

IN THE SUPREME COURT OF THE UNITED STATES

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TUAN NGOC LUONG, PETITIONER

v.

UNITED STATES OF AMERICA

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

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether sufficient evidence supports petitioner's conviction for Hobbs Act robbery, in violation of 18 U.S.C. 1951(a).

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No. 20-7998

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-35) is reported at 965 F.3d 973. The order of the district court (Pet. App. 36-50) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 2020. A petition for rehearing was denied on December 11, 2020 (Pet. App. 52). By order of March 19, 2020, this Court extended the deadline for all petitions for writs of certiorari to 150 days from the date of the lower court judgment or order denying a timely petition for rehearing. 3/19/20 Order 1. The petition for a writ

of certiorari was filed on May 7, 2021. 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 Northern District of California, petitioner was convicted of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii); and possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. 5-6. The district court sentenced him to 144 months of imprisonment, to be followed by three years of supervised release. Id. at 6. The court of appeals affirmed petitioner's convictions, but remanded for resentencing. Id. at 1-35.

1. On February 15, 2015, petitioner advertised a 1996 Acura Integra for sale on the Internet. Pet. App. 6. He posted his advertisement on a subsection of the Craigslist website, which is accessible throughout the world, on a section designated for offerings in the San Francisco East Bay area. Ibid. Joel Montellano, who lived in Hayward, California, was searching Craigslist for used cars that he could buy, fix up, and sell for a profit. C.A. E.R. 434-435, 438-439, 443, 454-455, 688-691. He saw the advertisement and arranged to meet petitioner at the Castro Valley BART train station. Pet. App. 7.

Montellano's girlfriend drove him to the BART station and waited there while petitioner and Montellano took the car for a test drive. Pet. App. 7. During the drive, Montellano agreed to buy the car, and petitioner directed Montellano to drive to petitioner's house to obtain the title. Ibid. When they arrived at petitioner's house, petitioner pointed a pistol at Montellano and demanded money. Ibid. When Montellano told petitioner that his cash was with his girlfriend at the BART station, petitioner directed Montellano to place his iPhone, his girlfriend's debit card, and his U.S. Department of Veterans Affairs medical card on the Acura. Ibid. Montellano complied and petitioner fled in the car. Ibid. Montellano ran back to the BART station, and his girlfriend called 911. Ibid.

About 30 minutes later, petitioner tried to use the stolen debit card at nearby Citibank and Bank of America ATMs, but was unable to withdraw money because Montellano had given him an incorrect PIN. Pet. App. 7-8. Two days later, police posed as potential buyers for the Acura and arrested petitioner, who was in possession of a firearm and ammunition. Id. at 8.

2. A federal grand jury in the Northern District of California returned an indictment charging petitioner with Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) (1) (A) (ii); and possessing a firearm as a felon, in violation of 18 U.S.C. 922(g) (1). Pet. App. 5.

The Hobbs Act prohibits robberies that "in any way or degree obstruct[], delay[], or affect[] commerce or the movement of any article or commodity in commerce," 18 U.S.C. 1951(a), with "commerce" defined to include "all \* \* \* commerce over which the United States has jurisdiction," 18 U.S.C. 1951(b) (3). Petitioner contested only the commerce element, Pet. App. 5, and at trial, the government presented evidence about petitioner's use of the Craigslist website and various features of that website, id. at 8. The jury found petitioner guilty of possessing a firearm as a felon but did not reach a unanimous verdict on the Hobbs Act robbery count or the Section 924(c) count. Id. at 5. Petitioner moved for judgment of acquittal on the Hobbs Act robbery and Section 924(c) counts, which the district court denied. Id. at 36. Petitioner next sought mandamus relief from the court of appeals to prevent a retrial on those counts. Id. at 36-37. The court of appeals denied the petition for a writ of mandamus. Id. at 37.

At a second trial, the government presented not only Craigslist-related evidence, but also additional evidence on the interstate-commerce element, including evidence that petitioner's attempted use of the stolen debit card caused electronic transmissions to travel to out-of-state servers. Pet. App. 5-6. The jury returned guilty verdicts on the Hobbs Act robbery and Section 924(c) counts. Id. at 6. The district court again denied a motion for judgment of acquittal, finding sufficient evidence at

either trial for a jury to find the Hobbs Act's jurisdictional element beyond a reasonable doubt. Id. at 39-41, 49-50. The court sentenced petitioner to 144 months of imprisonment, to be followed by three years of supervised release. Id. at 6.

3. The court of appeals affirmed petitioner's convictions. Pet. App. 1-35. Noting that insufficient evidence at the first trial would invalidate the convictions obtained at the second trial on double-jeopardy grounds, the court focused its discussion on the sufficiency of the evidence at petitioner's first trial. Id. at 10.

The court of appeals found that evidence sufficient to prove a nexus with interstate commerce. Pet. App. 10-17. The court stated that the Hobbs Act's interstate-commerce element requires proof that a defendant's act had at least "a de minimis effect on interstate commerce," or else "a probable or potential impact on interstate commerce." Id. at 12 (citation and internal quotation marks omitted). And it found that "[b]y using a website that facilitates interstate commerce (like Craigslist) to advertise a commercial transaction, [petitioner] necessarily affected or potentially affected 'commerce over which the United States has jurisdiction'" under the Hobbs Act. Ibid. (quoting 18 U.S.C. 1951(b)(3)).

The court of appeals explained that the evidence at petitioner's first trial established that "Craigslist is an

Internet site that facilitates commerce on a national and international level.” Pet. App. 12. The court observed that evidence included testimony that the victim previously sold a vehicle on Craigslist to a buyer in Nevada; received inquiries for other vehicles posted on the Bay Area site from potential buyers in Nevada, Texas, and Florida; and had seen car advertisements on the Bay Area site from sellers in Nevada, Oregon, Texas, Minnesota, and other States. Id. at 12-13. The court also noted evidence that the Craigslist site for Reno, Nevada contained advertisements from sellers in California and Oregon, and that local Craigslist sites allow a user to search other locations across state lines through a drop-down menu for nearby cities, such that the Bay Area site links users to the site for Reno, Nevada. Id. at 13. And the court noted the investigating agent’s testimony that he had searched Washington D.C.’s Craigslist site from the Bay Area to purchase a car before he was transferred to Washington. Ibid.

The court of appeals accordingly determined that “a jury could reasonably conclude that the Craigslist Bay Area site facilitated commercial transactions beyond the local area and operated as an interstate market for used vehicles.” Pet. App. 13. The court explained that because an interstate used-vehicle market is “commerce ‘over which the United States has jurisdiction,’” a robbery occurring during a Craigslist transaction for a used car “‘affects’” such commerce. Id. at 13-14 (quoting Taylor v. United



States, 136 S. Ct. 2074, 2077 (2016) (quoting 18 U.S.C. 1951(b)(3))). The court of appeals also reasoned that the interstate-commerce nexus would be satisfied even if Craigslist facilitated only local transactions. Pet. App. 14. The court observed that in Taylor, this Court had held that Congress's authority to regulate the intrastate marijuana market meant that intrastate marijuana theft violates the Hobbs Act. Ibid. And the court observed that "the logic employed in Taylor readily applies to the facts of this case," where petitioner "used a commercial website to advertise a commercial transaction in order to facilitate a robbery." Ibid.

The court of appeals emphasized, however, that its decision did not rest on the theory that petitioner had transmitted data over the Internet or "the mere use of any instrumentality of interstate commerce." Pet. App. 15. The court instead made clear "that the jurisdictional element is met because [petitioner]'s use of a service like Craigslist had an actual impact on interstate commerce," because "the evidence was sufficient to show that [petitioner] clearly affected interstate commerce by robbing his victim as part of a commercial transaction facilitated by a website that forms an interstate market for used cars." Id. at 15-16. And the court of appeals accordingly noted that its decision "d[id] not mean every local robbery is a Hobbs Act robbery simply because the robber touched his smart phone to check the weather or plan a

get-away route,” observing that “the Craigslist website was an integral element of the robbery, not a peripheral afterthought.” Id. at 16-17.

The court of appeals separately vacated petitioner’s sentence and remanded for reconsideration in light of an issue under the Sentencing Guidelines unrelated to his Hobbs Act challenge. Pet. App. 35 (remanding “for the district court to make a factual finding on contrition in the first instance” in connection with the potential applicability of a downward departure due to acceptance of responsibility).

#### ARGUMENT

Petitioner renews his contention (Pet. 18-25) that the evidence was insufficient to satisfy the interstate-commerce element of Hobbs Act robbery. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. And this case does not, in any event, provide a good vehicle for reviewing the question presented.

1. The Hobbs Act prohibits robbery or extortion 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” broadly to include “all \* \* \* commerce over which the United States has jurisdiction.” 18 U.S.C. 1951(b)(3). As this Court has recently observed, in Taylor v.

United States, 136 S. Ct. 2074 (2016), “[t]he language of the Hobbs Act is unmistakably broad,” reaching “any obstruction, delay, or other effect on commerce, even if small.” Id. at 2079; see, e.g., United States v. Culbert, 435 U.S. 371, 373 (1978) (observing that the words of the Hobbs Act “do not lend themselves to restrictive interpretation”); Stirone v. United States, 361 U.S. 212, 215 (1960) (observing that language “manifest[s] a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence”).

In Taylor, this Court considered whether evidence that the defendant had “target[ed] drug dealers” as his robbery victims was sufficient to satisfy the Hobbs Act’s commerce element, even if “the drug dealers he targeted might [have] deal[t] in only locally grown marijuana.” 136 S. Ct. at 2078. The Court explained that the Hobbs Act extends to all robberies that affect any of the “categories of activity that Congress may regulate under its commerce power.” Id. at 2079; see id. at 2080. The Court noted that its prior decisions had “upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature,” but observed that the sale of marijuana is “unquestionably an economic activity.” Id. at 2079–2080. And because “the market for marijuana, including its intrastate aspects is ‘commerce over which the United States has jurisdiction,’” the Court reasoned that it “follows as a simple matter of logic that a robber who

affects or attempts to affect even the intrastate sale of marijuana grown within the State affects or attempts to affect commerce over which the United States has jurisdiction." Id. at 2080 (quoting 18 U.S.C. 1951(b)(3), and citing Gonzales v. Raich, 545 U.S. 1 (2005)).

The principles articulated in Taylor resolve this case. Petitioner robbed Montellano at gunpoint during a sales transaction for a used car that petitioner initiated through a website that is accessible and in fact accessed to facilitate sales across state lines. Pet. App. 6-8. The court of appeals determined that sufficient evidence supported a finding that Craigslist "facilitates commerce on a national and international level" and "operate[s] as an interstate market for used vehicles." Id. at 12-13. An interstate market for resale of used cars that is advertised on the Internet -- unquestionably economic activity -- is a subject that "Congress may regulate under its commerce power." Taylor, 136 S. Ct. at 2079. Accordingly, "a robber who affects or attempts to affect" even an intrastate sale of a used car in that interstate market "affects or attempts to affect commerce over which the United States has jurisdiction." Id. at 2080.

Other courts of appeals have found a sufficient nexus to interstate commerce for Hobbs Act robbery in similar scenarios. See United States v. Horne, 474 F.3d 1004, 1006 (7th Cir.)

(affirming Hobbs Act robbery conviction where defendant advertised fictitious vintage cars on eBay for cash, and then robbed or attempted to rob the purchasers when they arrived to purchase the cars, because eBay is "an avenue of interstate commerce" made up of buyers and sellers "scattered around the world"), cert. denied, 551 U.S. 1123 (2007); United States v. Person, 714 Fed. Appx. 547, 550-551 (6th Cir. 2017) (affirming that Hobbs Act robbery conviction where defendant schemed to rob people selling cars through Craigslist had sufficient nexus to interstate commerce), cert. denied, 138 S. Ct. 1339 (2018). Petitioner identifies no case where a court of appeals found an insufficient nexus to interstate commerce for Hobbs Act robbery where the crime occurred during a sales transaction initiated through an online interstate marketplace.

Petitioner attempts to distinguish Taylor (Pet. 23-25; see Pet. 12) on the ground that the economic activity in that case (drug trafficking) was heavily regulated by the federal government. No such requirement exists in the Hobbs Act, nor does the reasoning of Taylor support importing one. As this Court explained, the Hobbs Act defines "commerce" to include "all \* \* \* commerce over which the United States has jurisdiction," 18 U.S.C. 1951(b)(3), and prohibits robbery that "in any way or degree \* \* \* affects commerce or the movement of any article or commodity in commerce," 18 U.S.C. 1951(a). See Taylor, 136 S. Ct. at 2080. An

interstate marketplace for used cars falls squarely within that broad definition. See Pet. App. 12-14.

Petitioner errs in asserting (Pet. 18) that the court of appeals found the interstate-commerce element of Hobbs Act robbery to be satisfied "based solely on the use of the Internet to facilitate the crime." See Pet. 21 (characterizing court of appeals' decision as authorizing Hobbs Act prosecution based on "mere use of a channel of commerce"); see also Pet. 12-15 (discussing Hobbs Act cases where defendant engaged in an interstate communication or used a channel of interstate commerce during a robbery). The court of appeals explicitly declined to rely on that theory. See Pet. App. 15 (stating that the court did "not rely on" a "data-transmission theory"); id. at 16 ("While the Hobbs Act is implicated by robberies involving commercial transactions facilitated by electronic marketplaces, this does not mean every local robbery is a Hobbs Act robbery simply because the robber touched his smart phone to check the weather or plan a get-away route."). Rather, the court determined that the jurisdictional element was satisfied here by an actual impact on interstate commerce, given that petitioner "robb[ed] his victim as part of a commercial transaction facilitated by a website that forms an interstate market for used cars." Id. at 15-16.

2. Contrary to petitioner's contention (Pet. 10-18), the decision below does not conflict with the decision of any other court of appeals.

a. Petitioner contends (Pet. 10-12) that the decision below is inconsistent with decisions of other courts of appeals addressing the application of the Hobbs Act to robberies of individuals (rather than businesses).

The courts of appeals have on occasion reversed Hobbs Act convictions where individuals, rather than businesses, were robbed and the crime had only a speculative effect on a business engaged in interstate commerce. See, e.g., United States v. Wang, 222 F.3d 234, 237-240 (6th Cir. 2000) (reversing Hobbs Act conviction for robbery of individuals in private home where a portion of the stolen funds were proceeds of the victims' business); United States v. Quigley, 53 F.3d 909, 910-911 (8th Cir. 1995) (reversing Hobbs Act conviction for robbery of individuals en route to a convenience store); United States v. Collins, 40 F.3d 95, 99-101 (5th Cir. 1994) (reversing Hobbs Act conviction for robbery of an employee of a computer company when robbery prevented him from attending a business meeting and making business calls), cert. denied, 514 U.S. 1121 (1995). Unlike those cases, however, this was not a simple robbery of an individual with merely a happenstance and tangential connection to interstate commerce to justify a Hobbs Act prosecution. See Wang, 222 F.3d at 236 (home-invasion robbery

of restaurant owners); Quigley, 53 F.3d at 909-910 (robbery of two individuals en route to purchase beer); Collins, 40 F.3d at 97-98 (home-invasion robbery). Indeed, the decision below expressly declined to hold that cases of that sort would constitute Hobbs Act robbery. See Pet. App. 16-17.

Instead, this is a case in which petitioner robbed Montellano during a "commercial transaction facilitated by a website that forms an interstate market." Pet. App. 16. Montellano was not only searching Craigslist for used cars that he could improve and resell for profit, C.A. E.R. 434-435, 438-439, 443, 454-455, 688-691, but he himself had attracted out-of-state car buyers through his own postings to the section of Craigslist that petitioner used to lure in a victim, see Pet. App. 12-13. Because Congress can regulate that interstate marketplace, robberies committed during such transactions fall under the Hobbs Act. See Taylor, 136 S. Ct. at 2079-2080. Petitioner identifies no case where a court of appeals vacated a Hobbs Act conviction in similar circumstances.

b. Petitioner further contends (Pet. 15-18) that his case "may be related in part" to a disagreement in the circuits as to whether the Hobbs Act requires the government to show an "actual" effect on interstate commerce. But any conflict on this question is not implicated here. The court of appeals determined that evidence "was sufficient to show that [petitioner] clearly affected interstate commerce by robbing his victim as part of a



commercial transaction facilitated by a website that forms an interstate market for used cars.” Pet. App. 15-16 (emphasis added). Accordingly, the court of appeals’ decision was based on its determination that petitioner’s “use of a service like Craigslist had an actual impact on interstate commerce.” Id. at 15.

In any event, the asserted conflict on this score would not merit the Court’s review. Among other things, the decisions on which petitioner relies long predate this Court’s decision in Taylor, which made clear that “proof that the defendant’s conduct in and of itself affected or threatened commerce is not needed” for a Hobbs Act robbery conviction. 136 S. Ct. at 2081. Instead, “[a]ll that is needed is proof that the defendant’s conduct fell within a category of conduct that, in the aggregate, had the requisite effect.” Ibid. And Taylor repeatedly emphasized that Congress may regulate economic activities on the basis of their effect on interstate commerce “so long as they substantially affect interstate commerce in the aggregate, even if their individual impact on interstate commerce is minimal.” Id. at 2079; see id. at 2081 (“[I]t makes no difference under our cases that any actual or threatened effect on commerce in a particular case is minimal.”); ibid. (“Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the

class.”) (citation and internal quotation marks omitted). Thus, to the extent that any substantial disagreement exists on the precise degree of connection to the commerce that the Hobbs Act requires, Taylor may resolve it.

3. Finally, this case would be a poor vehicle to analyze the question presented. First, the decision below was remanded for resentencing, and the interlocutory posture of this case “alone furnishe[s] sufficient ground for the denial” of the petition for a writ of certiorari. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); see Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967) (per curiam) (explaining that a case remanded to district court “is not yet ripe for review by this Court”). “[E]xcept in extraordinary cases, [a] writ [of certiorari] is not issued until final decree.” Hamilton-Brown Shoe Co., 240 U.S. at 258. Following the proceedings on remand, petitioner will have an opportunity to raise the claims pressed here, in addition to any claims that may arise from his resentencing, in a single petition for a writ of certiorari. See Major League Baseball Players Ass’n v. Garvey, 532 U.S. 504, 508 n.1 (2001) (per curiam). No justification exists in this case to depart from this Court’s usual practice of declining to review interlocutory petitions.

Second, review of the sufficiency of the evidence presented at petitioner’s first trial, Pet App. 10, would have little

salience for future cases. As the second trial here demonstrates, the government had, and in future cases will have, additional evidence that a robbery like the one committed by petitioner satisfies the Hobbs Act's interstate commerce element. For example, at petitioner's second trial, the government introduced evidence that petitioner's attempted use of a stolen ATM card created data transmissions to computer servers located out of state. Id. at 5-6. A decision by this Court on whether the evidence presented at petitioner's first trial was sufficient to satisfy the interstate-commerce element will be of limited practical significance.

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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