No. 14-6166

IN THE SUPREME COURT OF THE UNITED STATES

DAVID ANTHONY TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the evidence was sufficient to support the jury's conclusion that petitioner's attempted robberies of drug dealers to obtain marijuana and drug proceeds satisfied the commerce element of the Hobbs Act, 18 U.S.C. 1951(a), which prohibits "attempts" to commit a robbery that would "in any way or degree obstruct[], delay[], or affect[] commerce or the movement of any article or commodity in commerce."

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A18) is reported at 754 F.3d 217.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 2014. The petition for a writ of certiorari was filed on September 4, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Virginia, petitioner was convicted

on two counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a), and one count of using a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c). The district court sentenced petitioner to 336 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. A1-A18.

1. Petitioner was a member of the "Southwest Goonz," a group of robbers that targeted drug dealers in the Roanoke, Virginia, area. Pet. App. A2. The group, which was led by George Fitzgerald, chose drug dealers as their victims because drug dealers typically stored illegal drugs and cash in their homes and were unlikely to report the crimes to the police. Ibid. Petitioner's Hobbs Act convictions were based on two such robberies.

a. On August 27, 2009, Fitzgerald, petitioner, and two others robbed the residence of Josh Whorley. Pet. App. A3. Fitzgerald had received information -- which he relayed to petitioner and the rest of his crew -- that Whorley sold an exotic, high grade of marijuana. Ibid. Petitioner and the others thus expected to find both drugs and money at Whorley's home. Id. at A3, A13. That expectation was well-founded; Whorley admitted to a detective that he had dealt in marijuana in the past. Gov't C.A. Br. 5. And although Whorley told investigators that he was no longer in the drug trade, a

detective testified that he suspected Whorley of drug dealing because drug dealers are commonly victims of home invasions and Whorley's home had been invaded multiple times before the robbery here. Id. at A14.

The crew entered Whorley's home while Whorley and his girlfriend were present. Pet. App. A3. The robbers kicked in the door and held the victims at gunpoint while they repeatedly demanded to know "where the money and marijuana were located." Ibid.; Gov't C.A. Br. 2-4. Petitioner pistol whipped and groped Whorley's girlfriend and threatened to shoot her genitals, while an accomplice repeatedly struck Whorley. Pet. App. A3; 2013 Trial Tr. (Tr.) 94. The crew, however, was unsuccessful in locating drugs and drug money. They left instead with the girlfriend's jewelry, $40 from her purse, two cell phones, and a marijuana cigarette. Pet. App. A3.

b. On October 21, 2009, petitioner participated in another attempted robbery of drugs and drug proceeds at the home of William Lynch. Pet. App. A4. The group targeted Lynch because a reliable source had informed Fitzgerald that Lynch sold marijuana and that the source had personally robbed Lynch of 20 pounds of marijuana at Lynch's home. Ibid. Lynch later admitted that he was involved in marijuana dealing before the invasion but had concealed that activity from his wife. Gov't C.A. Br. 7.

After the group entered the Lynch home, in which Lynch lived with his wife and their three children, petitioner kept Lynch and two children at gunpoint with his finger on the trigger. Pet. App. A4; see Tr. 357-358, 365, 369. Another assailant chased Lynch's wife into a bedroom, where he tried to remove her pants, assaulted her at gunpoint, and demanded to know where the money and drugs were located. Pet. App. A4; Tr. 373-375. Fitzgerald, in turn, asked Lynch where the marijuana was located. Lynch stated that he did not have the marijuana and that another person "'has the weed.'" Tr. 359; see Pet. App. A4. Petitioner later admitted to a federal agent that they expected to get "pounds of weed" from the home invasion. Tr. 421. The crew, however, ultimately left with only a cell phone. Pet. App. A4.

2. The jury in petitioner's first trial was not able to return a verdict, resulting in a mistrial. Pet. App. A5. Before the retrial commenced, the government filed a motion in limine to preclude petitioner from presenting evidence or argument that robbing a drug dealer of marijuana grown within Virginia would not have violated the interstate commerce element of the Hobbs Act. Ibid. The district court granted the motion. Ibid.

At retrial, the government presented the testimony of an expert in "drug trafficking" and "drug trends" in Roanoke, Tr.

63, who explained that the cocaine and marijuana trades in Roanoke were largely "cash-only business[es]" in which both drugs were sold and repackaged by wholesale- and retail-level entities before being distributed for sale to individual drug users, Tr. 67. See Tr. 64-70.

The district court instructed the jury that a Hobbs Act robbery offense requires, inter alia, proof beyond a reasonable doubt that "interstate commerce or an item moving in interstate commerce was delayed, obstructed, or affected in any way or degree" by the charged offense. Tr. 605. That jurisdictional element will be satisfied, the court continued, if "the defendant reduced the movement of articles and commodities in interstate commerce, in this case illegal drugs and drug proceeds, or attempted to do so by the robberies charged." Tr. 605-606; see Tr. 606-607 (additional jury instructions for the offense of "attempting to commit a Hobbs Act robbery"). The court added that the government need not "prove that the defendant intended to affect interstate commerce; rather, this element may be proven by evidence that a defendant's actions were likely to affect interstate commerce, even though the actual impact on commerce is small." Tr. 606. The jury found petitioner guilty on the Hobbs Act counts and the firearms charge related to the Whorley robbery. Tr. 626-627.

3. On appeal, petitioner did not challenge the district court's jury instructions. See Pet. App. A12. Petitioner argued, as relevant here, that the evidence was insufficient to permit the jury to find the Hobbs Act's jurisdictional element because the government failed to present evidence that the two robberies at issue affected interstate commerce. Pet. C.A. Br. 2, 9, 13-18. The court of appeals affirmed. Pet. App. A1-A18.

The court of appeals rejected petitioner's sufficiency-of-the-evidence argument, Pet. App. A6-A18, based on its conclusion that "the jury could rationally have found that the government met its burden" of proving the jurisdictional element, id. at A13. The court reasoned that the evidence's sufficiency must be analyzed by taking the evidence and "the reasonable inferences to be drawn therefrom" in the light most favorable to the government, id. at A12 (citation omitted), and that, under that standard, the evidence was sufficient to have allowed the jury to find an effect on interstate commerce, id. at A16.

The court of appeals explained that the Hobbs Act requires only a "'minimal' effect on interstate commerce." Pet. App. A7 (citation omitted). That requisite effect, in turn, "do[es] not simply [turn upon] the effect of the individual action in question; it is sufficient that the 'relevant class of acts' has a measurable impact on interstate commerce" in the aggregate. Id. at A7-A8 (citation omitted). The court observed that this Court

had previously determined that the Commerce Clause reaches conduct that "in the aggregate, impacts interstate commerce" in Wickard v. Filburn, 317 U.S. 111 (1942), and, more recently, in Gonzales v. Raich, 545 U.S. 1 (2005), where the Court held that "Congress may regulate [the] intrastate marijuana market because of its aggregate impact on interstate commerce." Pet. App. A8. The court of appeals also cited "the large number of circuits" that had specifically applied that aggregation principle to the jurisdictional element of the Hobbs Act. Id. at A9. The court thus explained that "the precise effect on commerce" need not "be traced in each and every case," ibid., and that the evidence here was sufficient to establish the requisite effect on commerce under "two independent" theories, id. at A16. See id. at A13-A17.

First, the court of appeals concluded that it would have been "reasonable for the jury to conclude that the robberies 'would have the effect of depleting the assets of an entity engaged in interstate commerce.'" Pet. App. A13 (citation omitted); see id. at A13-A15. The court observed that it had previously "found that drug dealing was 'an inherently economic enterprise that affects interstate commerce.'" Id. at A13 (quoting United States v. Williams, 342 F.3d 350, 355 (4th Cir. 2003), cert. denied, 540 U.S. 1169 (2004)). Because "drug dealing in the aggregate necessarily affects interstate commerce"

and because petitioner attempted to rob a drug-dealing operation, the court continued, the government could satisfy the relevant jurisdictional element by "prov[ing] that [petitioner] depleted or attempted to deplete the assets of such an operation." Ibid.

With respect to the Whorley robbery, the court of appeals concluded, the evidence was sufficient to show that "Whorley was a drug dealer"; the crew specifically targeted his home because they were informed that "a drug dealer lived there"; petitioner "expected to find drugs and drug proceeds in the home"; and petitioner stole several items, including a marijuana cigarette, from the home. Pet. App. A13-A14. The court reasoned that the jury could have rationally found either that (a) the robbery resulted in at least a minimal depletion of the operation's assets or (b) petitioner "attempted to steal drugs and drug proceeds" satisfying the Hobbs Act's jurisdictional element. Id. at A14. The court similarly found the evidence sufficient to show that petitioner either "depleted or attempted to deplete" the assets of a drug-dealing entity during the Lynch robbery. Id. at A14-A15.

Second, the court of appeals concluded that the jury could have reasonably found the jurisdictional element based on a "targeting" theory in light of "evidence that [petitioner] intentionally targeted a business engaged in interstate commerce."

Pet. App. A15-A16. The court explained that a defendant who attempts to steal "the proceeds of an enterprise engaged in interstate commerce will not fortuitously escape prosecution" if "his target did not possess those proceeds at the precise time of the robbery." Id. at A16. Petitioner's intent, the court concluded, was thus "probative on the question of whether his actions would have had the 'natural consequence' of affecting [interstate] commerce." Id. at A15 (brackets omitted) (quoting United States v. Powell, 693 F.3d 398, 405 (3d Cir. 2012), cert. denied, 133 S. Ct. 901 (2013)).

ARGUMENT

Petitioner contends (Pet. 7-14) that the evidence against him was insufficient to establish the jurisdictional element of the Hobbs Act and that the court of appeals' decision conflicts with decisions in the Second and Seventh Circuits. That contention lacks merit, and the court of appeals' decision does not conflict with any decision of this Court or any other court of appeals. No further review is warranted.

1. a. The Hobbs Act makes it a federal crime to commit -- or to "attempt[] or conspire[]" to commit -- a robbery that "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce." 18 U.S.C. 1951(a). The Act defines "commerce" to include not only commerce that crosses a state line but also, inter alia, "all

other commerce over which the United States has jurisdiction." 18 U.S.C. 1951(b)(3). This Court has held that the statute's broad language demonstrates "a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence." Stirone v. United States, 361 U.S. 212, 215 (1960); see Scheidler v. National Org. for Women, Inc., 537 U.S. 393, 408 (2003). That interpretation is consistent with the general principle that the phrase "affects commerce" is presumed to reflect congressional intent to exercise "the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause." NRLB v. Reliance Fuel Oil Corp., 371 U.S. 224, 226 (1963) (per curiam) (emphasis omitted); accord Carr v. United States, 560 U.S. 438, 454 (2010).

This Court in United States v. Lopez, 514 U.S. 549 (1995), reaffirmed that Congress may regulate and protect "the use of the channels of interstate commerce"; "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and "activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce." Id. at 558-559 (citations omitted). In the third category, the substantiality requirement is not limited to the effects on commerce of a particular indivi-

dual's conduct. Rather, the aggregate effects of the regulated activity may establish that the regulation falls within Congress's commerce power. In other words, "where a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence." Id. at 558 (emphasis and citation omitted); accord Gonzales v. Raich, 545 U.S. 1, 17 (2005).

In Raich, the Court confirmed Congress's authority to regulate the intrastate manufacture and possession of marijuana for medical purposes, even though the activity involved only non-commercial, home consumption. The Court relied on decades of precedent "firmly establish[ing]" that Congress has the power to regulate "purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." 545 U.S. at 17; see id. at 17-19. The Court explained that marijuana is "a fungible commodity for which there is an established, albeit illegal, interstate market." Id. at 18. The Court accordingly concluded that "locally cultivated" marijuana -- even if produced only for "personal use" -- "may have a substantial impact on the interstate market for this extraordinarily popular substance." Id. at 28. In so holding, the Court found it "'visible to the naked eye' under any commonsense appraisal of the probable consequences" that leaving "such a significant segment of the total market" for

marijuana unregulated would undermine Congress's effort to control the interstate market for the drug. Id. at 28-29 (citation omitted).

b. Petitioner contends (Pet. 7-8) that "generalized evidence that robbery or attempted robbery of a drug dealer" affects interstate commerce is insufficient to show that a particular Hobbs Act offense had the requisite effect on commerce. Instead, petitioner argues (Pet. 8), the Hobbs Act requires "individualized proof * * * that the robbery charged affected interstate commerce" and that the evidence in this case is insufficient to support his conviction because it lacks case-specific proof of such an effect.

The court of appeals held that drug dealing is an "inherently economic enterprise that affects interstate commerce," Pet. App. A13 (citation omitted), such that a Hobbs Act conviction based on the robbery of a marijuana dealer need not rest on evidence of the broader interstate market for marijuana production of which the target enterprise was a part. Id. at A8-A11, A13. Citing Raich, the court explained that "illegal drug enterprises" that "operate out of homes" can have a "significant cumulative effect on interstate commerce." Id. at A11. And because such marijuana "drug dealing in the aggregate necessarily affects interstate commerce," the court concluded, the government could satisfy the Hobbs Act's interstate commerce require-

ment by "prov[ing] that [petitioner] depleted or attempted to deplete the assets of such an operation." Id. at A13.

Raich's analysis establishes that local marijuana-distribution enterprises fall within Congress's regulatory authority under the Commerce Clause, and, therefore, the robbery of such enterprises may be found to affect commerce under the Hobbs Act. Although Raich addressed Congress's Commerce Clause power to prohibit the local cultivation and use of marijuana under the Controlled Substances Act, 21 U.S.C. 801 et seq., the Court's constitutional conclusion bears on the Hobbs Act jurisdictional element because Congress, in enacting the Hobbs Act, intended to exercise the full extent of its Commerce Clause authority. United States v. Culbert, 435 U.S. 371, 373 (1978); see, e.g., United States v. Elias, 285 F.3d 183, 188 (2d Cir.) ("The reach of the Hobbs Act has been held to be coextensive with that of the Commerce Clause of the United States Constitution.") (citing Stirone, 361 U.S. at 215), cert. denied, 537 U.S. 988 (2002).

A further question may be posed whether the jury must be provided with specific evidence in a Hobbs Act prosecution to establish that the robbery of a marijuana dealer occurred in the context of the national marijuana market described in Raich. This case, however, would not be an appropriate vehicle to address that question. Even if evidence beyond the attempted

robbery of a marijuana operation were required to show an effect on commerce under a Raich theory, it would not affect the disposition of this case. That is because the evidence was sufficient for a rational jury to infer that the targeted marijuana enterprises were themselves engaged in interstate commerce.

Both before and after this Court's decision in Lopez, the Hobbs Act has been understood to prohibit the robbery of businesses that trade in out-of-state goods because such interference or attempted interference with interstate commerce has at the very least a slight effect on commerce. The courts of appeals have thus consistently upheld Hobbs Act convictions where a robbery targeted the assets of such a commercial enterprise and where the robbery depleted those assets, even when the depletion was minimal. See, e.g., United States v. Ossai, 485 F.3d 25, 30-31 (1st Cir.) (robbery of doughnut shop), cert. denied, 552 U.S. 919 (2007); United States v. Elias, 285 F.3d 183, 187-189 (2d Cir.) (robbery of grocery store), cert. denied, 537 U.S. 988 (2002); United States v. Robinson, 119 F.3d 1205, 1212-1215 (5th Cir. 1997) (robberies of check-cashing stores), cert. denied, 522 U.S. 1139 (1998); United States v. Smith, 182 F.3d 452, 453, 456-457 (6th Cir. 1999) (robberies of grocery and party stores), cert. denied, 530 U.S. 1206 (2000); United States v. Dobbs, 449 F.3d 904, 911-912 (8th Cir. 2006) (robbery of "'mom and pop' convenience store"), cert. denied, 549 U.S. 1139,

and 549 U.S. 1233 (2007); United States v. Nelson, 137 F.3d 1094, 1102 (9th Cir.) (robbery of jewelry stores), cert. denied, 525 U.S. 901 (1998); United States v. Curtis, 344 F.3d 1057, 1069-1071 (10th Cir. 2003) (robberies of convenience stores and restaurants), cert. denied, 540 U.S. 1157 (2004); United States v. Guerra, 164 F.3d 1358, 1360-1361 (11th Cir. 1999) (robbery of gas station); United States v. Harrington, 108 F.3d 1460, 1468-1469 (D.C. Cir. 1997) (robbery of restaurant). Those holdings recognize that the depletion of assets of a business in interstate commerce or that buys products in interstate commerce will, in the aggregate, affect interstate commerce. That principle applies directly to this case.[1]

The evidence here showed that petitioner sought to rob drugs and drug proceeds from a drug dealer who "sold an exotic and high grade of marijuana," Pet. App. A3, and from another dealer from whom 20 pounds of marijuana had previously been stolen, id. at A4. Indeed, petitioner expected to steal "pounds of weed" in the second robbery. Tr. 421. Such evidence would allow a jury to infer that petitioner attempted to deplete the drugs and drug-derived proceeds of drug dealers who were engaged

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[1] Petitioner does not question the applicability of the Hobbs Act to cases involving illegal drug trafficking. It is settled that Congress's authority to regulate interstate commerce applies with equal force to both lawful and unlawful commerce. Raich, 545 U.S. at 19 n.29; Perez v. United States, 402 U.S. 146, 155-157 (1971).

in interstate, not purely local, commerce. The jury could reasonably conclude that a dealer selling an "exotic," high-grade of marijuana obtained marijuana that was not local. Likewise, the sheer volume of 20 pounds of marijuana reasonably indicates a drug-dealing enterprise on such a scale that it would obtain at least some of its product in an interstate market.

The Hobbs Act not only prohibits robberies that affect commerce "in any way," it also prohibits the mere "attempt[]" to commit such a robbery. 18 U.S.C. 1951(a). Attempt liability under the Hobbs Act is evaluated under the facts as the defendant believed them to be. See, e.g., United States v. Muratovic, 719 F.3d 809, 814-815 (7th Cir. 2013) (explaining that a defendant's mistaken "belief [that he would rob a dealer of drugs in interstate commerce] provides the requisite interstate effect" for a Hobbs Act conviction). See generally United States v. Williams, 553 U.S. 285, 301 (2008) ("[I]n attempt prosecutions, 'the defendant's conduct should be measured according to the circumstances as he believes them to be, rather than the circumstances as they may have existed in fact.'") (quoting Model Penal Code § 5.01, Comment). Here, given the nature and scale of the operations that petitioner believed he was robbing, the evidence was sufficient to allow the jury to infer that petitioner intended to target dealers engaged in interstate commerce. His convictions are therefore valid under

the line of Hobbs Act authority cited above establishing that the commerce element is satisfied by evidence of an attempted robbery on a business believed to be engaged in interstate commerce. See pp. 14-15, supra; see also Pet. App. A15-A16 (concluding that the evidence was sufficient to show that petitioner "intentionally targeted a business engaged in interstate commerce").

2. Petitioner contends that the decision of the court of appeals conflicts with three decisions of the Second and Seventh Circuits, which petitioner reads as requiring "particularized evidence" that each robbery of a drug dealer has affected interstate commerce. Pet. 10-13 (relying upon United States v. Parkes, 497 F.3d 220 (2d Cir. 2007), cert. denied, 552 U.S. 1220 (2008); United States v. Needham, 604 F.3d 673 (2d Cir.), cert. denied, 131 S. Ct. 355 (2010); and United States v. Peterson, 236 F.3d 848 (7th Cir. 2001)). Although some language in those decisions may be in tension with the court of appeals' analysis in this case, the decisions do not reflect a conflict of authority warranting review.

a. In Parkes, the Second Circuit overruled its prior precedent that had "treated the interstate commerce element of the Hobbs Act as a matter of law for the judge" to decide, 497 F.3d at 227, and held instead that "the Hobbs Act requires the jury to determine * * * whether the conduct affected, or

would have affected, interstate commerce," id. at 230. See id. at 227-230. Parkes further stated that evidence that a robbery targeted drugs or drug proceeds did not per se establish an effect on interstate commerce. Id. at 226-230. The court then held that the evidence in the case was sufficient to establish that "the attempted robbery of * * * marijuana or [drug] proceeds" from "a local, part-time marijuana dealer" in New York "would have affected interstate commerce 'in any way or degree.'" Id. at 231 (quoting 18 U.S.C. 1951(a)). The court explained "a reasonable juror" could have found such an effect based on evidence showing that "marijuana 'is almost exclusively trucked into the United States, predominat[e]ly through Mexico,'" and that "'[v]ery little' marijuana is grown in New York." Ibid. (citation omitted; second set of brackets in original). Because Parkes found the evidence sufficient to support the jury's verdict, the court had no occasion to address whether other evidentiary showings would have been insufficient. In fact, Parkes specifically noted that "[i]t may well be that a rational jury could conclude that the interstate commerce element is satisfied by proof that a robbery targeted drugs or proceeds of a drug business that is purely intrastate," but that it "need not decide" that question to resolve the case. Id. at 231 n.10.

The Second Circuit later held in Needham that a district court erred by instructing the jury (before Parkes was decided) that "all illegal drug activity * * * has an effect on interstate commerce" and that the Act's effect-on-interstate-commerce element "is satisfied" "if you find that the object of the robbery at issue was to obtain illegal drugs or money earned from the sale of illegal drugs." 604 F.3d at 678 (quoting instructions). The court explained that the instructions erroneously "foreclosed the jury's consideration" of whether "the robberies [at issue], which targeted the proceeds of drug trafficking, affected interstate commerce," id. at 675, and, consequently, "the jury never had an opportunity to make this crucial jurisdictional finding," id. at 678.

The Needham court therefore analyzed whether the instructions that had prevented the jury from finding an element of the offense were reversible plain error. 604 F.3d at 678-680, 681-685. The court noted that "the government offered little or no direct evidence supporting the jurisdictional element" other than "the mere fact that the robberies targeted drug trafficking proceeds." Id. at 680. It therefore found that the instructional error was prejudicial (and required reversal) with respect to Hobbs Act convictions based on robberies targeting "marijuana and the proceeds from its sale," id. at 681, because "the erroneous instruction may very well have affected the outcome,"

id. at 682. The court explained that it would be inappropriate "[f]or the [c]ourt, as opposed to a jury, to find that the government's limited evidence" had established an interstate effect. Ibid. That holding reflects the court's view that the evidence presented in Needham was not sufficiently powerful to render non-prejudicial the instructional error that prevented the jury from ever making the requisite finding on an element of the offense. Cf. Neder v. United States, 527 U.S. 1, 11, 17-18 (1999) (holding that an instructional error that "prevent[ed] the jury from making a finding on [an] element" of the offense was harmless in light of the "overwhelming record evidence of guilt" because a "rational jury would have found the defendant guilty absent the error"); Johnson v. United States, 520 U.S. 461, 460-470 (1997) (finding that similar instructional error did not affect substantial rights on plain-error review where the evidence was "overwhelming" and "essentially uncontroverted"). Needham does not address whether the same evidence would have been sufficient if a properly instructed jury had, in fact, made that finding.

Some language in the Needham decision may be viewed, when read in isolation, to support the view that a properly instructed jury (unlike the jury in Needham) would need proof that the particular robbery affected interstate commerce in order to find a Hobbs Act violation. For instance, Needham states that the

government offered "no proof" of an interstate nexus for the robberies at issue, and it noted that the government did not show that "the marijuana sold by the victims had originated out of state" or "was sold to out-of-state customers," that the victims "crossed state lines in conducting their business," or that the "robbery depleted assets that would have purchased goods in interstate commerce." 604 F.3d at 681. But "general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994) (quoting Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399 (1821) (Marshall, C.J.)). And because the "issue [of evidentiary sufficiency] was not presented on the facts of the case," Zenith Radio Corp. v. United States, 437 U.S. 443, 462 (1978), which merely concerned whether the jury's failure to make any finding on the jurisdictional element of the offense was prejudicial, Needham did not resolve a question relevant here.[2]

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[2] The Second Circuit later stated that Needham determined, in the course of deciding "whether the error in the jury instruction affected the defendant's substantial rights," that the trial evidence did not meet the "'modest threshold' of proving a connection to interstate commerce." United States v. Celaj, 649 F.3d 162, 169 (2d Cir. 2011), cert. denied, 132 S. Ct. 1636 (2012). Celaj, however, held that a stipulation that "marijuana is grown outside the state" and "travels in interstate and foreign commerce" was sufficient to show that the robbery of a marijuana dealer has the requisite effect on interstate commerce. Id. at 169-170. Like Parkes and Needham, Celaj does

Petitioner did not challenge on appeal either the jury instructions or the fact of the jury's jurisdictional finding. His argument was that the evidence was insufficient to support the finding that the properly instructed jury actually made. The court of appeals resolved petitioner's appeal by holding that the evidence was sufficient to permit such a finding. Neither Parkes nor Needham addresses such a question.

b. The Seventh Circuit's decision in Peterson similarly provides no basis for review. Peterson reversed a Hobbs Act conviction that had been based on the "jurisdictional theory" that the particular items that the defendants took (or attempted to take) in their robberies of drug dealers had "crossed state lines." 236 F.3d at 853 (quoting the government's opening statement to the jury); see id. at 856. The court concluded that the Hobbs Act "does not envision this type of [jurisdictional] showing" based on the fact that "the items taken -- the money, drugs, and guns -- had crossed state lines at some point"; stated that the government's case "should have focused on the nature of the [drug-dealing] business robbed and how the robbery affected its operation in interstate commerce"; but concluded that the government's belated attempt to focus on that

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not address in a holding what evidence would be insufficient to support a Hobbs Act conviction.

issue on appeal was unavailing because "this theory was not presented to the jury." Id. at 856 (emphasis added).

Peterson recognized that a "de minimis effect" on interstate commerce satisfies the Hobbs Act's jurisdictional element, 236 F.3d at 852, and that the government often can satisfy that standard under a "'depletion of assets' theory," id. at 854. Under a "typical[]" application of that theory, the court explained, the theft of assets from a business that either sells to "out-of-state customers" or buys "inventory manufactured out-of-state" will be deemed to affect commerce because it can "curtail[] the business' potential" role in such interstate transactions. Ibid. Peterson concluded, however, that the government did not establish that the charged robbery of a marijuana dealer affected commerce in that particular way because the government needed (but failed) "to show the jury that [the specific drug dealer's] marijuana source originated from out-of-state or that he sold drugs to out-of-state customers." Id. at 855. That specific showing, the court continued, could not be established with proof that it was "highly unlikely" that the dealer's marijuana was grown in-state because, even with such proof, "it is possible" that it was grown locally. Ibid.

Peterson addressed only the jurisdictional theories presented to it and did not consider whether other alternatives might justify Hobbs Act jurisdiction. Since Peterson, the Sev-

enth Circuit has made clear that the Hobbs Act does not require "the individual criminal act" in question -- i.e., "the robbery of [drug] dealers" -- "be shown to have a measurable impact on commerce." United States v. Marrero, 299 F.3d 653, 655 (7th Cir. 2002), cert. denied, 537 U.S. 1145 (2003). Like the court of appeals in this case, the Seventh Circuit has held that it "is enough if the class of acts has such an impact" and that, even if that class is defined as "narrowly as [the] theft of cash from drug dealers, it is undoubtedly large enough to have some effect on the drug trade" so as to fall within Congress's commerce power to regulate. Ibid.; see United States v. Sutton, 337 F.3d 792, 796 n.2 (7th Cir.) (explaining that robbery can be prosecuted under the Hobbs Act "even if the specific events prosecuted do not, themselves, have a substantial effect on interstate commerce" so long as "the class of transactions or the types of businesses affected * * * have a substantial connection to interstate commerce, such that interference with that class of transactions would have a substantial effect on commerce"), cert. denied, 540 U.S. 1050, and 540 U.S. 1051 (2003); see also United States v. Griffin, 493 F.3d 856, 861 (7th Cir. 2007) (following Sutton).

The Seventh Circuit does not appear to have addressed the type of evidence needed to establish an effect on interstate commerce in cases involving robberies targeting marijuana drug

dealers on such a jurisdictional theory, and its decisions thus do not reflect a division of authority warranting review. Even if Peterson had announced principles in tension with that court's subsequent decisions like Marrero, any resulting uncertainty within the Seventh Circuit would not warrant certiorari. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2015