

IN THE SUPREME COURT OF THE UNITED STATES

EMMANUEL DURAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the evidence was sufficient to establish that petitioner's conspiracy to rob and attempted robberies of the inventory and assets of drug trafficking enterprises had the requisite effect on interstate commerce under the Hobbs Act, 18 U.S.C. 1951(a), which prohibits "attempts or conspiracies" 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."

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is not published in the Federal Reporter but is reprinted in 568 Fed. Appx. 90.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 2014. A petition for rehearing was denied on September 17, 2014. Pet. App. C1-C2. The petition for a writ of certiorari was filed on October 17, 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 Eastern District of Pennsylvania, petitioner was convicted on one count of conspiracy to obstruct commerce by robbery, in violation of the Hobbs Act, 18 U.S.C. 1951(a); five counts of obstruction and attempted obstruction of commerce by robbery, in violation of 18 U.S.C. 1951(a); five counts of using or carrying a firearm during and in relation to the commission of a crime of violence, in violation of 18 U.S.C. 924(c)(1); and one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 1472 months of imprisonment, to be followed by five years of supervised release. Pet. App. B1-B5. The court of appeals affirmed. Id. at A1-A10.

1. During the night of March 24, 2010, and continuing into the next day, petitioner and his co-conspirators committed a series of violent armed robberies in an attempt to steal the inventory and assets of drug-trafficking enterprises. Pet. App. A2. The crime spree began when petitioner's girlfriend, Jacklyn Smith, told petitioner that her ex-boyfriend, Brandon Coleman, was a drug dealer, and petitioner and Smith devised a plan to rob him of his marijuana, cocaine, and drug proceeds. Gov't C.A. Br. 8-9. Smith lured Coleman and his teenage nephew to her apartment, where petitioner and several co-conspirators were

armed and waiting. Id. at 9-10. The assailants violently assaulted the two victims and took them captive, repeatedly asking them "where the money at," "where's the 10,000 at," and "where are the ninety pounds [of weed]." Id. at 9-11; see id. at 10 (asking "we know you got it, it's in your house in your basement.>"). In an effort to force Coleman to divulge the location of the drugs and drug proceeds, the conspirators tortured the two victims -- including stabbing Coleman approximately 20 times, burning him with cigarettes and a hot iron, and threatening to kill him "if [he did not] give it up." Id. at 10-11. Coleman denied that he had that kind of money and told them that he worked at Wendy's. Id. at 10. The assailants took the victims' cell phones, cash, and other personal items. Ibid.

In the hope of escaping from his captors and fearing imminent death, Coleman's nephew told the assailants that he would take them to the location of Coleman's drug proceeds, even though he knew there was no such money. Gov't C.A. Br. 11. The nephew led petitioner and two others to a house Coleman shared with his fiancée and her two young children. The assailants committed a violent home-invasion robbery, assaulting the fiancée, threatening her in front of her children, and telling her "they were there for weed and money." Id. at 12. They did not find any contraband. After tying up the fiancée, the

assailants made off with her cash and other valuables. Id. at 11-13.

Still holding the nephew hostage, petitioner and the others committed another violent home invasion at a nearby house where they suspected drugs were sold because they had seen men standing outside. Gov't C.A. Br. 14. The armed assailants threatened the residents, took them captive, and repeatedly demanded to know where they kept their drugs. Id. at 14-15. After their search for drugs proved unsuccessful, they took a new hostage who directed them to the nephew's house. Once there, the assailants attempted yet another home-invasion robbery for drugs and drug money, which triggered a shoot-out with the residents. Id. at 15-16. Petitioner and the other two men were unable to enter the house and fled. Id. at 14-17.

The next morning, Smith called a lawyer, who advised her that she should turn herself in to the police. Gov't C.A. Br. 21. Smith later told petitioner that the lawyer "want[ed] 1,500 to start, plus bail money, then 2,500 for Delaware and the bail money for that." Ibid. (quoting C.A. App. 1248-1249). Petitioner told Smith he would "make something happen." Ibid. Hours later, petitioner and a co-conspirator committed a violent armed robbery of a deli, stealing cash from the main register, cash from a register for lottery ticket sales, and the wallets and cellphones of the employees, whom they also assaulted. Id.

at 22-23. Petitioner gave the robbery proceeds to Smith, who subsequently surrendered to police. Id. at 23-24. Petitioner was arrested six weeks later after fleeing from a car that was reported as stolen. Id. at 24.

2. A federal grand jury returned a superseding indictment charging petitioner and two co-conspirators with Hobbs Act conspiracy, in violation of 18 U.S.C. 1951(a), (b)(1) and (b)(3); four counts of attempted Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) and 2, for the attempted robberies of drugs and drug proceeds; one count of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) and 2, for the completed robbery of the deli; five counts of using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1); and possessing a firearm as a convicted felon, in violation of 18 U.S.C. 922(g)(1). Gov't C.A. Br. 4-5.

The Hobbs Act establishes criminal penalties for any person who "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." 18 U.S.C. 1951(a). At trial, the government supported its theory of guilt under that statute by presenting the testimony of Detective Andrew Callahan of the Philadelphia Police Department. Detective Callahan testified that all cocaine and most marijuana is produced outside Pennsylvania. Gov't C.A. Br. 39 n.12.

The jury found petitioner guilty on all counts. Pet. App. A4. The district court denied all post-conviction motions and sentenced petitioner to 1472 months of imprisonment, to be followed by five years of supervised release. Gov't C.A. Br. 5; see also Order at 1, United States v. Duran, No. 10-cr-605 (E.D. Pa. Nov. 16, 2012).

3. The court of appeals affirmed in an unpublished opinion. Pet. App. A1-A10. As relevant here, petitioner argued that the district court should have dismissed his Hobbs Act conspiracy conviction, his four Hobbs Act convictions for attempted robbery, and his convictions for using and carrying a firearm during and in relation to the attempted robberies because, according to petitioner, the government failed to prove a sufficient impact on interstate commerce.¹ Specifically, petitioner argued that because Coleman was no longer a drug dealer at the time of the robberies, the robberies targeted private individuals rather than businesses. The court rejected that argument and affirmed. It agreed with the reasoning of the district court, which had noted that "a Hobbs Act violation can be established even if the ends of the conspiracy were from the

¹ Petitioner did not raise such a challenge to his Hobbs Act conviction for the completed robbery of the deli; his conviction for using and carrying a firearm during and in relation to that offense; or his conviction for being a felon in possession of a weapon. See Pet. C.A. Br. 4, 11-13.

very inception of the agreement objectively unattainable, so long as the agreed-upon acts would have affected commerce, if successfully completed." Id. at A5 (citations and internal quotation marks omitted). The court of appeals also agreed with the district court's conclusion that the evidence was sufficient because petitioner and his co-conspirators "committed three home invasions with the intent to obtain drugs and drug proceeds, and expert testimony indicated that cocaine and marijuana, the drugs that the defendants thought Coleman sold, are grown and harvested outside of Pennsylvania and brought into the state for sale." Ibid.

ARGUMENT

Petitioner contends (Pet. 10-16) that the court of appeals' decision impermissibly expands the Hobbs Act, 18 U.S.C. 1951(a), to cover any robbery or attempted robbery of funds from an individual who previously engaged in drug trafficking. The court established no such rule. The court affirmed petitioner's conviction because a person who attempts to rob the inventory and assets of a drug-trafficking enterprise "attempts" 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), and therefore violates the Hobbs Act, even if the defendant was mistaken and the victims were not, in fact, engaged in drug trafficking. The court's decision

is correct and does not conflict with any decision of this Court or another court of appeals. Similar petitions have also often been denied, including a recent petition by one of petitioner's co-defendants challenging the same court of appeals decision at issue here. See Bowie v. United States, 135 S. Ct. 309 (2014) (No. 14-5960). This Court should deny certiorari here as well.

1. The Hobbs Act makes it a federal crime to commit (or "attemp[t] or conspir[e]" 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). 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." NLRB 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).

Both before and after this Court's decision in United States v. Lopez, 514 U.S. 549 (1995), the Hobbs Act has been understood to prohibit all interference with interstate commerce by robbery or extortion, even when the effect of such interference or attempted interference is slight. Accordingly, courts of appeals have consistently upheld Hobbs Act convictions where the assets of a commercial enterprise were the target of a robbery and where the robbery depleted those assets, even if the depletion was minimal. See, e.g., United States v. Capozzi, 486 F.3d 711, 726 (1st Cir. 2007) (robbery and attempted robbery of drug dealer); 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. 1233 (2007); United States v. Nelson, 137 F.3d 1094, 1102 (9th Cir.) (robbery of jewelry store), cert. denied, 525 U.S. 901 (1998); United States v. Curtis, 344 F.3d 1057, 1070-1071 (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). That principle is squarely applicable to this case because petitioner specifically targeted the transactions, capital, and inventory of illegal drug-trafficking businesses. Indeed, petitioner does not dispute that his completed robbery of a deli violated the Hobbs Act. See Pet. C.A. Br. 4, 11-13.

This Court in Lopez 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." 514 U.S. at 558-559 (citations omitted). Even in cases where a substantiality requirement governs the Commerce Clause analysis, however, the inquiry is not limited to the effects on commerce of a particular individual's conduct. Rather, the aggregate effects of the regulated economic activity may be considered in determining whether the statute falls within the reach of the 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 internal quotation

marks omitted); see also Gonzales v. Raich, 545 U.S. 1, 17 (2005) (Congress has the power to regulate even “purely local activities that are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce”).

Under that principle, the application of the Hobbs Act to petitioner’s conduct is valid. Petitioner conspired and attempted to rob the inventory and proceeds of traffickers of illicit drugs that are shipped in interstate and foreign commerce. Specifically, petitioner conspired and attempted to rob Coleman of at least \$10,000 in cash, 90 pounds of marijuana, and an unspecified quantity of cocaine. Gov’t C.A. Br. 8-11; see also id. at 12 (demanding “weed and money” from Coleman’s fiancée). Petitioner also attempted to rob drugs and drug proceeds from a nearby house, unrelated to Coleman, because he believed that it was the site of a drug-trafficking operation. Id. at 14. Such robberies, in the aggregate, unquestionably have a “substantial” effect on interstate commerce.

Contrary to petitioner’s contention (Pet. 15-16), it is immaterial that he was mistaken in his belief that Coleman was engaged in a drug-trafficking enterprise. What matters under the Hobbs Act is that petitioner and his co-conspirators attempted to rob the inventory and assets of a drug-trafficking enterprise, because they thereby “attempt[ed] [and] conspir[ed]” 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 court of appeals' decision in this case is consistent with rulings of other circuits, which have held that a mistake of fact or factual impossibility is not a defense to Hobbs Act conspiracy and attempt charges. See, e.g., United States v. Muratovic, 719 F.3d 809, 814 (7th Cir. 2013) (explaining that government did not need to offer proof that vehicle defendant targeted actually did contain drug money "if the facts as the defendant believed them satisfy the jurisdictional element"); United States v. Orisnord, 483 F.3d 1169, 1177 (11th Cir.) ("Because the Hobbs Act, by its own terms, encompasses the inchoate offenses of attempt and conspiracy, the interstate nexus required to prove a Hobbs Act conspiracy may be established upon evidence that had the conspiratorial objective been accomplished, interstate commerce would have been affected."), cert. denied, 552 U.S. 1049 (2007); United States v. Fabian, 312 F.3d 550, 555 (2d Cir. 2002) ("What is legally relevant is whether at the time of the crime, Fabian believed he was robbing a loan shark and the proceeds of a drug deal, not whether the crimes actually involved a loan shark and the proceeds of a drug deal."), cert. denied, 538 U.S. 1025 (2003), abrogated on other grounds by United States v. Parkes, 497 F.3d 220 (2d Cir 2007), cert. denied, 552 U.S. 220 (2008); United

States v. Bailey, 227 F.3d 792, 798-799 (7th Cir. 2000) (holding that an attempt to rob undercover FBI agent posing as drug dealer satisfied the Hobbs Act interstate-commerce element notwithstanding defendant's argument that effect on interstate commerce was "purely imaginary"); United States v. Huynh, 60 F.3d 1386, 1389-1390 (9th Cir. 1995) (per curiam) ("[W]e have upheld Hobbs Act convictions even in the absence of a potential or actual impact on commerce, as long as the extortion purported to have such an effect.").

There is also no merit to petitioner's contention (Pet. 13, 15-16) that the court of appeals' holding means that all robberies, including noncommercial ones, could be prosecuted under the Hobbs Act. The courts of appeals have routinely reversed Hobbs Act convictions where robberies or efforts at extortion targeted individuals as such. See, e.g., United States v. Perrotta, 313 F.3d 33, 36-40 (2d Cir. 2002); United States v. Wang, 222 F.3d 234, 237-240 (6th Cir. 2000); United States v. Quigley, 53 F.3d 909, 910-911 (8th Cir. 1995); United States v. Collins, 40 F.3d 95, 99-101 (5th Cir. 1994), cert. denied, 514 U.S. 1121 (1995); United States v. Buffey, 899 F.2d 1402, 1403-1407 (4th Cir. 1990). Petitioner, by contrast, attempted to rob the inventory and assets of enterprises engaged in interstate commerce.

2. Petitioner concedes (Pet. 10, 13) that the courts of appeals have consistently rejected claims that the Hobbs Act's jurisdictional element requires proof that each individual robbery substantially affects commerce. Instead, he relies (Pet. 13-15) on concurring or dissenting opinions that have questioned whether the evidence sufficiently established an effect on interstate commerce. In each of those cases, however, the courts affirmed convictions that were based on applications of the Hobbs Act consistent with the decision in this case. See United States v. Jamison, 299 F.3d 114, 121 (2d Cir. 2002) ("[E]ven if we were to agree * * * that the robbery of an individual depleting the individual's personal funds should be governed by a different test from a robbery that depletes the assets of a business, it would not affect the present case. This attempted robbery, if successful, would have taken the cash of two businesses operating in commerce."), cert. denied, 537 U.S. 1196 (2003); see also United States v. Baylor, 517 F.3d 899, 901-902 (6th Cir.) (reaffirming circuit precedent holding that, in a Hobbs Act offense directed at a business, the government must establish only that the defendant's activities had a de minimis effect on interstate commerce), cert. denied, 554 U.S. 920 (2008); United States v. McFarland, 311 F.3d 376 (5th Cir. 2002) (en banc) (per curiam) (affirming by equally divided vote of en banc court defendant's Hobbs Act convictions

for string of convenience store robberies and leaving in place its earlier holding in Robinson, 119 F.3d at 1215, that "the particular conduct at issue in any given case need not have a substantial effect upon interstate commerce * * * so long as the regulated activity, in the aggregate, could reasonably be thought to substantially affect interstate commerce"), cert. denied, 538 U.S. 962 (2003).

3. This Court has denied review in numerous cases raising the same or similar arguments that petitioner presses here. See, e.g., Williams v. United States, 131 S. Ct. 1784 (2011) (No. 10-7693); Berroa v. United States, 131 S. Ct. 637 (2010) (No. 09-11362); Collins v. United States, 546 U.S. 1017 (2005) (No. 05-5794); McFarland v. United States, 538 U.S. 962 (2003) (No. 02-8338). This Court also denied a petition for certiorari filed by one of petitioner's co-conspirators, seeking review of the same court of appeals opinion at issue here. See Bowie, 135 S. Ct. at 309. This case presents no reason for a different result.

4. Petitioner contends (Pet. 10-13) that the question presented is "ripe for review" in light of Bond v. United States, 134 S. Ct. 2077 (2014). That decision does not call into question the validity of petitioner's convictions under the Hobbs Act or the Commerce Clause, because Bond did not address the Hobbs Act or the Commerce Clause.

In Bond, this Court held that the Chemical Weapons Convention Implementation Act of 1998 (Implementation Act), 18 U.S.C. 229(a)(1), which prohibits possessing and using a "chemical weapon," did not apply to the defendant's use of chemicals to poison her romantic rival in a lover's quarrel. Bond, 134 S. Ct. at 2085. The Court did not reach the argument that the Implementation Act could be upheld as a necessary and proper means of executing the power to regulate interstate commerce, U.S. Const. Art. I, § 8, cl. 3. See 134 S. Ct. at 2087. Nor did it reach the argument that Congress could not reach purely local activity, such as Bond's crime, as a necessary and proper means of executing the Treaty Power, U.S. Const. Art. II, § 2, cl. 2, under which the United States had entered into the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction, S. Treaty Doc. No. 103-21, 1974 U.N.T.S. 317 (Jan. 13, 1993). See Bond, 134 S. Ct. at 2083, 2086-2087. Instead, the Court held that Congress did not intend for the Implementation Act to reach the defendant's conduct. "[I]n this curious case, we can insist on a clear indication that Congress meant to reach purely local crimes, before interpreting the statute's expansive language in a way that intrudes on the police power of the States." Id. at 2090.

By contrast, Congress enacted the Hobbs Act pursuant to the Commerce Clause and expressly required proof of a jurisdictional nexus to ensure that the Act only reached crimes that affect interstate commerce and thus are not purely local: the Hobbs Act only reaches a person who commits (or attempts or conspires to commit) robbery or extortion that "obstructs, delays, or affects commerce or the movement of any article or commodity in commerce." 18 U.S.C. 1951(a); see 18 U.S.C. 1951(b)(3) (defining "commerce" to mean all interstate and foreign commerce). The court of appeals correctly affirmed petitioner's conviction, as the jury found, based on sufficient evidence, that he attempted and conspired to commit robberies affecting interstate commerce when he attempted and conspired to rob drugs and drug proceeds from people engaged in trafficking drugs in interstate commerce.

Petitioner also cites (Pet. 12) Loughrin v. United States, 134 S. Ct. 2384 (2014), but Loughrin further underscores that the decision below is correct and does not warrant further review. In Loughrin, the Court rejected an argument that it "must import an unstated element" into the federal bank fraud statute, 18 U.S.C. 1344(2), "to avoid covering run-of-the-mill frauds, properly of concern only to States." Loughrin, 134 S. Ct. at 2394. The Court explained that "[t]he premise of [the] federalism argument * * * collapses" because "the text

of § 1344(2) already limits its scope to deceptions that have some real connection to a federally insured bank, and thus implicate the pertinent federal interest." Id. at 2394-2395. Petitioner's federalism argument "collapses" here for similar reasons, as the text of the Hobbs Act "already limits its scope" to robberies or attempts to commit robberies that affect interstate or foreign commerce and thus "implicate the pertinent federal interest." Ibid. The decision below is accordingly correct, does not implicate any conflict of authority in the lower courts, and does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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