No. _____

IN THE

Supreme Court of the United States

JONATHAN MOTA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit incorrectly held—in conflict with the decisions of several other circuits—that to violate the Hobbs Act, 18 U.S.C. § 1951 et seq., a defendant's conduct need only have a "potential" or "probable" impact, as opposed to an *actual* impact, on interstate commerce.

2. Whether applying the Hobbs Act to a local convenience store robbery that did not have a substantial impact on interstate commerce violates the Commerce Clause.

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PETITION FOR A WRIT OF CERTIORARI

Jonathan Mota petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

JUDGMENT BELOW

The judgment for which review is sought is *United States v. Mota*, 753 Fed. Appx. 470 (9th Cir. Feb. 20, 2019). (Appendix ("App.") at 2-5.) The Ninth Circuit denied a petition for panel rehearing and rehearing en banc on May 15, 2019. (App. 1.)

JURISDICTION

This petition was originally due August 13, 2019. *See* Rules 13.1 & 13.3 of the Rules of the Supreme Court of the United States. Petitioner applied for, and was granted, a 60-day extension of time to file the petition, to and including October 12, 2019. (*See* Order dated July 29, 2019, in Application No. 19A114.) Pursuant to Rule 30.1 of the Rules of the Supreme Court of the United States, this petition is being timely filed. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Art. 1, Section 8, Clause 3

"The Congress shall have the power . . . [t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes . . . ."

Title 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 to do so, 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."

Title 18 U.S.C. § 1951(b)(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."

STATEMENT OF THE CASE

Petitioner Jonathan Mota was charged with Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a); use of a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c); and the killing of a human being during a crime of violence, in violation of 18 U.S.C. § 924(j). (ER 226-32.)[1] A fourth charge, possession of a firearm by a felon, was severed and later dismissed on the government's motion. (C.R. 422 at 3.)

Petitioner moved to dismiss the Hobbs Act robbery count as well as the 18 U.S.C. §§ 924(c) and 924(j) counts for which Hobbs Act robbery served as a predicate

[1] "ER" stands for the "Excerpts of Record" that were submitted alongside the opening brief before the Ninth Circuit. "C.R." stands for the "Clerk's Record," and the numbers follow it correspond to the district court's docket entries.

"crime of violence." (App. 9-12, 20-26.) He argued that, because the isolated robbery of a local convenience store did not have a "substantial impact" on interstate commerce, his federal prosecution violated the Commerce Clause. (App. 20-26; *see also* App. 9-12.) In opposing the motion, the government argued that only a "probable" or "potential" "de minimis" impact was required, under controlling Ninth Circuit authority, and that the victim store owner's statement to law enforcement approximating $62,000 in lost sales satisfied this standard. (App. 13-19.) The district court denied the motion, finding that "the actions alleged in the indictment had an at least potential or de minimis impact on interstate commerce." (App. 7.)

Evidence at trial established that Petitioner robbed a local Northern California convenience store and gas station at gunpoint. When one of the clerks attempted to stop the robbery, Petitioner fatally shot him. Petitioner then fled with the cash register, which contained approximately $200. (*See* C.R. 340 at 72-76; C.R. 345 at 484-92, 503.)

The owner of the convenience store testified that the store served 1,000 customers a day, of which perhaps 15-20% were from out-of-state. (C.R. 345 at 421.) The store purchased its gasoline from Texas. (*Id.* at 424.) Gas sales made up approximately 53% of its business. (*Id.*) Some of the food products sold in the store were also purchased from out-of-state companies. (*Id.* at 424-25.) The crime scene

was taped off after the shooting, but there was no evidence at trial concerning the length of any store closure or whether sales were lost.[2]

The trial court instructed the jury that, in order to convict Petitioner of Hobbs Act robbery, it had to find that "commerce from one state to another was affected in some way" but that "[o]nly a de minimis effect on interstate commerce is required . . . , and the effect need only be probable or potential, not actual." (App. 6.) The jury convicted Petitioner on all three counts (ER 54-56), and he was sentenced to life in prison plus ten years (ER 2).

On appeal, the Ninth Circuit found the 18 U.S.C. §§ 924(c) and 924(j) convictions to be multiplicitous and remanded for the district court to vacate the § 924(c) conviction and the 10-year sentence it carried. (App. 4-5.) The court otherwise affirmed the judgment. (App. 2-5.) A petition for rehearing and rehearing en banc was denied on May 15, 2019. (App. 1.)

REASONS FOR GRANTING THE WRIT

A. A Circuit Split Exists Regarding Whether a Hobbs Act Violation Requires an *Actual* Effect on Interstate Commerce or Merely a "Potential" or "Probable" Effect.

The Hobbs Act, 18 U.S.C. § 1951 et seq., prohibits "obstruct[ing], delay[ing], or affect[ing] commerce or the movement of any article or commodity in commerce" "in any way or degree" by robbery or extortion. 18 U.S.C. § 1951(a). Below, the Ninth Circuit rejected Petitioner's claim that an *actual, substantial* impact on

[2] Crime scene tape was put up shortly after the shooting, which occurred at 10:49 p.m. (C.R. 340 at 125), and was still up at 11:30 p.m. (*id.* at 222).

interstate commerce should be required and held instead that the Hobbs Act requires no more than "proof of a *probable or potential impact*." (App. 4 (quoting *United States v. Lynch*, 437 F.3d 902, 909 (9th Cir. 2006) (emphasis added).) Several other circuits have reached a similar conclusion. *See United States v. Rivera Rangel*, 396 F.3d 476, 482-83 (1st Cir. 2005) ("potential or subtle"); *United States v. Silverio*, 335 F.3d 183, 186 (2d Cir. 2003) ("slight, subtle or even potential"); *United States v. Urban*, 404 F.3d 754, 766 (3d Cir. 2005) ("potential"); *United States v. Brantley*, 777 F.2d 159, 162 (4th Cir. 1985) ("jurisdictional predicate . . . may be shown by proof of probabilities without evidence that any particular commercial movements were affected"); *United States v. Curtis*, 344 F.3d 1057, 1070 (10th Cir. 2003) ("potential or de minimis effect").

Other circuits, in contrast, have concluded that the Hobbs Act requires an *actual* effect on commerce. *See United States v. Williams*, 308 F.3d 833, 837-38 (8th Cir. 2002) (holding that Hobbs Act requires evidence of "actual rather than potential effect on interstate commerce" and reversing on plain error despite trial court's use of circuit's model jury instruction); *United States v. Carcione*, 272 F.3d 1297, 1301 n.5 (11th Cir. 2001) (violating Hobbs Act "requires an actual, de minimis affect"); *United States v. DiCarlantonio*, 870 F.2d 1058, 1061 (6th Cir. 1989) (requiring "actual effect on interstate commerce"); *but see United States v. Wang*, 222 F.3d 234, 237 (6th Cir. 2000) (noting that Hobbs Act requires "only a realistic

probability that [the offense] will have an effect on interstate commerce").[3] The circuit split has been recognized by at least one circuit court. *See Urban*, 404 F.3d at 765 n.3.

The circuits that require an actual, as opposed to probable or potential, impact on interstate commerce are consistent with the statutory language and legislative history of the Hobbs Act. The plain language of the Hobbs Act contemplates an actual effect: it penalizes an individual who "obstructs, delays, or affects commerce" in any degree. 18 U.S.C. § 1951(a). The verbs "obstructs," "delays," and "affects" are action verbs; they have no qualifiers. *See Taylor v. United States*, 136 S. Ct. 2074, 2084 (2016) (Thomas, J., dissenting) ("The Act uses active verbs . . . to describe how a robbery must relate to commerce, making clear that a defendant's robbery must affect commerce."). That any *degree* of impact is sufficient according to the statute, *see* 18 U.S.C. § 1951(a), does not mean that the impact need not actually occur. The text of the statute is unambiguous.

Even if the text were ambiguous, however, the Ninth Circuit's "probable or potential" impact test runs counter to the legislative history of the Hobbs Act. *See United States v. McFarland*, 311 F.3d 376, 387 (5th Cir. 2002) (Garwood, Jolly, Higginbotham, Jones, Smith, Barksdale, Demoss, and Clement, JJ., dissenting)

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[3] Even in the Fifth Circuit, where a potential impact has been held sufficient, the question has produced discord among the bench. *E.g.*, *United States v. Hebert*, 131 F.3d 514, 530 (5th Cir. 1997) (DeMoss, J., dissenting) ("[T]he government's theories of 'de minimis effect on interstate commerce' resulting from 'depletion of assets' and 'frustration of potential future sales' are nothing but semantical camouflage intended to obscure the fact that the robberies in this case did not 'obstruct, delay or affect' interstate commerce.").

("Th[e] legislative history strongly suggests to us that Congress in enacting the Hobbs Act was concerned with protecting against relatively direct obstruction . . . ."). The House debates of 1945 demonstrate that Congress's goal in enacting the Hobbs Act (and its predecessor, the Anti-Racketeering Act of 1934) was to curtail what was then a common occurrence: literal highway robbery involving teamsters holding up farmers' trucks as they approached urban centers and demanding payment for unnecessary "services." Congress intervened to protect the right of farmers to travel the nation's highways with their goods, unimpeded by extortionist threats or robbery. *See, e.g.*, 91 Cong. Rec. 11909 (Rep. Sumner: "This bill is . . . against anybody waylaying farmers bringing their produce to market, for instance, and robbing them, forcing them to turn over their money on demand . . . ."); *id.* at 11912 (Rep. Hobbs: "The sole and simple purpose, the single purpose, of this bill is to do the best we can to protect interstate commerce and free the highways and streets of this country of robbers."). In other words, the law was prompted by a need to better police activities that were directly—and therefore actually—impacting the movement of goods in interstate commerce.

The legislative history also makes clear that Congress did not intend to criminalize extortion or robbery except where those criminal offenses were directed at disrupting the flow of goods across state lines. *See* 91 Cong. Rec. 11912 (Rep. Hobbs: "[The bill] will do the job it is meant to do, which is to prevent interference with interstate commerce by robbery or extortion. That is all we are shooting at."). Some members of Congress were explicitly concerned about interfering with the

States' police power or historical right to prosecute robbery and extortion. *See id.* at 11909-10. They were reassured by promises that only those robberies and racketeering schemes aimed at impacting interstate commerce would fall within the statute's reach. *See id.* at 11910 (Mr. Granger: "This applies only to interstate commerce, does it not?" Mr. Springer: "It applies to interstate commerce."); *id.* at 11911 (remarks of Rep. Jennings: "It is true that the statutes of most states denounce robbery and extortion as crimes but this act is peculiarly appropriate because these offenses many times are committed at State lines and many, in the perpetration and consummation of the crime, cross and recross State lines."). In other words, Congress anticipated that the Hobbs Act would only criminalize robbery and extortion attempts aimed at, and actually affecting, interstate commerce. A "probable or potential" effect would not have provided federal jurisdiction over an otherwise run-of-the-mill local robbery.

This case is an appropriate vehicle for this Court to clarify that violating the Hobbs Act requires that the defendant's actions produce an actual effect or impact on interstate commerce. There was no evidence at Petitioner's trial of any actual impact or effect on interstate commerce. While the store owner testified in general terms about the percentages of his merchandise that originated from out-of-state (C.R. 345 at 421-25), he did not testify about any lost sales—or any other economic impact—resulting from the robbery and homicide. If the Ninth Circuit, like the Eighth and Eleventh Circuits and at least one panel of the Sixth Circuit, had required an actual effect on interstate commerce, Petitioner would not have been

convicted. *See Williams*, 308 F.3d 833; *Carcione*, 272 F.3d 1297; *DiCarlantonio*, 870 F.3d 1058. This Court should grant the petition for certiorari and resolve the circuit split.

B. Applying the Hobbs Act to a Local Convenience Store Robbery that Did Not Substantially Affect Interstate Commerce Violates the Commerce Clause, and the Ninth Circuit's Contrary Decision Conflicts with this Court's Precedent.

The Hobbs Act's scope extends to the limit of Congress's authority under the Commerce Clause. *See Stirone v. United States*, 361 U.S. 212, 215 (1960); *Taylor v. United States*, 136 S. Ct. 2074, 2079 (2016). In *United States v. Lopez*, 514 U.S. 549 (1995), however, this Court identified just three categories of activity that Congress may lawfully regulate under its commerce power: the "channels of interstate commerce," the "instrumentalities of interstate commerce," and "those activities that substantially affect interstate commerce." *Id.* at 558-59.

With respect to the third category, the Court noted that it had previously upheld numerous laws regulating economic activity that substantially affected interstate commerce. *Id.* at 559-60. However, it struck down a section of the Gun-Free School Zones Act of 1990 in *Lopez* on the basis that it was a "criminal statute that by its terms ha[d] nothing to do with 'commerce' or any sort of economic enterprise," and had no jurisdictional element requiring an effect on interstate commerce for prosecution. *Id.* at 561-62. Several years later, the Court also found that a statute providing civil remedies for victims of gender violence exceeded Congress's Commerce Clause authority. *United States v. Morrison*, 529 U.S. 598, 617-20 (2000). In *Morrison*, furthermore, the Court specifically rejected the idea

that the indirect economic effects of noneconomic violent crimes could be aggregated, under *Wickard v. Filburn*, 317 U.S. 111, 125 (1942), such that they would come within *Lopez*'s third category. *See Morrison*, 529 U.S. at 617-18.

In *Taylor v. United States,* 136 S. Ct. 2074 (2016), this Court applied *Lopez*'s "substantially affects" test to a Hobbs Act prosecution involving the robbery of locally produced marijuana and local drug proceeds. This Court had previously held that drug production, possession, and distribution "constitute a 'class of activities' that in the aggregate substantially affect interstate commerce" under *Lopez*. *See Gonzalez v. Raich*, 545 U.S. 1, 17 (2005). Accordingly, in *Taylor*, the Court held that Congress's authority under the Commerce Clause allowed it to prosecute even purely local robberies if they *involved the drug trade*. 136 S. Ct. at 2080-82. The Court warned, however, that the decision did not address "what the Government must prove to establish Hobbs Act robbery where some other type of business or victim is targeted." *Id.* at 2082.

Below, the Ninth Circuit held that *Lopez*'s "substantially affects" requirement applies only to *intra*state activity, and that Congress may validly regulate *inter*state activity so long as it has a "de minimis" impact on commerce. (App. 4 ("[Our] precedent forecloses [Petitioner]'s argument that the Hobbs Act as applied in this case violates the Commerce Clause. *United States v. Atcheson*, 94 F.3d 1237, 1242 (9th Cir. 1996). *Taylor v. United States*, 136 S. Ct. 2074 (2016), does not undermine this conclusion, because unlike this case and *Atcheson*, *Taylor* dealt with purely intrastate activity.").) In doing so, the Ninth Circuit essentially crafted a fourth

category of activity that Congress may regulate, beyond the three categories identified by this Court in *Lopez*—i.e., "interstate activity" that does not impact the channels or instrumentalities of interstate commerce but that nonetheless needs only have a de minimis impact upon it.

The Ninth Circuit's approach is in direct conflict with *Lopez*, which established an exhaustive, *finite* list of the three categories of activity capable of regulation under the Commerce Clause. *See* George D. Brown, *Constitutionalizing the Federal Criminal Law Debate:* Morrison, Jones, *and the ABA*, 2001 U. ILL. L. REV. 983, 1019 (2001) ("[T]he de minimis approach . . . is clearly at variance with the spirit of [*Lopez*]."). Simply put, for *Lopez*'s third category, if the activity in question does not *substantially* affect interstate commerce, Congress may not regulate it. *See Lopez*, 514 U.S. at 561-62; *Morrison*, 529 U.S. at 617 (rejecting application of aggregation principle to "non-economic, violent crime" and holding that statute providing civil remedies for victims of gender violence exceeded Congress's Commerce Clause authority). And there is no fourth category, despite the Ninth Circuit's attempt to create one.

This case represents an appropriate vehicle for the Court to clarify that applying the Hobbs Act to an activity that does not *substantially* affect interstate commerce—whether alone or, if economic in nature, when aggregated with other instances of like conduct—violates the Commerce Clause. The robbery in this case was a local one. Any connection to interstate commerce was indirect and highly attenuated at best—that is, there was evidence that the store procured goods for

sale from out-of-state and served out-of-state customers, but there was no evidence at trial of any actual lost sales or reduced inventory purchases. (*See* C.R. 345 at 421-25.)

Furthermore, unlike in *Taylor*, where a previous decision of this Court firmly established that drug trafficking activities substantially affect interstate commerce in the aggregate, this Court's decisions do *not* support aggregating the effects of generic retail robberies—i.e., "non-economic, violent crime." *Morrison*, 29 U.S. at 617; *see also McFarland*, 311 F.3d at 377-424 (Garwood, Jolly, Higginbotham, Jones, Smith, Barksdale, Demoss, and Clement, JJ., dissenting) (explaining why various arguments for aggregating effect on interstate commerce of isolated Hobbs Act robberies fail); *United States v. Hickman*, 179 F.3d 230, 231-43 (5th Cir. 1999) (Higginbotham, Jolly, Jones, Smith, Duhe', Barksdale, Garza, and DeMoss, JJ., dissenting) (same); *United States v. Harrington*, 108 F.3d 1460, 1476 (D.C. Cir. 1997) (Sentelle, J., dissenting) (explaining that aggregating retail robberies to permit prosecution under Hobbs Act raised serious constitutional concerns). But in any event, the Ninth Circuit's rule is not based upon an aggregate effect but rather upon the creation of an exception to the "substantial effect" test for interstate activity. No such exception exists.

Because the isolated local retail robbery in this case did not fall within any of the three categories of activity that *Lopez* held Congress could validly regulate under the Commerce Clause, Petitioner's convictions cannot stand. This Court should grant the petition for certiorari and clarify that Congress's authority to

regulate commerce does not extend to activities that have only a "de minimis" impact on interstate commerce.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DATED: October 15, 2019

By: _____
ELIZABETH RICHARDSON-ROYER
Attorney-at-Law*

Attorney for Petitioner
**Counsel of Record*

APPENDIX

FILED

MAY 15 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JONATHAN MOTA, Defendant-Appellant.	No. 16-10468 D.C. No. 4:13-cr-00093-JST-1 Northern District of California, Oakland ORDER

Before: McKEOWN, W. FLETCHER, and MURGUIA, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing and rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

NOT FOR PUBLICATION

FILED

FEB 20 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JONATHAN MOTA, Defendant-Appellant.	No. 16-10468 D.C. No. 4:13-cr-00093-JST-1 MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Jon S. Tigar, District Judge, Presiding

Submitted February 13, 2019**
San Francisco, California

Before: McKEOWN, W. FLETCHER, and MURGUIA, Circuit Judges.

Jonathan Mota appeals from his convictions under 18 U.S.C. §§ 1951(a), 924(c), and 924(j)(1). We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742, and affirm in part and reverse in part.

The district court did not abuse its discretion by restricting Mota's access to

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

a pen during pretrial proceedings. *See United States v. Shryock*, 342 F.3d 948, 974–75 (9th Cir. 2003) (reviewing trial court's security measures for abuse of discretion). The district court appropriately based this security measure on the charges against Mota and consultation with the United States Marshals Service ("USMS"). *See id.* at 975 (finding "allegations of extraordinarily violent crimes" an appropriate basis for security measures); *United States v. Collins*, 109 F.3d 1413, 1418 (9th Cir. 1997) (finding advice from the USMS an appropriate basis for security measures).

Nor did failing to order the government to give more advance notice of its witnesses and evidence violate Mota's right to self-representation. Even if the lack of notice, combined with restrictions on Mota's access to trial materials while incarcerated, affected his ability to prepare a defense, we have previously upheld comparable restrictions. *See United States v. Robinson*, 913 F.2d 712, 717–18 (9th Cir. 1990).

Even if the jury instructions for Count One permitted the jury to convict for Hobbs Act extortion, rather than robbery (the conduct charged in the indictment), Mota's constructive amendment argument fails on plain error review. *See United States v. Hartz*, 458 F.3d 1011, 1019 (9th Cir. 2006) (reviewing constructive amendment claim not raised before the district court for plain error). The jury could not have found that Forrest Seagrave consented to Mota taking property,

when Seagrave was attempting to stop the crime up until the moment he was fatally shot. *United States v. Ward*, 747 F.3d 1184, 1191 (9th Cir. 2014) (noting that constructive amendment claims fail "when no evidence was introduced at trial that would enable the jury to convict the defendant for conduct with which he was not charged."). The jury instructions for Count Three did not constructively amend the indictment, because the indictment did not specify that the murder being charged was felony murder.

Ninth Circuit precedent forecloses Mota's argument that the Hobbs Act as applied in this case violates the Commerce Clause. *United States v. Atcheson*, 94 F.3d 1237, 1242 (9th Cir. 1996). *Taylor v. United States*, 136 S. Ct. 2074 (2016), does not undermine this conclusion, because unlike this case and *Atcheson*, *Taylor* dealt with purely intrastate activity. *See Taylor*, 136 S. Ct. at 2078–79. We have also previously rejected the argument that the Hobbs Act requires more than "proof of a probable or potential impact on interstate commerce." *United States v. Lynch*, 437 F.3d 902, 909 (9th Cir. 2006) (internal quotation marks omitted).

Because conviction under 18 U.S.C. § 924(j)(1) requires proof the defendant also violated 18 U.S.C. § 924(c), Mota's conviction for both offenses is multiplicitous. *United States v. Davenport*, 519 F.3d 940, 943 (9th Cir. 2008).

We therefore remand with instructions to vacate Mota's conviction and sentence on Count Two, the lesser charge. *United States v. Jose*, 425 F.3d 1237,

1247 (9th Cir. 2005) (when conviction on a lesser-included offense violates the Double Jeopardy Clause, district court should vacate the sentence and conviction on the lesser offense). We affirm in all other respects.

AFFIRMED in part, VACATED in part, and REMANDED.

INSTRUCTION NO. 29

ROBBERY AFFECTING INTERSTATE COMMERCE

Defendant is charged in Count One with committing robbery affecting interstate commerce in violation of Section 1951 of Title 18 of the United States Code. In order for the defendant to be found guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant induced Forrest Seagrave, an employee of the Mount Konocti Gas and Mart to part with property by the wrongful use of actual or threatened force, violence, or fear;

Second, the defendant acted with the intent to obtain property; and

Third, commerce from one state to another was affected in some way.

Only a *de minimis* effect on interstate commerce is required to establish jurisdiction for these charges, and the effect need only be probable or potential, not actual.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

JONATHAN MOTA,

Defendant.

Case No. 13-cr-00093-JST-1

ORDER DENYING MOTION TO DISMISS COUNTS ONE, TWO AND THREE

Re: ECF No. 39

Defendant Jonathan Mota is charged with four felony offenses, including a robbery affecting interstate commerce in violation of 18 U.S.C. § 1951(a), use and possession of a firearm during the alleged robbery in violation of 18 U.S.C. § 924(c), and use of a firearm causing murder during the alleged robbery in violation of 18 U.S.C. § 924(j). Superseding Indictment, ECF No. 19. Defendant has moved to dismiss those three counts on the grounds that there is no federal jurisdiction over the conduct alleged. ECF No. 39.

Defendant acknowledges that under current Ninth Circuit precedent, the United States need only show a "probable[,] . . . potential," or even simply "*de minimis*" effect on interstate commerce to fulfill the jurisdictional element of the Hobbs Act. United States v. Lynch, 437 F.3d 902, 909 (9th Cir. 2006) (en banc); United States v. Rodriguez, 360 F.3d 949, 955 (9th Cir. 2004).

The United States has submitted undisputed evidence demonstrating that the actions alleged in the indictment had an at least potential or *de minimis* impact on interstate commerce. See Declaration of Special Agent Long ¶¶ 2-4 ECF No. 47-1 (attesting to the fact that the store which was allegedly robbed sold goods which traveled from out-of-state, that currency was taken from the cash register after the robbery, and that the store was closed for four days as a direct result of the alleged robbery). Defendant does not dispute that the acts alleged have an at least

potential, or *de minimis* effect on interstate commerce.

Consequently, the motion to dismiss is DENIED.

IT IS SO ORDERED.

Dated: October 25, 2013

JON S. TIGAR
United States District Judge

United States District Court
Northern District of California

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. JONATHAN MOTA, Defendant.	No. CR 13- 0093 JST Hon. Jon S. Tigar Date: October 25, 2013 Time: 10:00 a.m.

DEFENDANT'S REPLY BRIEF IN SUPPORT OF
MOTION TO DISMISS COUNTS ONE, TWO AND THREE

Defendant acknowledges that the "*de minimis*" test is the current standard in the Ninth Circuit for determining if an alleged robbery affects interstate

commerce, and thus violated the Hobbs Act. That does not mean, however, that the "de minimis" test is the constitutionally correct standard in light of congressional intent and basic notions of federalism.

The position that this Court finds itself in was eloquently described by Circuit Judge Suhrheinrich of the United States Court of Appeals for the Sixth Circuit in a concurring opinion in the case of *United States v. Baylor*, 517 F.3d 899, 903-04 (6th Cir. 2008). In *Baylor,* the defendant was convicted under the Hobbs Act of robbing a Little Caesar's pizza chain store of $538. He appealed on the sufficiency of the evidence as to whether the robbery sufficiently affected interstate commerce. The Sixth Circuit affirmed the conviction, applying the *de minimis* test. Judge Suhrheinrich's concurring opinion, in abbreviated form, stated:

> I concur because the majority's decision is consistent with the law of this Circuit and most other circuits, and is thus correct. However, I think those decisions are inconsistent with the recent Supreme Court precedent, and more fundamentally, the doctrine of federalism.
>
> In *United States v. Lopez,* the Supreme Court held that to fall within the scope of the Commerce Clause, the regulated activity must substantially affect interstate commerce. *United States v. Lopez,* 514 U.S. 549, 559 (1995). . . . By continuing to allow a de minimis standard for individual violations of the Hobbs Act, we are essentially nullifying the "substantial effect" test of Lopez and Morrison.
>
> The effect of our Court's rulings is that every local robbery of a business in the United States is a federal crime. I acknowledge that the Supreme Court has held that Congress intended to include within the scope of the Hobbs Act conduct that was already punishable under the state robbery and extortion statutes. *See United States v. Culbert,* 435 U.S. 371, 379-80, 98 S.Ct. 1112, 55 L.Ed.2d 349 (1978). However, I cannot believe that this is what the Founding Fathers intended. Moreover, I have harbored the hope that the Supreme Court in *Lopez* was seeking to restore a proper state-federal balance that gives actual meaning to the term federalism. I also hope that the Supreme Court will consider the issue of whether the *de minimis* test survives *Lopez* and *Morrison.*

United States v. Baylor, supra, at 517 F.3d 903-04.

Perhaps somewhat less eloquent, but more to the point, is a district court opinion granting a judgment of acquittal in a trial of a Hobbs Act violation. "This court can see how breathing or spending a buck could be said to affect commerce, but such actions would be too remote to constitue interference with commerce, that is unless *everything* that moves or breathes is automatically deemed to affect commerce, making any proof redundant." *United States v. Waters*, 850 F.Supp 1550, 1562 (N.D.Ala. 1994).

Indeed, the *de minimis* test applied to Hobbs Act violations has indeed resulted in every robbery of a local business in the United States becoming a federal crime. Moreover, the logical extension of the *de minimis* test means that every street robbery involving the snatching of a cell phone or an Ipad is potentially a Hobbs Act federal robbery, since these devices are commonly used in interstate commerce. Such scenarios clearly exceed both the congressional intent of the Hobbs Act statute as well as basic federalism notions of reserving the police power to the states.

As a result, the government is using this *de minimis* jurisdictional doctrine to prosecute Jonathan Mota in federal court in a case that is clearly a matter for state authorities. There is no organized crime aspect to this case, nor is this a case involving criminal activity across state lines or as part of a series of robberies. There is no extortion of a large interstate corporation, or in any other way a direct and substantial interference in interstate commerce. There is, however, an enormous cost to the federal court system to have this local robbery and murder case prosecuted in federal court. If the government authorizes this case for capital prosecution, as it threatens to do, then the burden placed on CJA funds and the Court's time will be enormous.

Although defendant acknowledges that this Court may be bound by Ninth Circuit precedent to allow this prosecution to go forward, defendant nonetheless

submits that the appropriate and constitutionally correct action to be taken in this case would be to dismiss Counts One through Three of the indictment and send this case back to state court, where it belongs.

Dated: October 11, 2013

Respectfully Submitted,

/s/ Richard B. Mazer

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. JONATHAN ANTONIO MOTA, Defendant.	CASE NO. 13-CR-93-JST UNITED STATES' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS Date: October 25, 2013 Time: 2:00 p.m.

The United States opposes the defendant's motion to dismiss Counts One through Three of the Superseding Indictment. Defendant relies principally upon academic articles and dissents in support of his legal argument that the conduct at issue in this case does not affect interstate commerce. Binding Ninth Circuit precedent that is directly on point, however, forecloses the relief he seeks.[1] As explained

[1] The government understands that the defendant may simply be preserving this issue for appeal.

below, to convict the defendant of the Hobbs Act robbery charged in Count One the government need show only a potential, de minimus impact on interstate commerce and no more. And as further explained below, the facts of this case easily support a potential de minimus impact on interstate commerce.

FACTUAL BACKGROUND

Counts One through Three of the Superseding Indictment the grand jury returned in this case charge that on January 18, 2013, the defendant committed an armed robbery and murder at the Mount Konocti Gas and Mart. The Mount Konocti Gas and Mart (the "store") is a gas station and convenience store that acquires a large percentage of its goods through interstate commerce. *See* Special Agent Long Decl. (attached hereto as Exhibit A) ¶ 2. First, the store's oil and gasoline supply that it offers for sale comes from outside the state of California, from Texas. *Id.* In addition, the store purchases and makes available for resale to the public certain goods that travel interstate. *Id*. For example, the store offers cigarettes, foodstuffs, and beverages that come from outside the state of California from various others states. *Id*.

During the course of the January 18, 2013 robbery and murder, which took the life of Forrest Seagrave, the defendant took approximately $250 dollars from the store's cash register. *Id.* ¶ 3. That cash has not been recovered. This robbery and murder caused the store to close for the rest of the night and for the next four days, thereby impacting the general public's ability to shop at the Mount Konocti Gas and Mart. *Id*. ¶ 4. The store's owner estimates that this closure cost him tens thousands of dollars of revenue, and approximates the amount of lost revenue was $62,000.00. *Id.*

ARGUMENT

I. THE GOVERNMENT NEED ONLY DEMONSTRATE A POTENTIAL DE MINIMUS IMPACT ON INTERSTATE COMMERCE TO SUSTAIN A HOBBS ACT CONVICTION

To convict a defendant of a Hobbs Act robbery and murder, the government does not need to prove an *actual* impact on interstate commerce. It certainly does not need to prove, as the defendant contends, a "clear and direct interstate commerce connection." *See* Deft's Motion at 6. Rather, the Ninth Circuit has held that the crime in question must have only produced a "probable or potential" "de minimis" impact on interstate commerce. *United States* v. *Lynch*, 437 F.3d 902, 909 (9th Cir. 2006) (en banc) ("The government need not show that a defendant's acts actually affected interstate commerce … [t]he interstate nexus requirement is satisfied by proof of a probable or *potential* impact on interstate commerce.") (emphasis added); *United States v. Rodriguez*, 360 F.3d 949, 955 (9th Cir. 2004) ("It is well-established that the government need only show a *de minimis* effect on interstate commerce to fulfill the jurisdictional element of the Hobbs Act") (emphasis added).

Following these authorities, numerous cases have held that the robbery of a single convenience store which acquires some of its goods from out of state sufficiently affects interstate commerce to meet the de minimus requirement. *See e.g., United States v. Bellamy*, No. 12-10270, 2013 WL 1247646 (9th Cir. Mar. 28, 2013) (unpub). *See also United States v. Guerra*, 164 F.3d 1358, 1361 (11th Cir. 1999) (de minimus impact established when the defendant "[stole] some $300 in cash from … an Amoco service station that was part of a nationwide network of gas stations and primarily sold fuel products drawn from outside the state"); *United States v. Paredes*, 139 F.3d 840, 844 (11th Cir. 1998) (de minimus impact established when the defendants robbed "two local convenient stores that [acquired some of their goods from out of state but were] not connected to out-of-state stores, located hundreds of miles from the nearest other state … [and] there [was] no evidence that *most* of the merchandise, or even a substantial part, [was] from outside of Florida."); *see also United States* v. *Carr*, 652 F.3d 811, 812 (7th Cir. 2011); *United States* v. *McAdory*, 501 F.3d 868, 871 (8th Cir. 2007) ("Robberies from small

commercial establishments qualify as Hobbs Act violations so long as the commercial establishments deal in goods that move through interstate commerce.").

The defendant's motion acknowledges the Ninth Circuit's decision in *Lynch* but attempts to distinguish it by noting that "a closer examination of the facts distinguish it from the present case" because in *Lynch* there was a "clear and direct interstate commerce connection to the robbery." *See* Deft's Motion at 6. However, the defendant's motion does not address the Ninth Circuit's more recent decision in *Bellamy* that rejected a challenge similar to the one the defendant makes here. *Bellamy* involved a case where the defendant stole $135 from a convenience store that obtained its inventory from out of state sources, but the stolen money was returned to the store within an hour of the robbery. The defendant in that case challenged the jurisdiction of the federal court on grounds there was not a sufficient tie to interstate commerce. *Bellamy* rejected that argument, and held that the de minimus impact was nonetheless established where the store obtained inventory from out of state sources.

As set forth in the factual background above, the government will prove at trial that the Mount Konocti Gas and Mart acquired a substantial percentage of its goods from out of state during the relevant timeframe of the January 18, 2013 robbery and murder. This included oil and gasoline that traveled from outside the state, and it also included products the store made available for sale to include foodstuffs, cigarettes and beverages. In fact, the government intends to prove that the impact in this case was more than just potential: Given that the store was forced to close for a prolonged period during the investigation, thereby closing down the store to customers and unable to sell its goods that traveled interstate, an actual impact on interstate commerce will be demonstrated. Given the binding precedent on facts that are even less compelling than these, the government has demonstrated that dismissal of Counts One through Three of the Superseding Indictment is unwarranted.

CONCLUSION

Because the government has alleged facts in the Superseding Indictment sufficient to establish that the defendant's crime produced a potential de minimus impact on interstate commerce, it respectfully requests the Court deny the defendant's motion to dismiss.

DATED: September 27, 2013

Respectfully submitted,

MELINDA HAAG
United States Attorney
/S/

KATHRYN HAUN
WILLIAM FRENTZEN
Assistant United States Attorneys

EXHIBIT A

DECLARATION OF SPECIAL AGENT LONG

I, ATF Special Agent Megan Long, declare as follows under penalty of perjury:

I am employed by the ATF as an ATF Special Agent since 2005 assigned to the San Francisco Field Division. I am the lead case agent assigned to the investigation and prosecution of a Hobbs Act robbery and murder that occurred on January 18, 2013, in the Northern District of California involving defendant Jonathan Mota. I have also received specialized training in investigations and prosecutions brought under the Hobbs Act, which is robbery affecting interstate commerce.

1. As part of my investigation I met with the owner of the Mount Konocti Gas & Mart ("store") that is located in Kelseyville, California. That store was the scene of the robbery and murder charged in this case. I have obtained and reviewed records received pursuant to a grand jury subpoena that concern the goods and services that the store purchased and made available for resale to the customers. For example, I reviewed numerous Bills of Lading for the timeframe of late 2012 and early 2013 to include January 18, 2013.

2. Those records show, for example, that the store received gasoline deliveries shipped from Houston, Texas to California during the specified timeframe. They also show that other supplies, to include multiple brands of cigarettes, foodstuffs, and beverages were purchased by the store for resale to the public that traveled from outside the state of California to the store, which is located in California. The store acquires a large percentage of its goods through interstate commerce and from outside the state of California.

3. During the robbery that occurred at the store on January 18, 2013, cash was removed from the cash register by the robber. Approximately $250 in currency was taken. The currency was not recovered.

4. The robbery and murder that occurred at the store on January 18, 2013, caused the store to close. In fact, the store was closed for approximately 4 days as a result of the robbery and murder, and accompanying investigation.

5. During the time the store was closed the public was not able to shop there and purchase the goods, to include gasoline, which had traveled in interstate commerce. I have spoken with the owner of the store, and he approximates that he lost tens of thousands of dollars (approximately $62,000.00) in revenue during that period due to the closure.

I declare under penalty of perjury that the forgoing is true and correct.

Executed this 27 day of September 2013

AGENT MEGAN LONG

ATF

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Attorney for Defendant
JONATHAN MOTA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. JONATHAN MOTA, Defendant.	No. CR 13- 0093 JST Hon. Jon S. Tigar Date: October 25, 2013 Time: 10:00 a.m.

DEFENDANT'S NOTICE OF
MOTION TO DISMISS COUNTS ONE TWO AND THREE

TO: CLERK OF DISTRICT COURT; PLAINTIFF UNITED STATES OF AMERICA; AND TO ASSISTANT U.S. ATTORNEY KATHRYN R. HAHN AND WILLIAM FRENTZEN, ATTORNEYS FOR PLAINTIFF;

Please take notice that on October 25, 2013, at 10:00 a.m., in the courtroom of United States District Judge Jon S. Tigar, or as soon thereafter as counsel may be heard, defendant Jonathan Mota, by and through his attorney Richard B. Mazer, will and hereby does move the Court to order that Counts One, Two and three of the indictment be dismissed with prejudice.

This motion is made pursuant to Fed.R.Crim.P. 12(b), and for the reason that there is no jurisdiction over the conduct alleged because an isolated robbery and murder of a clerk in a convenience store in rural Northern California is not a robbery that affects interstate commerce, and is therefore a state, not a federal, crime.

II. STATEMENT OF THE CASE AND FACTS

Defendant Jonathan Mota is charged by superseding indictment in this case with four felony offenses (document no. 19). Count One charges him with a robbery affecting interstate commerce in violation of 18 U.S.C. § 1951(a), allegedly occurring on January 18, 2013. Count Two charges him with use and possession of a firearm during the robbery charged in Count One, in violation of 18 U.S.C. § 924(c). Count Three charges Mr. Mota with use of a firearm causing murder during the robbery charged in Count One, in violation of 18 U.S.C. § 924(j). Count Four charges Mr. Mota with being a felon in possession of a firearm and ammunition, a Zastava 7.62 firearm, in violation of 18 U.S.C. § 922(g). Mr. Mota has pleaded not guilty to all charges.

Count One is the essential charge to establish federal jurisdiction over this case. It charges:

> On or about January 18, 2013, in the Northern District of California, the defendant, Jonathan Mota, unlawfully and knowingly did obstruct, delay, and affect commerce and commodities in commerce by robbery, as that term is defined in Title 18, United States Code, Section 1951(b)(1), all in violation of Title 18, United States Code, Section 1951(a).

Counts Two and Three are charges that incorporate the charge in Count One, a robbery affecting commerce, in order to establish jurisdiction for those additional offenses as federal crimes.

III. ARGUMENT

A. APPLICABLE LAW

The Supreme Court has consistently recognized that the Constitution imposes real limits on federal power. See *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991); *Marbury v. Madison*, 1 Cranch 137, 176, 2 L.Ed. 60 (1803) (opinion for the Court by Marshall, C.J.) ("The powers of the legislature are defined, and limited")The Court has held that the Constitution "withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation." *United States v. Lopez*, 514 U.S. 549, 566 (1995). In *Lopez*, the Court sought impose limits on Congress' enumerated "[p]ower ... [t]o regulate Commerce ... among the several States." U.S. Const., Art. I, § 8, cl. 3. *Lopez* marked the first time in half a century that the Supreme Court held that an Act of Congress exceeded its commerce power. In *Lopez*, the Court identified three categories of activity that Congress' commerce power authorizes it to regulate: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) "activities having a substantial relation to interstate commerce ... i.e., those activities that substantially affect interstate commerce." *Lopez, supra,* 514 U.S., at 558–559. Emphasizing that they were unwilling to "convert congressional authority under the Commerce Clause to a general police power," *id.* at 567, the Court struck down a ban on the possession of firearms within a 1,000–foot radius of schools because the statute did not regulate an activity that "substantially affect[ed]" interstate commerce, id., at 561, 115 S.Ct. 1624.

Five years after *Lopez*, the Supreme Court reaffirmed the *Lopez* "substantial effects" test in *United States v. Morrison*, 529 U.S. 598 (2000). The Court rejected Congress' attempt to "regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce," and held

unconstitutional the civil remedy portion of the Violence Against Women Act of 1994. *Id*. at 529 U.S. 617.

In *Jones v. United States*, 529 U.S. 848 (2000), decided one week after *Morrison*, the Supreme Court held that an owner-occupied residence not being used in any commercial activity was not a "property 'used in' commerce or commerce-affecting activity" for purposes of the federal arson statute. The Court noted that *Lopez*, in conjunction with the rule of statutory interpretation requiring the avoidance of constitutionally suspect construction when at all possible, "reinforced" this limiting interpretation of the arson statute. *Id*., at 851. The Court pointed out that the *Lopez* decision "stressed that the area [regulated] was one of traditional state concern and that the legislation aimed at activity in which 'neither the actors nor their conduct has a commercial character.'" *Id*., at 858. Arson, much like guns in school zones, has traditionally been a matter of state concern and typically is noncommercial. *Id*., at 858.

Since the *Lopez* decision, several law review articles have been written suggesting that the rule of *Lopez* should be applied to Hobbs Act robbery cases. In "THE HOBBS ACT, THE INTERSTATE COMMERCE CLAUSE, AND UNITED STATES V. MCFARLAND: THE IRRATIONAL AGGREGATION OF INDEPENDENT LOCAL ROBBERIES TO SUSTAIN FEDERAL CONVICTIONS", 76 Tulane Law Review 1761 (June 2002), the writer suggested that that the Hobbs should not be applied to local isolated robberies that had a minimal, if any, connection to interstate commerce.

> Constitutionally, it is difficult to understand why possession of a firearm in a school zone with the intent to sell is not considered commercial activity by the Lopez Court, but the armed robbery of a convenience store that nets the robber only a small sum is considered commercial in nature. Furthermore, the fact patterns and logical inferences used to find an interstate effect for many Hobbs Act robberies are strikingly similar to the "attenuated" patterns rejected in Jones. A thorough analysis of the Hobbs Act as it applies to local robberies in light of Morrison should conclude that there is no

> rational basis for finding that these local robberies substantially affect interstate commerce.

Id., at 1774.

Another law review article suggesting that *Lopez* applies to Hobbs Act prosecutions is "THE HOBBS ACT AFTER LOPEZ", Vol. 41 Boston College Law Review 949 (July 2000). This law review looked to the legislative history of the Hobbs Act, which was enacted in 1946 as an amendment to the Anti-Racketeering Act of 1934, and found that the intention of the law was to address robbery and extortion by organized criminal gangs and labor unions. *Id.*, at 41 B.C.L.Rev. 956. Relying on a dissent in *United States v. Hickman*, 179 F.3d 230 (5th Cir. 1999), the article suggests a two-step approach in determining whether there is federal Hobbs Act jurisdiction over a particular crime or group of crimes.

> Applying this two-part inquiry to the Hobbs Act, as advocated by the dissent in *Hickman*, lower courts should first determine whether the extortion or robbery in question was commercial in nature. Based on the legislative history of the 1934 Act and the Hobbs Act, only organized conspiracies to commit crimes of extortion or robbery by organized criminal gangs may be considered commercial in nature. Congressional findings illustrate that extortion and highway robbery by organized gangs has a substantial effect on interstate commerce and the Hobbs Act was passed, in part, in response to the inability of state authorities to alleviate this barrier to free trade. The legislative findings regarding such conduct sufficiently demonstrate a rational basis for concluding that such activity, in the aggregate, has a substantial effect on interstate commerce. Thus, the *de minimis* effect of individual instances of the activity is of no consequence and the aggregate effect of the class of activity may be considered in determining the validity of a prosecution under the Hobbs Act.
>
> The limited scope of activities subject to prosecution under the Hobbs Act that may be considered commercial in nature is further supported by the fact that the Hobbs Act intrudes on an area of traditional state sovereignty. The Hobbs Act is a federal criminal statute and, according to the Court in *Lopez*, the states possess primary authority for defining and enforcing criminal law. Although all crime is arguably economically motivated, to hold that all extortion and robbery is commercial in nature in order to support the finding of a "substantial effect" on interstate commerce converts congressional authority under the Commerce Clause to a general

> police power. According to the Court in *Lopez*, such a federal police power violates our federal system of government.
>
> If the extortion or robbery in question was not committed by an organized criminal gang, and, based on the legislative history, therefore may not be considered commercial in nature, under the second part of the inquiry adopted in Lopez and advocated by the dissent in *Hickman*, the lower courts should determine whether the individual extortion or robbery had a "substantial effect" on interstate commerce. Although the Hobbs Act includes a jurisdictional element and is therefore facially valid, lower courts must determine whether the Hobbs Act, as applied, is constitutional. According to the Court in *Lopez*, to satisfy the jurisdictional element of the Hobbs Act, the government must make a case-by-case showing that the individual extortion or robbery in question had a "substantial effect" on interstate commerce.

Id., at 41 B.C.L.Rev. 967-69.

Defendant acknowledges that the Ninth Circuit has held that "[t]o establish the interstate commerce element of a Hobbs Act charge, the government need only establish that a defendant's acts had a de minimis effect on interstate commerce." *United States v. Lynch*, 437 F.3d 902, 908 (9th Cir.2006) (en banc). "The interstate nexus requirement is satisfied 'by proof of a probable or potential impact' on interstate commerce." Id. at 909 (quoting *United States v. Huynh*, 60 F.3d 1386, 1389 (9th Cir.1995)). Defendant submits that a closer examination of the facts in *Lynch* distinguish it from the present case. The defendants in *Lynch* stole an ATM card in Montana as the result of a robbery and murder of a drug dealer lured across state lines from Nevada to Montana, and then the ATM card was used by the robbers in Montana and elsewhere to obtain money from a bank in Nevada. Thus, *Lynch* was a case where there was a clear and direct interstate commerce connection to the robbery, and the language in the opinion regarding the potential effect on interstate commerce was irrelevant to the facts underlying that decision.

B. THIS CASE DOES NOT INVOLVE A ROBBERY AFFECTING INTERSTATE COMMERCE.

Applying the foregoing analysis suggested in these law review articles, it is apparent that the armed robbery and killing charged in Counts One through Three was not a robbery that affected interstate commerce. This was not a robbery by an organized criminal gang or a robbery constituting part of a series of robberies. No state lines were crossed to commit the crime. This was an isolated robbery by a single person of a local convenience store in which approximately $200 in cash was stolen. No ATM or credit cards were stolen or accessed during or after the crime. This robbery clearly had no substantial impact on interstate commerce. It is a state crime that should be prosecuted in state court. To extend federal jurisdiction to this robbery invokes a plenary police power that is prohibited under *United States v. Lopez, supra.*

IV. CONCLUSION

Wherefore, defendant respectfully requests the Court to grant the relief requested in this motion, and dismiss Counts One, Two and Three of trhe indictment with prejudice.

Dated: August 30, 2013

Respectfully Submitted,

/s/ Richard B. Mazer

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