

#### **6.18.1951-6 Hobbs Act - Extortion Under Color of Official Right**

**The government alleges that *(name)* committed extortion under color of official right. A public *(official)(employee)* commits “extortion under color of official right” if *(he)(she)* uses the power and authority of *(his)(her)* office in order to obtain money, property, or something of value from another to which neither that public *(official)(employee)* nor that government office has an official right.**

**Extortion under color of official right means that a public official induced, obtained, accepted, or agreed to accept a payment to which he or she was not entitled, knowing that the payment was made in return for taking, withholding, or influencing official acts. *[The government may show that the benefit was meant to be given to the public official directly, or to a third party who is not a public official but who was acting in concert with the public official.]***

**The government is not required to prove an explicit promise to perform the official acts in return for the payment. Passive acceptance of a benefit by a public official is a sufficient basis for this type of extortion, if the official knows that *(he)(she)* is being offered payment in exchange for *(his)(her)* ability to do official acts.**

**The government is not required to prove that *(name)* made any specific threat or used force or fear to cause *(the victim alleged in the indictment)* to**

**part with the property that the indictment alleges (name) obtained by extortion under color of right. However, the government must prove beyond a reasonable doubt that (name) knowingly and deliberately used (his)(her) official position in order to obtain something of value, to which (name) had no right.**

*[The government is not required to prove that (name) actually possessed the official power to guarantee, deny, or influence any actions. It is enough to show that (victim alleged in indictment) reasonably believed that (name) had the actual, residual, or anticipated official power to help (him)(her) with respect to matters pending before a government agency.]*

*[In order for (name) to have obtained the property of another there must have been a transfer of possession of, or a legal interest in, that property from that other person to (name) or a designee of (name).]*

## **Comment**

Sand et al., supra, 50-9; O'Malley et al., supra, § 53.09. See also *United States v. Munchak*, 2013 WL 2382618 (3d Cir. 2013) (non-precedential) (discussing instructions).

18 U.S.C. § 1951(b)(2) provides:

As used in this section-

\* \* \*

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

This instruction and the one that follows address extortion by color of official

right, which is distinct from extortion through force, violence, or fear, and may only be committed by a public official (although a non-public official may be guilty of aiding and abetting extortion by color of official right).

In *United States v. Kenny*, 462 F.2d 1205, 1229 (3d Cir. 1972), the Third Circuit held that the following instruction properly defined extortion under the statute:

The term 'extortion' means the obtaining of property from another with his consent induced either by wrongful use of fear or under color of official right. The term 'fear,' as used in the statute, has the commonly accepted meaning. It is a state of anxious concern, alarm, apprehension of anticipated harm to a business or of a threatened loss.

\* \* \*

Extortion under color of official right is the wrongful taking by a public officer of money not due him or his office, whether or not the taking was accomplished by force, threats or use of fear. You will note that extortion as defined by Federal Law is committed when property is obtained by consent of the victim by wrongful use of fear, or when it is obtained under color of official right, and in either instance the offense of extortion is committed.

The defendant complained that the instruction defined extortion disjunctively, allowing the jury to find extortion if the defendant obtained money or property either by use of fear or under color of official right. The Third Circuit rejected the defendant's argument and explained:

[W]hile private persons may violate the statute only by use of fear and public officials may violate the act by use of fear, persons holding public office may also violate the statute by a wrongful taking under color of official right. The term "extortion" is defined in § 1951(b)(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." The "under color of official right" language plainly is disjunctive. That part of the definition repeats the common law definition of extortion, a crime which could only be committed by a public official, and which did not require proof of threat, fear, or duress. The disjunctive charge on § 1951 extortion was correct.

*Id.* at 1229 (citations omitted). In *United States v. Urban*, 404 F.3d 754, 768 (3d Cir. 2005), the Third Circuit explained that, "[i]n order to prove Hobbs Act extortion 'under color of official right,' 'the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in

return for official acts.”

There need not be one benefit for one official act. Instead, a conviction may be based on proof that the official accepted a “stream of benefits” in exchange for one or more official acts. *See United States v. Donna*, 366 F. App’x. 441 (3d Cir. 2010) (non-precedential) (citing *United States v. Kemp*, 500 F.3d 257, 282 (3d Cir. 2007)).

The government may show that the benefit was meant to be given to the public official directly, or to a third party who is not a public official but who was acting in concert with the public official. *See generally United States v. Antico*, 275 F.3d 245, 255-56 (3d Cir. 2001); *United States v. Bradley*, 173 F.3d 225, 231-32 (3d Cir. 1999); *United States v. Margiotta*, 688 F.2d 108, 133 (2d Cir. 1982) (“A Hobbs Act prosecution may lie where the extorted payments are transferred to third parties, including political allies and political parties, rather than to the public official who has acted under color of official right.”).

The offense of extortion under color of official right does not have to involve force or threat on the part of the public official. The coercive element is provided by the existence of the public office itself. *Evans v. United States*, 504 U.S. 255, 265 (1992); *Antico*, 275 F.3d at 255 n.14; *United States v. Jannotti*, 673 F.2d 578, 594 (3d Cir. 1982).

The government need not prove that the defendant acted exclusively with corrupt intent. *See United States v. Donna*, 366 F. App’x. 441 (3d Cir. 2010) (non-precedential) (remarking that trial court’s “dual motive” instruction stating that a person commits extortion under color of official right when that person has “a partly corrupt intent and a partly neutral intent” constituted a correct statement of the law).

An explicit promise to perform the official acts in return for the payment is not required. *Evans*, 504 U.S. at 268; *Antico*, 275 F.3d at 255-56; *Bradley*, 173 F.3d at 231. Passive acceptance of a benefit by a public official is a sufficient basis for this type of extortion, if the official knows that he or she is being offered payment in exchange for his ability to do official acts. The government need not prove that the public official first suggested or solicited the giving of money or property. *Evans*, 504 U.S. at 259; *United States v. Blandford*, 33 F.3d 685, 698-99 n.15 (6th Cir. 1994). Extortion occurs if the official knows that the payment or benefit is motivated by a hope that it will influence the official in the exercise of his or her office, or influence any action that the official takes because of the official position, and if, knowing this, the official accepts or agrees to accept the payment or benefit or have it accepted by another person. *United States v. Holzer*, 816 F.2d 304, 311 (7th Cir. 1987); *United States v. Butler*, 618 F.2d 411, 417-19 (6th Cir. 1980); *United States v. Trotta*, 525 F.2d 1096, 1101 (2d Cir. 1975) (“To repeat, it is the use of the power of public office itself to procure the payments of money not owed to the public official or his office that constitutes the offense.”); *United States v. Braasch*, 505 F.2d 139, 151 (7th Cir. 1974).

It is not necessary for the government to prove that the defendant actually misused or attempted to misuse the power of his/her office insofar as the defendant granted some benefit or favor to the payors. Though the payors may not have gotten any more than their due in the defendant's performance of his office, the defendant's acceptance of money or a benefit, in return for the use of, or the attempted use of, his/her office is extortion. See *Antico*, 275 F.3d at 255-58; *United States v. Evans*, 30 F.3d 1015, 1019 (8th Cir. 1994); *United States v. Loftus*, 992 F.2d 793, 797 (8th Cir. 1993); *Holzer*, 816 F.2d at 308; *United States v. Paschall*, 772 F.2d 68, 71, 74 (4th Cir. 1985) (citing *United States v. Manton*, 107 F.2d 834 (2d Cir. 1939)); *United States v. Bibby*, 752 F.2d 1116, 1128 (6th Cir. 1985) (“[I]t is not essential that a [public] official be able to guarantee a certain result before his acceptance of money to bring about that result will run afoul of the law.”); *United States v. Butler*, 618 F.2d 411, 420 (6th Cir. 1980).

The public official's agreement to take or refrain from taking an action on behalf of the payor need not be express. *Antico*, 275 F.3d at 255-57; *United States v. Donna*, 366 F. App'x. 441 (3d Cir. 2010) (non-precedential).

The official need not actually possess the power to provide or deny the particular action. *United States v. Mazzei*, 521 F.2d 639, 645 (3d Cir. 1975); *United States v. Nedza*, 880 F.2d 896, 902 (7th Cir. 1989); *United States v. Braasch*, 505 F.2d 139, 151 (7th Cir. 1974). It is the payor's reasonable belief in such power which is relevant. *Mazzei*, 521 F.2d at 643; *United States v. McDonough*, 56 F.3d 381, 388 (2d Cir. 1995); *Nedza*, 880 F.2d at 902; see *United States v. Brown*, 540 F.2d 364, 372 (8th Cir. 1976); *United States v. Freedman*, 562 F. Supp. 1378, 1385 (N.D. Ill. 1983).

The bracketed language in the last paragraph should be included if there is a question concerning whether the defendant acquired property rather than simply depriving the victim of property. Mere deprivation of property or interference with the use of property is not sufficient under the statute. In *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003), the Court addressed the definition of “extortion” under § 1951. The Court stated, “we have construed the extortion provision of the Hobbs Act at issue in these cases to require not only the deprivation of but also the acquisition of property.” *Id.* at 404.

If the public official plays a role in more than one aspect of government, the court may want to specify the particular office that the extortion threatened to corrupt. See, e.g., *United States v. Mister*, 2010 WL 1006693 (3d Cir. 2010) (non-precedential) (rejecting defendant's variance argument in part because jury instructions clearly stated the corruption at issue in the case).

(Revised 11/2013)