404 F.3d 754
(Cite as: 404 F.3d 754)

United States Court of Appeals,
Third Circuit.
UNITED STATES of America
v.
Thomas URBAN, Appellant No. 03–1325
United States of America
v.
Joseph J. O'Malley, Appellant No. 03–1326
United States of America
v.
Joseph R. Leone, Appellant No. 03–1356
United States of America
v.
Gerald S. Mulderig, Appellant No. 03–1370
United States of America
v.
Fred Tursi, Appellant No. 03–1371
United States of America
v.
James F. Smith, Appellant No. 03–2315
United States of America
v.
William C. Jackson, Appellant No. 03–2737
United States of America
v.
Stephen M. Rachuba, Appellant No. 03–2751.

Nos. 03–1325, 03–1326, 03–1356, 03–1370, 03–1371, 03–2315, 03–2737, 03–2751.
Argued Oct. 28, 2004.
Filed: April 20, 2005.

OPINION OF THE COURT

FISHER, Circuit Judge.

Appellants, plumbing inspectors employed by the City of Philadelphia, were convicted of improperly accepting payments from plumbers whose work they inspected in violation of the Hobbs Act and the Racketeer Influenced and Corrupt Organizations Act ("RICO"). They raise a host of contentions on appeal, including primarily a challenge to the District Court's jury instruction regarding the Hobbs Act's requirement that the covered misconduct have affected commerce. We find none of Appellants' contentions sufficient to support overturning their convictions. We will, however, vacate their sentences in light of the United States Supreme Court's recent decision in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), and remand to the District Court for resentencing in accordance with that decision.

I.

Appellants Thomas Urban, Joseph J. O'Malley, Joseph R. Leone, Gerald S. Mulderig, Fred Tursi, James F. Smith, William C. Jackson and Stephen M. Rachuba were plumbing inspectors employed by the Construction Services Department ("CSD"), a division of the Department of Licenses and Inspections ("L & I Department") of the City of Philadelphia. The L & I Department is a regulatory agency charged with construction inspections and business regulatory affairs. The CSD is responsible for issuing all construction permits and performing construction inspections. Appellants were tasked with performing the plumbing component of these inspections, and were expected to enforce the city plumbing code in order, among other things, to ensure the safety of the city drinking water. Appellants were assigned to districts. Plumbers were required to call the offices of the district in which their job was located to set up an appointment with an inspector. Appellants had discretion to decide when to perform the inspection. In performing inspections and enforcing the plumbing code, Appellants had the power to cite violations of the code, issue stop work orders on projects, and revoke the license of any plumber who failed to comply with the code.

In the late 1990s, law enforcement became aware that plumbing inspectors were accepting monetary payments from plumbers whose work they inspected, or claimed to have inspected. In the course of its investigation into this practice, the FBI interviewed several confidential sources—designated as CS1, CS2 and CS3, respectively—who had worked as plumbing inspectors alongside Appellants, or as plumbers whose work Appellants had inspected. An affidavit executed by an FBI agent, filed by the government in support of a request to install hidden cameras in city vehicles which would be used by suspected plumbing inspectors, detailed statements given by these confidential sources. CS1, a former plumbing inspector from 1992 to 1997, stated that 70%–80% of the

plumbing contractors whose work he inspected during that time period "provided him with a cash 'tip' of $5 to $20 in return for his inspection and for allowing the contractor to work without interference." CS1 stated that he made an additional $3,000 to $6,000 per year from these "tips," and that acceptance of "tips" was commonplace among the L & I Department's plumbing inspectors. CS1 believed that plumbing inspectors, including specifically many of the Appellants, "regularly accept[ed] 'tips' while working in their official capacity as City inspectors[.]"

***760** CS2, a small plumbing contractor who had allegedly interacted with plumbing inspectors through a third party, stated that he provided money used to pay a plumbing inspector named "Tursi" in 1999 and on at least ten prior occasions. CS3, a large general plumbing contractor who worked with several plumbing subcontractors, stated that he was told by his subcontractors that payments were made to an inspector named "O'Donnell" and his replacement named "Smith." The affidavit also stated that the affiant had interviewed a "cooperating witness" who had "made consensual recordings of L & I plumbing inspector Fred Tursi allegedly extorting money from him." This cooperating witness advised that he had given $50 to his plumbers to give to Tursi to "keep him off their backs."

On the strength of this information, the government sought and obtained from the United States District Court for the Eastern District of Pennsylvania an order authorizing the installation of hidden video cameras in two city vehicles which would be used by certain of the Appellants while on official city business. Video captured by these cameras apparently showed Appellants Jackson, Leone, O'Malley, Rachuba and Smith accepting cash on numerous occasions from plumbers during the course of conducting inspections; in many instances, Appellants apparently accepted cash payments without performing any inspection at all.

On March 19, 2002, a grand jury in the Eastern District of Pennsylvania returned an indictment of 13 plumbing inspectors, including Appellants, charging them with a violation of RICO, 18 U.S.C. § 1962, and multiple counts of Hobbs Act extortion, in violation of 18 U.S.C. § 1951. A five-week trial ensued in early September 2002. At trial, the government presented evidence showing that multiple plumbers made numerous monetary payments of varying sizes to each of the Appellants. Plumbers testified that they paid inspectors anywhere from $5 to $200 per inspection. There was ample evidence at trial that plumbers paid inspectors in order to ensure timely and favorable inspections,[FN1] and to prevent unfavorable treatment or harassment by inspectors. One plumber testified that "We felt like if you didn't do what was, what had been going on for years, you certainly would not see, you may not see an inspector showing up when you want him[,]" while another testified that he paid inspectors because "[y]ou didn't want to get on the bad side of the inspector." Other plumbers testified that they paid inspectors because they could not afford to find out if they would be treated differently by the inspectors if they did not pay. Plumber Richard Clements testified that failing to tip could result in an inspector who would "give me a hard time, or I wouldn't get the prompt service." Yet another plumber testified that when Appellant Tursi asked him for a larger tip than offered, he complied because "I felt as though there would be some kind of problem if I didn't do it."

> FN1. Numerous plumbers testified that because of labor and equipment costs, any idle time between the completion of a project and the performance of an inspection harmed their business. It was therefore essential that plumbing inspectors arrive as soon as a project was completed, and that they perform the inspection of that project as rapidly as possible so that the plumbers could move on to their next project.

The government presented substantial evidence demonstrating that Appellants knew that it was improper to accept monetary payments from plumbers whose work they were inspecting, thus undermining Appellants' view that they were voluntarily (and therefore properly) accepting "tips." Each Appellant was required, at the time of hiring, to sign an ethics statement acknowledging***761** that he was not permitted to accept "any offer, any gift, favor or service that might tend to influence" him in the discharge of his duties. Every inspector hired between 1980 and 2000—including all of the Appellants—was told that it was against city policy for employees to take any cash in any amount at any time. An ethics directive from the Mayor of Philadelphia permitted City employees to accept up to $100 in gifts per year from any

one source, but expressly disallowed their acceptance of cash in any amount.

Evidence of how Appellants accepted the plumbers' payments reinforced the government's contention that Appellants knew the payments were improper. Plumbers concealed the payments to Appellants in the pages of their work permit or by folding it up and transferring the money in what was commonly referred to as a "green handshake." In a conversation taped by a cooperating witness and played for the jury, Appellant Mulderig explained that "every time they hand me a permit I, I used to fold it over like that and then put it in my pocket, you know what I mean.... when I would go to like Boston Market or something for lunch I would go in the men's room and take it out and put it in my, you know, take the money out of there and put it in my pocket." Moreover, video taken by the hidden cameras in the city vehicles apparently revealed numerous instances of Appellants surreptitiously receiving the payments and endeavoring to keep the payments hidden.

In support of the Hobbs Act's requirement that any extortionate conduct have an effect on commerce, the government presented evidence that each Appellant accepted tips from plumbers who purchased supplies made out-of-state, i.e., outside of Pennsylvania. Many of these same plumbers, however, testified that the payments they made to Appellants did *not* affect their ability to make out-of-state purchases.

On October 18, 2002, the jury convicted all Appellants except William Jackson of the RICO charges, and all Appellants of the Hobbs Act extortion charges. The District Court imposed varying sentences on Appellants, ranging from twelve months of home confinement to thirty-four months' imprisonment, as well as fines, assessments and probation. These eight, timely, consolidated appeals followed.

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C. Appellants' challenges to their RICO convictions.

Appellants O'Malley, Rachuba, Tursi and Urban contend that the government failed to prove that they directed the affairs of an "enterprise" as required to support a RICO conviction. Appellants also argue that the government failed to prove the existence of an "enterprise" for purposes of their RICO convictions because the CSD cannot be such an "enterprise." We reject these contentions.

Appellants were charged with violating § 1962(c) of RICO, which provides that "[i]t shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c). "To establish a § 1962(c) RICO violation, the government must prove the following four elements: '(1) the existence of an enterprise affecting interstate commerce; (2) that the defendant was employed by or associated with the enterprise; (3) that the defendant participated, either directly or indirectly, in the conduct or the affairs of the enterprise; and (4) that he or she participated through a pattern of racketeering activity.' " *United States v. Irizarry*, 341 F.3d 273, 285 (3d Cir.2003) (quoting *United States v. Console*, 13 F.3d 641, 652–653 (3d Cir.1993)).

Appellants contend that the government failed to prove that they directed the affairs of the CSD or participated in its operation or management. In order to participate, directly or indirectly, in the conduct of an enterprise's affairs for purposes of § 1962(c), "one must have some part in directing those affairs." *Reves v. Ernst & Young*, 507 U.S. 170, 179, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993). But "one need not hold a formal position within an enterprise in order to 'participate' in its affairs." *United States v. Parise*, 159 F.3d 790, 796 (3d Cir.1998) (citing *Reves*, 507 U.S. at 179, 113 S.Ct. 1163). Moreover, "the 'operation or management' test does not limit RICO liability to upper management because 'an enterprise is operated not just by upper management but also by lower-rung participants in the enterprise who are under the direction of upper management.' " *Parise*, 159 F.3d at 796 (quoting *Reves*, 507 U.S. at 184, 113 S.Ct. 1163) ***770** (internal quotation marks omitted). *Reves* thus "made clear that RICO liability may extend to those who do not hold a managerial position within an enterprise, but who do nonetheless knowingly further the illegal aims of the enterprise by carrying out the directives of those in control." *Id.*

We have applied *Reves* to limit RICO liability under § 1962(c) to those instances where there is " 'a nexus between the person and the conduct in the affairs of an enterprise.' " *Parise*, 159 F.3d at 796 (quoting *University of Maryland at Baltimore v. Peat*,

Marwick, Main & Co., 996 F.2d 1534, 1539 (3d Cir.1993)). The government's evidence sufficiently established the existence of such a nexus here simply by demonstrating that the City employed Appellants to perform plumbing inspections and related work, and that Appellants in fact performed that work.

Appellants also argue that the government failed to prove the existence of an "enterprise." RICO defines "enterprise" as "includ[ing] any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity[.]" 18 U.S.C. § 1961(4). In order to prove the requisite "enterprise," we require proof "(1) that the enterprise is an ongoing organization with some sort of framework for making or carrying out decisions; (2) that the various associates function as a continuing unit; and (3) that the enterprise be separate and apart from the pattern of activity in which it engages." *Irizarry*, 341 F.3d at 286 (citations omitted).

Here, the government adduced evidence establishing each of the three elements of "enterprise" set forth in *Irizarry*. There is no dispute that the CSD is "an ongoing organization with some sort of framework for making or carrying out decisions." In order to prove the second element—"associates function[ing] as a continuing unit"—we have said that the government must show "that each person perform[ed] a role in the group consistent with the organizational structure established by the first element and which furthers the activities of the organization." *United States v. Riccobene*, 709 F.2d 214, 223 (3d Cir.1983), *overruled on other grounds by Griffin v. United States*, 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991). Again, the government offered sufficient evidence to support this element. There is no question that Appellants worked for the "enterprise," i.e., the CSD, and they did so on a continuous basis, daily issuing permits and performing inspections of plumbing projects in Philadelphia. Finally, there is no dispute that the CSD was distinct from Appellants' extortionate acts. The CSD is an arm of the government of the City of Philadelphia created for the purpose of issuing permits for construction projects in Philadelphia and overseeing those projects to ensure their compliance with code regulations. There is no contention that the CSD was created and existed for the purpose of enabling Appellants' extortionate acts.

Appellants suggest that an "enterprise" can only be an "illegal organization," and that therefore "an employment group [like the CSD] created by the City is definitely not an enterprise." This misstates the law under RICO. The plain text of RICO defines enterprise as, *inter alia*, a "legal entity [.]" *See* 18 U.S.C. § 1961(4). And we have frequently found government entities to be "enterprises" for RICO purposes. *See, e.g.*, *Genty v. Resolution Trust Corp.*, 937 F.2d 899, 906–07 (3d Cir.1991) (holding that township can be an "enterprise" for RICO purposes) (citation omitted); *Averbach v. Rival Mfg. Co.*, 809 F.2d 1016, 1018 (3d Cir.1987) (noting that court can be an "enterprise"); *United States v. Bacheler*, 611 F.2d 443, 450 (3d Cir.1979) (holding that Philadelphia Traffic Court ***771** can be an "enterprise"); *United States v. Frumento*, 563 F.2d 1083, 1092 (3d Cir.1977) (holding that the Pennsylvania Department of Revenue's Bureau of Cigarette and Beverage Taxes was an "enterprise").

Finally, Appellants assert that the government failed to prove an agreement among Appellants to participate in an enterprise through a pattern of racketeering activities. But Appellants were charged with committing substantive RICO violations under 18 U.S.C. § 1962(c), which does not require proof of any such agreement. *See Parise*, 159 F.3d at 794 (citation omitted). Accordingly, we find that the government adduced sufficient evidence to support Appellants' RICO convictions, and will therefore affirm those convictions.

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III.

For the foregoing reasons, we will affirm the judgments of conviction as to each of the Appellants, but vacate the judgments of sentence of each of the Appellants [FN12] and remand to the District Court for resentencing.

FN12. We will vacate the sentences of Appellants Jackson, Rachuba and Tursi even though they have not expressly indicated that they wish to challenge their sentences under *Booker*.