified that it would be straightforward to determine from the road whether Bass was in residence. If the lights are on in the upper floors of the residence in the evening, then it would be clear that Bass was there; otherwise, the staff would have already left for the day. This is how the home invasion could be executed without assistance from a current employee. If the lights had been off, the home invasion could have been aborted for another day.

Nicolescu would have also known other important details about potential pitfalls

that awaited on the estate. Having been partly responsible for transporting Bass's Labrador Retriever during his employment, he was at least familiar with the dog. Of note, the dog was not heard by the victims during the entire home invasion, until Bass woke up in the morning. Additionally, Nicolescu would also know about the spotty cellular phone coverage in the main house, and thus the importance of procuring 2-way radios, or walkie-talkies, for communication with anyone on the outside of the house. Lethbridge testified that he heard what sounded like walkie-talkies being used in the hallway during the home invasion.

PSR ¶¶ 28-30. From this, the district court could easily infer a high "degree of discretion exercised by [the defendant]," extensive "participation in planning or organizing the offense," and a significant "degree of control and authority exercised over the other members of the conspiracy." *Beaulieu*, 959 F.2d at 379-80. Indeed, it is likely that Nicolescu directed his confederates in most aspects of how to carry out the criminal plan.

Nicolescu's leadership and organizational role is further buttressed by the presence of a strong partial match between Nicolescu's DNA and a sample from the steering wheel of Bass's stolen Jeep. PSR ¶ 49. The district court could reasonably infer from that evidence that Nicolescu was

the driver of the getaway car, an inference made even more logical because Nicolescu was likely the only one of the perpetrators who was knowledgeable enough of the area to make the drive back to New York. As Special Agent Day testified at trial, “I compare South Kent to being very rural. There’s different ways to get there, some are through dirt roads, some are paved. I think back then my GPS had trouble finding the house. So it’s a confusing place to get to.” GA413-GA414.

Lastly, the government argued, and the district court agreed, that the phone records further supported Nicolescu’s role enhancement, as the “defendant was the common link between Mr. Kennedy and Barabas.” NA47. While Kennedy, Barabas, and Nicolescu were all in contact with one another in the time directly before and after the home invasion, only Nicolescu had contact with Barabas and Kennedy after April 17. *See* GA617. After that date, records showed no phone contact between Kennedy and Barabas.

Considering the phone records in light of other evidence—Nicolescu’s connection to Bass, his unique knowledge of her estate, his driving of the getaway car, and the presence of Nicolescu’s handmade knife in the accordion case—the district court was within its discretion to interpret the phone records as further proof of Nicolescu’s leadership role. Specifically, the district court could infer that Nicolescu played a significant

role in bringing the co-conspirators together for the purpose of executing the crime. U.S.S.G. § 3B1.1, comment. (note 4) (citing “recruitment of accomplices” as factor in determining leadership role).

Nicolescu’s sole counterargument, raised for the first time on appeal, is unavailing.³ Nicolescu mistakenly claims that the evidence relied upon by the government is proof only that Nicolescu played an “essential role.” Def. Br. 20. Nicolescu relies primarily on the Sixth Circuit’s decision in *United States v. Vandenberg*, 201 F.3d 805 (6th Cir. 2000). While there are some basic similarities between this case and *Vandenberg*, they are easily distinguishable.

First, the district court in *Vandenberg* adopted the role enhancement on the recommendation of the PSR, and over the objection of both the government and Nicolescu. *Id.* at 808-809. As a result, the government had made no effort to meet

³ Nicolescu also inexplicably claims, without proof, that the government argued at trial that Kennedy was the leader of the offense. First, even if Kennedy was a leader, that would not preclude Nicolescu from being one as well. Second, and more importantly, the government never made such an argument. In truth, it was defense counsel who, at trial, contended that Kennedy was the true mastermind of the offense—despite the fact that the evidence showed, and the government argued, that Kennedy never set foot inside Bass’s house.

its burden of proof, a fact that was clearly not lost on the appellate court. *See Id.* at 811 (“The government failed to meet this burden in this case. Indeed, at the sentencing hearing, the Assistant United States Attorney agreed with Vandenberg that a § 3B1.1(c) enhancement did not apply.”). An adequate factual record was especially important, given the fact that *Vandenberg* had pleaded guilty, and so there was no trial record on which to rely, as there is in this case. *Id.* at 808.

Second, the evidence of leadership in *Vandenberg* is much thinner than in this case. In *Vandenberg*, the defendant simply provided the location of his sometime employer’s home, along with alarm information and location of the safe, and his co-conspirator executed a burglary of the home. *Id.* at 808. Here, the reasonable inference from extensive evidence at trial was that Nicolescu was on-site with his co-conspirators, was responsible for directing them through the crime, drove the getaway car, and was the sole link between two different co-conspirators. *See* PSR ¶¶ 28-30.

Finally, even if the district court committed error in applying the role enhancement here, the error was harmless. *See Jass*, 569 F.3d at 68. Here, the district court made clear that, although the sentence was nominally within the Guidelines range, it would have imposed the same term as a non-Guidelines sentence. NA86.

Indeed, as the district court had the benefit of sitting through this trial of more than forty witnesses, including both victims, and hundreds of pages of exhibits, it was in a unique position to assess the crime and the appropriate punishment.

2. Grouping

a. Governing law

The instructions for applying grouping rules, where there are multiple objects of the same conspiracy, are spread primarily among two Guidelines sections. The commentary (note 8) to U.S.S.G. § 3D1.2, instructs that:

a defendant may be convicted of conspiring to commit several substantive offenses and also of committing one or more of the substantive offenses. In such cases, treat the conspiracy count as if it were several counts, each charging conspiracy to commit one of the substantive offenses. *See* §1B1.2(d) and accompanying commentary. Then apply the ordinary grouping rules to determine the combined offense level based upon the substantive counts of which the defendant is convicted and the various acts cited by the conspiracy count that would constitute behavior of a substantive nature. *Example:* The defendant is convicted of two counts: conspiring to commit offenses A, B, and C, and commit-

ting offense A. Treat this as if the defendant was convicted of (1) committing offense A; (2) conspiracy to commit offense A; (3) conspiracy to commit offense B; and (4) conspiracy to commit offense C. Count (1) and count (2) are grouped together under §3D1.2(b). Group the remaining counts, including the various acts cited by the conspiracy count that would constitute behavior of a substantive nature, according to the rules in this section.

U.S.S.G. § 1B1.2(d) states that “[a] conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit.” The commentary (note 3) adds, in pertinent part, that:

Subsection (d) provides that a conviction on a conspiracy count charging conspiracy to commit more than one offense is treated as if the defendant had been convicted of a separate conspiracy count for each offense that he conspired to commit. For example, where a conviction on a single count of conspiracy establishes that the defendant conspired to commit three robberies, the guidelines are to be applied as if the defendant had been convicted on one count of conspiracy to commit the first robbery, one count of conspiracy to commit the second

robbery, and one count of conspiracy to commit the third robbery.

Although the Guidelines refer generally to separate “offenses,” they apply equally to conspiracies aimed at the victimization of separate people in the same criminal event. *See United States v. Torrealba*, 339 F.3d 1238 (11th Cir. 2003). In *Torrealba*, the Eleventh Circuit affirmed a district court’s decision to separate into individual groups a conviction for a single conspiracy to kidnap three members of the same family, based solely on the existence of three victims. *Id.* at 1239-40. The Court reasoned that “where a conspiracy involves multiple victims, the defendant should be deemed to have conspired to commit an equal number of substantive offenses, and the conspiracy count should be divided under § 3D1.2 into that same number of distinct crimes for sentencing purposes.” *Id.* at 1243. The Court relied on the reasoning of *United States v. Jose-Gonzalez*, 291 F.3d 697, 707 (10th Cir. 2002), in which the Tenth Circuit, also interpreting the § 3D1.2 grouping rules, held that “[w]hen, however, the gist of the offense is injury to persons, the offense against each human victim belongs in a different group, even when the offense arose out of a single event.” *See also United States v. Melchor-Zaragoza*, 351 F.3d 925, 928 (9th Cir. 2003) (holding district court properly divided conspiracy conviction into separate groups according to the number of victims).

Generally, a district court may find the existence of a sentencing enhancement by a preponderance of the evidence, provided that the enhancement does not increase a statutory minimum or cause the sentence to go above the statutory maximum. *Alleyne v. United States*, 133 S. Ct. 2151, 2163 (2013); *United States v. Garcia*, 413 F.3d 201, 220 n.15 (2d Cir. 2005). “While a district court must make findings with sufficient clarity to permit meaningful appellate review, this obligation may be satisfied by explicitly adopting the factual findings set forth in a defendant’s presentence report.” *Watkins*, 667 F.3d at 261 (internal citations and quotations omitted).

The commentary (note 4) to U.S.S.G. § 1B1.2 cautions, in pertinent part, that:

Particular care must be taken in applying subsection (d) because there are cases in which the verdict or plea does not establish which offense(s) was the object of the conspiracy. In such cases, subsection (d) should only be applied with respect to an object offense alleged in the conspiracy count if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense

U.S.S.G. § 1B1.2, cmt. n. 4. Indeed, this Court has held that the district court, in order to consider multiple *uncharged* objects of a conspiracy, must find that the government has proved each

of those uncharged objects beyond a reasonable doubt. *United States v. Robles*, 562 F.3d 451, 455-56 (2d Cir. 2009) (per curiam) (applying reasonable doubt standard to find multiple groups within general robbery conspiracy count, where jury acquitted on substantive counts); *see also United States v. Malpeso*, 115 F.3d 155, 167-68 (2d Cir. 1997) (applying reasonable doubt standard to find multiple groups where conspiracy charges “unenumerated murders”).

However, where the different crimes and/or victims in the conspiracy count are enumerated, the Guidelines’ cautionary note may be less significant, especially where the conspiracy charges one event involving multiple victims. In *Melchor-Zaragoza*, the Ninth Circuit affirmed the use of the preponderance standard to divide a conspiracy count involving the kidnaping of 23 illegal aliens into 23 separate groups for sentencing. 351 F.3d at 929. In specifically rejecting the use of a heightened evidentiary standard, the Court reasoned that the preponderance of the evidence standard applies “where an increase in sentence is based on the *extent of a conspiracy* as opposed to uncharged conduct.” *Id.*

b. Discussion

Plain error is appropriate here because the issue raised below, regarding the district court’s authority to separate Count Two into groups, is distinct from that raised on appeal, that is, that

the district court had such authority, but applied an incorrect standard of proof. *See Villafuerte*, 502 F.3d at 207-08.

In the district court, the only objections Nicolescu levied against the separation of Count Two into groups came in his “reply” sentencing memorandum, and, briefly, in the sentencing hearing. In his reply memorandum, he argued:

Defendant objects to the two level increase in his offense level which resulted from Count Two being divided into two groups for sentencing purposes. Count Two charges one offense, based on one criminal transaction. Post-verdict is not the time to amend the indictment, and the enhancement urged by both the government and Probation is violated of the defendant’s Due Process rights.

GA630. At sentencing, Nicolescu made only passing mention of his objection to the division of Count Two, when his counsel noted, “we also raised an objection to the separate—to dividing Count Two into separate units for sentencing purposes.” NA32. Nowhere did Nicolescu raise any objection to the factual findings or standard of proof applied by the district court to support the division of Count Two into groups.

Now, on appeal, Nicolescu appears to change course—he concedes (or at least does not contest)

the district court's ability to divide Count Two into groups, and instead claims that:

for that adjustment to be applicable under the circumstances here, the district judge would have had to have found that the conspiracy count charged a conspiracy to commit more than one offense, *i.e.*, a conspiracy to extort \$8.5 million from Victim 1 (Ms. Bass) and a separate conspiracy to extort \$8.5 million from Victim 2 (Mr. Lethbridge), and also that [the defendant] was guilty of both conspiracies, beyond a reasonable doubt. Such a finding was not made.

Def. Br. 21. This is a wholly different claim than that raised below. Rather than claiming that the district court did not have the authority to divide Count Two, as he did during the sentencing proceedings, he now claims the district court could have done so, but that it did not make the correct factual findings. As Nicolescu did not raise this issue below, this Court should limit its review to plain error.

Applying the first part of plain error review, it is not at all evident that, under these facts, the district court committed error in failing to make specific findings beyond a reasonable doubt, rather than by a preponderance of the evidence, and at any rate, even if such an error exists, it is not "clear and obvious, rather than subject to reasonable dispute." *Marcus*, 130 S. Ct. at 2164.

The district court calculated the Guidelines, including the grouping analysis, without reference to a heightened evidentiary standard, and by adopting the factual statements in the PSR. NA35; *Watkins*, 667 F.3d at 261.

The sole basis offered by Nicolescu for a heightened evidentiary standard is the warning in U.S.S.G. § 1B1.2, comment. (note 4), that a heightened standard should apply when the verdict does not establish which offense was the object of the conspiracy. Yet this warning does not clearly apply to the facts in this case, as it did in this Court's decisions requiring the use of a "beyond a reasonable doubt" standard in *Robles* and *Malpeso*. In *Robles*, the defendant was acquitted of several substantive robbery counts, and convicted of a generalized robbery conspiracy that did not enumerate any particular robberies. 562 F.3d at 453. Notwithstanding the acquittals, the sentencing court found that the government had proven beyond a reasonable doubt the defendant's conspiracy to commit two of the acquitted robberies. *Id.* In *Malpeso*, the defendant was convicted of one count of conspiracy to murder members of a faction of the Columbo crime family, but the charge did not enumerate which murders were the objects of the conspiracy. 115 F.3d at 167. As in *Robles*, the district court found beyond a reasonable doubt that Malpeso had conspired to commit two particular murders. *Id.*

Thus, both *Robles* and *Malpeso* clearly implicated the warning in Note 4, in that the “the verdict [] [did] not establish which offense(s) was the object of the conspiracy.” In contrast, the same concern does not apply to this case, where Count Two specifically alleged a conspiracy to extort money from two victims during the course of a single criminal event. NA19-NA20. Indeed, the *Robles* Court recognized that the Application Note would not apply in this context. In response to a defense argument challenging the need to plead all objects of a conspiracy in the indictment, this Court in *Robles* reasoned:

If Application Note 4 required that the objects of a conspiracy be specifically named in the conspiracy count of an indictment, it would be difficult to imagine the reason for this comment’s existence. A verdict of guilty on the conspiracy count in such a situation would establish with precision the offenses a judge could “permissibly” consider at sentencing, and there would be no occasion warranting the “particular care” recommended by Application Note 4.

562 F.3d at 455. This scenario is precisely the one faced by the Court in this case, that is, that the objects of the conspiracy are specifically named in the indictment. Thus there is no need to apply Application Note 4.

Moreover, unlike in *Robles* and *Malpeso*, the division of the conspiracy count in this case is

based not on multiple separate uncharged criminal events, but rather upon a single event that victimized two people and that was charged in the indictment. This is precisely the scenario considered in *Melchor-Zaragoza*, where the Ninth Circuit affirmed the use of the preponderance standard to divide a conspiracy count involving the kidnaping of 23 illegal aliens into 23 separate groups for sentencing. 351 F.3d at 929. In specifically rejecting the use of a heightened evidentiary standard, the court reasoned that the preponderance of the evidence standard applies “where an increase in sentence is based on the *extent of a conspiracy* as opposed to uncharged conduct.” *Id.* Likewise, in this case, the separation of Count Two into two groups reflects the extent of the conspiracy, *i.e.*, against two victims, and not any uncharged conduct.

In any event, even if it was error for the district court to use a preponderance standard, Nicolescu cannot show that such error affected his substantial rights or seriously affected the “fairness, integrity or public reputation of judicial proceedings.” *Marcus*, 130 S. Ct. at 2164.

Here, even applying the “beyond a reasonable doubt” standard, there is little question that the district court would have found that there were multiple victims of this conspiracy. Indeed, Nicolescu concedes as much in his own recitation of the facts, stating:

Bass and Lethbridge were then told by one of the perpetrators that they had been injected with a virus that is almost always fatal within 20-24 hours, but that there was an antidote that will counteract the virus if it is administered within that time frame. The man then demanded \$8.5 million in exchange for administering the antidote.

Def. Br. 4. The record is replete with evidence that both Bass and Lethbridge were victims of this extortion—both were confronted at gunpoint, both were tied up and blindfolded for hours, both were injected with a supposed “virus,” and both were threatened with the same extortionate demand. There is no reason at all, on these facts, to think that the jury or the district court credited the victimization of Bass more or less than Lethbridge.

In sum, even if the district court applied a heightened standard of proof, it is impossible to imagine a scenario in which it would not have reached the same conclusion, *i.e.*, that this was a conspiracy and an attempt to extort two victims. Put simply, this was a conspiracy and attempt in which two people were victimized; the Guidelines should recognize as much.

3. Demand enhancement

a. Governing law

Under U.S.S.G. § 2B3.2(b)(2), “if the greater of the amount demanded or the loss to the victim exceeded \$10,000, [the district court should] increase [the offense level] by the corresponding number of levels from the table in §2B3.1(b)(7).” In determining the appropriate amount of money to use in the application of this enhancement, the district court may rely solely on the amount demanded, irrespective of whether the defendant had the “intent or reasonable ability” to commit the crime as expressed. *United States v. Zhuang*, 270 F.3d 107, 109 (2d Cir. 2001). In *Zhuang*, the Court approved the application of an enhancement based upon the initial demand for \$68,000 in ransom, despite the fact that the victim family professed an inability to pay that amount, and instead paid \$10,000. *Id.* The Court observed that:

There is no doubt that Zhuang did demand \$68,000, and this demand completed the criminal violation of 18 U.S.C. § 1951(a). This amount demanded was the greater of the amount demanded or lost by the victim. Accordingly, under the plain language of § 2B3.2(b)(2), the district court did not err when it applied a two-level upward adjustment on the basis of the \$68,000 demand.

Id. Where a demand is actually paid, loss may be higher than the demand itself, and will include “any demand paid plus any additional consequential loss from the offense (*e.g.*, the cost of defensive measures taken in direct response to the offense). U.S.S.G. § 2B3.2(b)(2), comment. (note 5).

Once the district court determines the relevant amount of demand and/or loss to apply, it then looks to the table in U.S.S.G. § 2B3.1(b)(7). Where the relevant amount is in excess of \$5 million, the offense level is increased by seven. U.S.S.G. § 2B3.1(b)(7)(H).

b. Discussion

Here, it is undisputed that the intruders’ extortionate demand was \$8.5 million. PSR ¶ 19, Defendant’s *Pro Se* Supplemental Brief (“Def. Supp. Br.”) 4. It is also clear that the intruders left before receiving any money. PSR ¶ 24. Thus, the district court properly used the \$8.5 million demand as the “the greater of the amount demanded or the loss to the victim.” § 2B3.2(b)(2). It is ultimately irrelevant that the victims offered other amounts, especially since the perpetrators maintained their original \$8.5 million demand. PSR ¶ 21, *see Zhuang*, 270 F.3d at 109 (using the initial demand amount even though defendants settled for less). Applying the \$8.5 million demand to the table in § 2B3.1(b)(7), the

district court properly increased Nicolescu's offense level by seven.

Nicolescu, on appeal, misapplies the Guidelines by substituting the standard of § 2B3.2, which uses "the greater of the amount demanded or the loss to the victim," with that of § 2B1.1, which enhances a sentence only according to loss to the victim, which is defined as "the greater of actual loss or intended loss." § 2B1.1 cmt. n. 3(A). Nicolescu attempts to argue that the district court should have looked not at the demand, but at so-called "probable loss," or what Nicolescu and his co-conspirators would have actually been able to get from the victims. Def. Supp. Br. 7.

This argument fails for several reasons. First, this is simply a misunderstanding of the Guidelines—the applicable section in this case is 2B3.2, not 2B1.1. Likewise, all of the cases cited by Nicolescu concern the definition of loss under § 2B1.1. Moreover, even if Nicolescu were accurate, and "intended loss" under § 2B1.1 were the applicable standard, his argument is precluded by Amendment 617 to the Guidelines, which revised the definition of "intended loss" to "include[] unlikely or impossible losses that are intended, because their inclusion better reflects the culpability of the offender." U.S.S.G. App. C, Amend. 617 (Nov. 2003). Nonetheless, the Court need not even reach Nicolescu's argument regarding impossibility, since the \$8.5 million de-

mand is sufficient, by itself, to increase the offense level by seven under § 2B3.2(b)(2). Thus the district court did not clearly err in applying a seven-level increase based upon the \$8.5 million demand.

4. U.S.S.G. § 2X1.1

a. Governing law

Title 18, United States Code, Section 1951(a), criminalizes “[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section” The statutory index to the Guidelines refers violations of 18 U.S.C. § 1951 to four sections: 2B3.1 (Robbery), 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage), 2B3.3 (Blackmail and Similar Forms of Extortion), and 2C1.1 (multiple public corruption related offenses). U.S.S.G. § 2X1.1 covers “Attempt, Solicitation, and Conspiracy (Not Covered by a Specific Offense Guideline),” and indicates that “[w]hen an attempt solicitation, or conspiracy is expressly covered by another offense guideline section, apply that guideline section.” U.S.S.G. § 2X1.1 (c).

In *United States v. Amato*, 46 F.3d 1251, 1261 (2d Cir. 1995), this Court held that Hobbs Act

robbery conspiracies should be sentenced under § 2X1.1. The Court in *Amato* began by noting that, under § 2B3.1, which at that time referred the valuation of loss to § 2B1.1, comment. (note 2) (“loss means the value of the property taken, damaged, or destroyed”), there was no provision that permitted the district court to include “losses that were intended as part of the offense but were not realized.” *Id.* at 1260. The only way, according to the Court, to account for such intended losses, was to include Hobbs Act robbery conspiracies in § 2X1.1, which specifically mandates adjustments for “any intended offense conduct.” *See id.* (quoting §2X1.1(a)).

Regardless of whether *Amato* was correctly decided, the reasoning in that case, applying § 2X1.1 to Hobbs Act robberies, does not necessarily apply to extortions or other related offenses. Hobbs Act extortions are expressly assigned to § 2B3.2, which contains relevant differences from § 2B3.1. First, § 2B3.2 accounts for not just loss to the victim, but also the demand by itself, even if the money turned over is less than that demanded (or none). *Zhuang*, 270 F.3d at 109. This eliminates the potential for the dilemma posed by *Amato*, in that the intended loss, *i.e.*, the demand, is factored into the substantive guideline. The *Amato* Court specifically cited a scenario in § 2X1.1, cmt. n. 4:

where the intended offense was the theft of \$800,000 but the participants completed

(or were about to complete) only the acts necessary to steal \$30,000, the offense level is the offense level for the theft of \$800,000 minus 3 levels, or the offense level for the theft of \$30,000, whichever is greater.

This scenario, while perhaps relevant in a robbery case, has no relevance for extortion. Indeed, under *Zhuang*, if a demand is made for \$800,000 and the participants only received \$30,000, then § 2B3.2 would use the \$800,000 demand. See 270 F.3d at 109.

U.S.S.G. § 2B3.2 is also distinct from § 2B3.1 in its Background section. The Background section to § 2B3.2 states, in relevant part, “The Hobbs Act, 18 U.S.C. § 1951, prohibits extortion, attempted extortion, and conspiracy to extort. It provides for a maximum term of imprisonment of twenty years.” The Background section to § 2B3.1 has no such reference to covered statutes, or attempt and/or conspiracy.

Nor is the *Amato* Court’s citation of § 2B1.1, and its reference to § 2X1.1, persuasive in cases of extortion. It is true that the 1995 version of § 2B3.1 valued loss using the commentary to § 2B1.1 (“the value of the property taken, damaged, or destroyed”), and that the commentary to § 2B1.1 also referenced applying § 2X1.1 to conspiracies and attempts. However, that cross reference has long since been deleted. See U.S.S.G. App. C, Amend. 617 (Nov. 2001). In Amendment

617, the Guidelines redefined loss for purposes of § 2B1.1 to include intended loss, but for § 2B3.1, it eliminated the cross-reference to § 2B1.1 and simply defined loss as “the value of the property taken, damaged, or destroyed.” At no point, however, has there ever been an express or implied cross-reference between § 2B3.2 and § 2X1.1.

In cases where § 2X1.1 does apply, the district court is directed to use “the base offense level from the guideline for the substantive offense, plus any adjustments from such guideline for any intended offense conduct that can be established with reasonable certainty.” § 2X1.1(a). The defendant is then eligible for certain adjustments, as follows:

- (1) If an attempt, decrease by 3 levels, unless the defendant completed all the acts the defendant believed necessary for successful completion of the substantive offense or the circumstances demonstrate that the defendant was about to complete all such acts but for apprehension or interruption by some similar event beyond the defendant’s control.
- (2) If a conspiracy, decrease by 3 levels, unless the defendant or a co-conspirator completed all the acts the conspirators believed necessary on their part for the successful completion of the substantive offense or the circumstances demonstrate that the conspirators were about to com-

plete all such acts but for apprehension or interruption by some similar event beyond their control.

§ 2X1.1(b). The fact that a particular conspiracy or attempt may be unlikely to succeed does not mean that the perpetrators are eligible for these reductions. This Court has held that

[2X1.1(b)] determines punishment based on the *conduct* of the defendant, not on the probability that a conspiracy would have achieved success. As the First Circuit has stated, “near accomplishment of the criminal object normally poses enough risk of actual harm, and reveals enough culpability” to defeat “the reduction available for conspiracies and attempts that have not progressed very far.”

United States v. Medina, 74 F.3d 413, 418 (2d Cir. 1996) (quoting *United States v. Chapdelaine*, 989 F.2d 28, 36 (1st Cir. 1993)). “Many pre-existing circumstances may doom a conspiracy, without rendering the conspirators any less culpable for their acts.” *Id.*

In *Medina*, the Court denied the three-level adjustment, where the defendants had developed a robbery plan, acquired weapons and other tools of the crime, and approached the front door of the office building. *Id.* at 419. It was at that point that law enforcement stopped them, after having been monitoring the group from early on,

including by means of a co-conspirator informant. *Id.* In denying a reduction, the Court again observed that “what matters under the Guidelines is that Medina and his co-conspirators were ‘about to complete’ the crime, not that they were ‘about to succeed.’” *Id.* at 418.

While in many cases the intervening factor may be the intercession of law enforcement, there are a myriad of other ways in which a conspiracy may be thwarted that do not reduce the culpability of the co-conspirators. *Id.* (citing examples). *Medina* cited, for example, *United States v. Toles*, 867 F.2d 222, 223 (5th Cir. 1989), where the Fifth Circuit denied the three point reduction where a defendant issued a threat against a bank teller, but failed to get money because the teller claimed not to have the keys to the cash box.

b. Discussion

Here, the Court should apply plain error review to deny Nicolescu’s application, made for the first time on appeal, that the district court should have considered a three-level reduction of his Guideline range under § 2X1.1(b).

First, the district court correctly applied U.S.S.G. § 2B3.2, rather than § 2X1.1, to this Hobbs Act extortion conspiracy and attempt, and at any rate, even if § 2X1.1 should have applied, it is not “clear and obvious, rather than subject to reasonable dispute.” *Marcus*, 130 S. Ct. at

2164. As discussed in the prior section, “when an attempt, solicitation, or conspiracy is expressly covered by another Guidelines section, [the district court should] apply that Guidelines section.” U.S.S.G. § 2X1.1(c)(1); *see Amato*, 46 F.3d at 1261 (“[T]he determinative passage in § 2X1.1(c)(1) makes this turn not on the content of the criminal statute in question, but rather on whether the Guidelines assign the particular class of conspiracy to a section other than the general conspiracy section.”).

18 U.S.C. § 1951 includes, in its statutory language, conspiracy and attempt. The Guidelines’ Statutory Index expressly assigns, without limitation to particular manner of violation (*i.e.*, completed offense, attempt, or conspiracy), violations of 18 U.S.C. § 1951 to four Guidelines sections, including, for Hobbs Act extortions, § 2B3.2. Moreover, the Background section to § 2B3.2 states, in relevant part, “the Hobbs Act, 18 U.S.C. § 1951, prohibits extortion, attempted extortion, and conspiracy to extort.” Thus, Hobbs Act extortions are expressly covered by U.S.S.G. § 2B3.2, and that section was correctly used by the district court, without reference to § 2X1.1.

Nicolescu refers the Court to *United States v. Khawly*, 170 Fed. Appx. 190 (2d Cir. 2006), an unreported summary order that ruled attempts and conspiracies under § 2B1.1 are, pursuant to the § 2B1.1 commentary, covered by § 2X1.1. This is a proposition with which the government

does not quarrel, and which has no bearing on the outcome of this case, since § 2B3.2 has no similar reference.

Even if the Court did clearly err in failing to apply § 2X1.1, Nicolescu cannot show that such error affected his substantial rights or “seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.” *Marcus*, 130 S. Ct. at 2164. Simply put, Nicolescu would not have been eligible for the three point reductions, because he and his co-conspirators committed all acts necessary for the completion of the Hobbs Act extortion that was the object of the attempt and conspiracy. *See* §§ 2X1.1(b)(1) and (2).

Like the offenders in *Medina*, Nicolescu and his co-conspirators assembled weapons and other tools of their intended offense, PSR ¶¶ 15 (guns, knives, and masks) and 18 (syringes); they drove to the location of the offense, PSR ¶¶ 40-42; and they approached the victim’s home, ¶ 15. *See Medina*, 74 F.3d at 419. Of course, unlike in *Medina*, the perpetrators here did not get stopped at the gate. Rather, here Nicolescu and his co-conspirators violently entered the home, PSR ¶ 15; held the victims at gunpoint, PSR ¶ 15; tied them up in a bathroom for several hours, PSR ¶¶ 16-17; injected them with a purported deadly “virus,” PSR ¶ 18; and demanded \$8.5 million in exchange for the antidote, PSR ¶ 19. Had the victims in fact turned over the money at that moment, the extortion

would have been a completed offense. The fact that the victims did not have ready access to Bass's fortune, and that they could not devise an immediate way to get the money for Nicolescu and his co-conspirators, does not "render him and his co-conspirators any less accountable for arriving at" the estate "armed and ready to execute their plan." *Medina*, 743 F.3d at 418. As in *Toles*, the defendant's conduct is not excused simply because the victims "did not have the keys to [the] cashbox." 867 F.2d at 223. Nicolescu and his co-conspirators made their escape without the money only when the victims, who were "beyond the defendant's control, blocked the final steps" of the extortion. *Id.*

Thus, even if the court should have applied § 2X1.1 to this case, Nicolescu would clearly not have been eligible for a three-level reduction, and therefore the error would not have had an effect on the sentence.

5. Bodily injury

a. Governing law

"Bodily injury" is defined as "any significant injury that is painful and obvious, or is of a type for which medical attention ordinarily would be sought." Application Note 1(B), Commentary to U.S.S.G. § 1B1.1. "Although determining whether an injury is 'significant' requires a fact-specific inquiry, injuries warranting medical attention generally are deemed 'significant.'" *Mar-*

kle, 628 F.3d at 63. Application of the bodily injury enhancement “presents a predominantly factual issue, which [the Court] review[s] for clear error.” *United States v. Lin Guang*, 511 F.3d 110 (2d Cir. 2007).

In *Markle*, the Court upheld the district court’s two-level enhancements as to each of four extortion victims, who were treated at the hospital for injuries, as follows:

James Skidds testified that he was treated at the hospital for an elbow abrasion and tenderness in the thigh, and he received a tetanus shot. Kyle Acel was treated for bruised ribs, shoulder, jaw, and back. Ira Maney went to the hospital and later testified that he “was hurting pretty bad.” Leon Carr took off two days of work after he was treated for pain while breathing, abrasions, and bruises.

628 F.3d at 60-61, 64. Indeed, minor cuts, swelling, and bruising, have repeatedly been upheld as supporting application of this enhancement. *See, e.g., United States v. Greene*, 964 F.2d 911, 912-13 (9th Cir. 1992) (per curiam) (two slaps to the face causing redness and pain for a week); *United States v. Isaacs*, 947 F.2d 112, 114-15 (4th Cir. 1991) (blow to face causing redness and ringing in ears); *United States v. Pandiello*, 184 F.3d 682, 685-86 (7th Cir. 1999) (red welts and shoeprint mark on back); *United States v. Hoelzer*, 183 F.3d 880, 882 (8th Cir. 1999)

(bruises resulting from “being hit, kicked and stepped on by the defendants”); *United States v. Hamm*, 13 F.3d 1126, 1128 (7th Cir. 1994) (bruises that were “painful and obvious”).

b. Discussion

Here, the district court did not clearly err in finding that the bodily injury enhancement applied to both the Bass and the Lethbridge Groups. The injury to Bass, consisting primarily of a very large bruise surrounding the injection site on her arm, was both “painful and obvious” and “of a type for which medical attention ordinarily would be sought.” U.S.S.G. § 1B1.1, comment. (note 1(B)). Indeed, Bass testified that the bruise eventually turned her entire arm black. GA348. Government Exhibit 94 itself showed a softball sized welt on Bass’s left arm, as seen on April 16, 2007. GA530. Government Exhibit 85 shows the same bruise, now larger, taken on April 22, 2007, buttressing Bass’s testimony that the bruise continued to worsen. GA529. Bass also testified that the injection was painful, saying “it was excruciating and I honestly, it felt, I’m sure it didn’t, but it felt like it hit the bone of my arm.” GA319. Arguably, given Bass’s testimony, the district court could have applied a four-point enhancement for “serious bodily injury” given the “extreme physical pain” suffered by Bass. *See* U.S.S.G. §§ 2B3.2(b)(4)(B), 1B1.1, comment (note 1(L)). At a minimum, though, she clearly

experienced a “painful and obvious” injury. U.S.S.G. § 1B1.1, comment. (note 1 (B)).

While it is true that Lethbridge did not sustain the same extent of bruising and pain as did Bass, the district court had ample evidence before it to find that Lethbridge also suffered bodily injury under § 2B3.2(4)(A). Most significantly, the injection of a needle containing a foreign substance, whether ultimately found to be poisonous or inert, “is of a type for which medical attention ordinarily would be sought.” § 1B1.1 comment. (note 1(B)). Likewise, the administering of a dose of what turned out to be the sleep-agent diphenhydramine, by other than a licensed medical practitioner, which then caused Lethbridge to fall asleep, is also clearly worthy of a hospital visit. *See* GA565-GA567, GA252-GA255.⁴ In sum, both the injection of a foreign

⁴ The syringes, some depressed and some full, that were recovered from the accordion case contained gentian violet, an “over-the-counter antiseptic dye used to treat fungal infections of the skin (e.g., ringworm, athlete’s foot).” GA566. Given the other evidence connecting the accordion case to the crime, including Nicolescu’s knife and a phone card from Bass’s home, it is easily deduced that these were the syringes used to inject Bass and Lethbridge. Also recovered from the accordion case were “Sleepinal” caplets, the active ingredient of which is diphenhydramine, and both Bass and Lethbridge were found to have diphenhydramine in their blood.

substance and the administration of a sleep agent into Lethbridge's body are significant enough to warrant an enhancement for bodily injury, and at any rate it was not clear error for the district court to so find.

Nor is it particularly relevant that Bass and Lethbridge initially resisted going to the hospital. As Bass testified, this reluctance was the result of Bass's grandchild's presence, and her concern that going to the hospital would terrify him. GA337. Nonetheless, they ultimately relented to the insistence of the police, whose adamancy was presumably at least in part because the victims had been injected with an unknown substance. GA336-GA337.

Finally, even if the district court erred in assessing two points for bodily injury as to Lethbridge, as opposed to Bass, that error was harmless, in that it would not have had an overall effect on Nicolescu's offense level. The district court calculated Nicolescu's offense level as 36 for both Guidelines groups, one as to Bass, and the other Lethbridge. NA38-NA39. Both groups included the enhancement for bodily injury. NA39. If the district court had decided not to find bodily injury as to Lethbridge, the offense level for his group would have been 34. U.S.S.G. § 3D1.4(a) dictates that the district court should:

count as one Unit the Group with the highest offense level. Count one additional

Unit for each Group that is equally serious or from 1 to 4 levels less serious.

Thus, the “Bass Group,” having the highest offense level, at 36, would count as one Unit. The “Lethbridge Group,” at 34 being “equally serious or from 1 to 4 levels less serious,” would be one additional Unit, for a total of two Units. Applying the table in § 3D1.4, two units means that two levels should be added to the “offense level applicable to the Group with the highest offense level,” which here is 36. The resulting offense level is 38, which is the same as the offense level that the district court reached, applying bodily injury to the Lethbridge Group. In sum, the district court’s application of the bodily injury enhancement to the Lethbridge group did not impact the combined offense level, and thus even if error, was harmless.⁵

⁵ Nicolescut relies unconvincingly on an unreported district court decision in *United States v. Robles*, 2012 U.S. Dist. LEXIS 13542, *12-*13 (S.D.N.Y. February 3, 2012). While the record related to bodily injury in this decision is sparse, it appears that in two bank robberies, one victim was “kicked” and one victim was “struck,” but there was “no evidence of any injury beyond bruises or that the victims sought medical care or ordinarily would for such an injury.” *Id.* *Robles* is easily distinguishable from this case, where the injury came because of the injection and oral administration of foreign substances, resulted in extreme pain to Bass, and caused extensive bruising

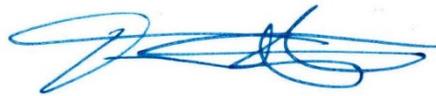
Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: July 12, 2013

Respectfully submitted,

DEIRDRE M. DALY
ACTING UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT



DAVID E. NOVICK
ASSISTANT U.S. ATTORNEY

Sandra S. Glover
Assistant United States Attorney (of counsel)

to Bass's arm that lasted more than a week and that eventually turned Bass's entire arm black. GA348.

**Federal Rule of Appellate Procedure
32(a)(7)(C) Certification**

This is to certify that on June 27, 2013, the government filed an unopposed motion seeking permission to file an oversized brief of no more than 20,000 words, pursuant to Local Rule 27.1. The Court granted that motion on July 12, 2013. This brief contains fewer than the requested number of words, in that the brief is calculated by the word processing program to contain approximately 19,981 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.



DAVID E. NOVICK
ASSISTANT U.S. ATTORNEY

Addendum

18 U.S.C. § 1951

(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, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term “robbery” means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(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.

(3) The term “commerce” means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State,

Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

U.S.S.G. § 2B3.2: Extortion by Force or Threat of Injury or Serious Damage

(a) Base Offense Level: 18

(b) Specific Offense Characteristics

(1) If the offense involved an express or implied threat of death, bodily injury, or kidnapping, increase by 2 levels.

(2) If the greater of the amount demanded or the loss to the victim exceeded \$10,000, increase by the corresponding number of levels from the table in §2B3.1(b)(7).

(3) (A)(i) If a firearm was discharged, increase by 7 levels; (ii) if a firearm was otherwise used, increase by 6 levels; (iii) if a firearm was brandished or possessed, increase by 5 levels; (iv) if a dangerous weapon was otherwise used, increase by 4 levels; or (v) if a dangerous weapon was brandished or possessed, increase by 3 levels; or

(B) If (i) the offense involved preparation to carry out a threat of (I) death; (II) serious bodily injury; (III) kidnapping; (IV) product tampering; or (V) damage to a computer system used to maintain or operate a critical infrastructure, or by or for a government entity in furtherance of the administration of justice, national

defense, or national security; or (ii) the participant(s) otherwise demonstrated the ability to carry out a threat described in any of subdivisions (i)(I) through (i)(V), increase by 3 levels.

(4) If any victim sustained bodily injury, increase the offense level according to the seriousness of the injury:

Degree of Bodily Injury Increase in Level

(A) Bodily Injury add **2**

(B) Serious Bodily Injury add **4**

(C) Permanent or Life-Threatening Bodily Injury add **6**

(D) If the degree of injury is between that specified in subdivisions (A) and (B), add **3** levels; or

(E) If the degree of injury is between that specified in subdivisions (B) and (C), add **5** levels.

Provided, however, that the cumulative adjustments from (3) and (4) shall not exceed 11 levels.

(5) (A) If any person was abducted to facilitate commission of the offense or to facilitate escape, increase by 4 levels; or (B) if any person was physically restrained to facilitate commission of the offense or to facilitate escape, increase by 2 levels.

...

Commentary

Statutory Provisions: 18 U.S.C. §§ 875(b), 876, 877, 1030(a)(7), 1951. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

...

2. This guideline applies if there was any threat, express or implied, that reasonably could be interpreted as one to injure a person or physically damage property, or any comparably serious threat, such as to drive an enterprise out of business. Even if the threat does not in itself imply violence, the possibility of violence or serious adverse consequences may be inferred from the circumstances of the threat or the reputation of the person making it. An ambiguous threat, such as "pay up or else," or a threat to cause labor problems, ordinarily should be treated under this section.

...

5. "Loss to the victim," as used in subsection (b)(2), means any demand paid plus any additional consequential loss from the offense (e.g., the cost of defensive measures taken in direct response to the offense).

Background: The Hobbs Act, 18 U.S.C. § 1951, prohibits extortion, attempted extortion, and conspiracy to extort. It provides for a maximum term of imprisonment of twenty years. 18 U.S.C. §§ 875-877 prohibit communication of extortionate demands through various means. The maximum penalty under these statutes varies from two to twenty years. Violations of 18 U.S.C. § 875 involve threats or demands transmitted by interstate commerce. Violations of 18 U.S.C. § 876 involve the use of the United States mails to communicate threats, while violations of 18 U.S.C. § 877 involve mailing threatening communications from foreign countries. This guideline also applies to offenses under 18 U.S.C. § 1030(a)(7) involving a threat to impair the operation of a "protected computer."

U.S.S.G. § 1B1.1

...

Commentary

Application Notes:

1. *The following are definitions of terms that are used frequently in the guidelines and are of general applicability (except to the extent expressly modified in respect to a particular guideline or policy statement):*

...

(B) "Bodily injury" means any significant injury; e.g., an injury that is painful and obvious, or is of a type for which medical attention ordinarily would be sought.