No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MARIO MARTELL SPENCER,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent*.

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

# PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Petitioner Mario Martell Spencer was convicted under the Hobbs Act—which makes it a federal crime to commit a robbery that "affects . . . commerce between points within the same State through any place outside such State," 18 U.S.C. §1951—for the robbery of a small, neighborhood mom-and-pop convenience store. The district court denied Spencer's motion for a judgment of acquittal on the basis that the conviction exceeded the Government's Commerce Clause power, notwithstanding the Government's failure to present any evidence that the robbery itself affected interstate commerce. The district court also imposed a sentencing enhancement for obstruction of justice for allegedly "unlawfully influencing a . . . witness" or attempting to do so, U.S.S.G. §3C1.1 cmt. 4, based on Spencer advising his ex-girlfriend, a potential witness, that she should "do some legal research on . . . pleading the Fifth" if the Government does not offer her anything "in exchange" for her testimony. The district court imposed the enhancement notwithstanding its determination that the ex-girlfriend should, in fact, have legal counsel advise her on her Fifth Amendment rights before testifying if the Government refused to give her immunity. The Eighth Circuit affirmed.

This petition presents the following questions:

1. For intrastate robberies that do not otherwise affect "commerce over which the United States has jurisdiction," 18 U.S.C. §1951(b)(3), does the Hobbs Act, in accordance with constitutional limits, only punish a robbery when the Government proves that the robbery itself affected interstate commerce?

2. Does a defendant unlawfully influence a witness for purposes of U.S.S.G. §3C1.1 when a defendant suggests to a witness with undisputed jeopardy of incriminating herself to "research" her Fifth Amendment rights, as the Eighth Circuit held here, or is such conduct lawful, as this Court suggested in *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703–04 (2005)?

## RELATED PROCEEDINGS

United States District Court for the District of Minnesota:

*United States v. Spencer*, No. 18-CR-00114 (Jan. 15, 2020)

United States Court of Appeals for the Eighth Circuit:

*United States v. Spencer*, No. 20-1142 (May 25, 2021)

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Mario Martell Spencer respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

## OPINIONS BELOW

The opinion of the court of appeals is reported at 998 F.3d 813 (8th Cir. 2021), and is reproduced in the Appendix at A1–A13. The court of appeals' order denying rehearing and rehearing *en banc* is not reported but is reproduced in the Appendix at A75. The relevant decisions of the United States District Court for the District of Minnesota are not reported, but the district court's relevant bench rulings are reproduced in the Appendix at A14 and A25, and the district court's judgment is reproduced in the Appendix at A67.

## JURISDICTION

The court of appeals issued its opinion on May 25, 2021, and its order denying rehearing and rehearing *en banc* on July 15, 2021. This petition for a writ of certiorari is timely under this Court's July 19, 2021 order extending the deadline for filing such petitions to 150 days when the relevant lower court order denying a timely petition for rehearing was issued prior to July 19, 2021.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, Clause 3 of the U.S. Constitution provides, in pertinent part, that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

The Fifth Amendment to the U.S. Constitution provides, in pertinent part, that "[n]o person shall be . . . compelled in any criminal case to be a witness against himself."

The Hobbs Act, 18 U.S.C. §1951, provides in pertinent part:

> (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 so to do, 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.
>
> (b) As used in this section—
>
> . . . .
>
> (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.

18 U.S.C §1951(a)–(b).

Section 3C1.1 of the U.S. Sentencing Guidelines provides, in pertinent part:

If (1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense, increase the offense level by 2 levels.

**Commentary**

**Application Notes:**

. . . .

2. **Limitations on Applicability of Adjustment.—** This provision is not intended to punish a defendant for the exercise of a constitutional right. . . .

. . . .

4. **Examples of Covered Conduct.—**The following is a non-exhaustive list of examples of the types of conduct to which this adjustment applies:

> (A) threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so;

. . . .

U.S.S.G. §3C1.1.

## STATEMENT OF THE CASE

### I. The Hobbs Act

The Hobbs Act, in its current form, provides that: "[w]hoever, in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery . . . or attempts or conspires so to do . . . ." 18 U.S.C. §1951(a). The Hobbs Act has its roots in the Federal Anti-Racketeering Act of 1934, 48 Stat. 979, and was enacted by Congress in 1946 to eliminate an exception addressed by the Court in its 1942 *Local 807* decision. *See United States v. Green*, 350 U.S. 415, 418 (1956) (discussing *United States v. Local 807 of Int'l Bhd. of Teamsters*, 315 U.S. 521 (1942), as holding that the act excepted "members of a city truck drivers' union offering superfluous services to drive arriving trucks to their city destination with intent, if the truck owners refused their offer, to exact the wages by violence."); *see also Scheidler v. NOW, Inc.*, 547 U.S. 9, 18–20 (2006) (discussing the history of the Hobbs Act).

Although the Court has recognized that the Hobbs Act's language reflects "a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence," that does not mean the Hobbs Act is unrestrained and without limit. *Stirone v. United States*, 361 U.S. 212, 215 (1960); *see Scheidler*, 537 U.S. at 18–20 (quoting *United States v. Culbert*, 435 U.S. 371, 377 (1978)). First and foremost, the Court has recognized that "congressional power under the Commerce clause . . . is subject to outer limits." *United States v. Lopez*, 514 U.S. 549, 556–57 (1995). These outer limits necessarily limit Congress' ability to criminalize certain conduct pursuant to its Commerce

Clause authority, especially where such an exercise of authority would otherwise intrude upon traditional state police powers. *Id.* at 561 n.3. As this Court has summarized, "Congress did not intend the Hobbs Act to have so broad a reach" so as to "federalize much ordinary criminal behavior . . . that typically is the subject to state, not federal prosecution." *Scheidler*, 547 U.S. at 20.

Moreover, for a period of time, the Department of Justice also imposed its own limitations on the Hobbs Act's applicability, specifically providing that "[t]he robbery offense in 18 U.S.C. §1951 is to be utilized only in instances involving organized crime, gang activity, or wide-ranging schemes." United States Attorney Manual §9-131.040 (Oct. 1997).[1] That requirement, however, has since been eliminated, *see* United States Attorney Manual §9-131.000 *et seq.* (current),[2] leaving prosecutors without any internal check against bringing Hobbs Act prosecutions for robberies that fall squarely within the States' historic police powers and stretch past the outer bounds of Congress' Commerce Clause authority.

At issue here is just such a case. The robbery of cash from a local neighborhood mom-and-pop convenience store was charged as a federal crime, with Petitioner Mario Martell Spencer convicted of one count of aiding and abetting interference with interstate commerce by robbery, in violation of the Hobbs Act, 18 U.S.C. §§2 and 1951, and one count of aiding and abetting the using, carrying, and

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[1] United States Attorney Manual §9-131.040 (Oct. 1997), *available at* https://www.justice.gov/archive/usao/usam/1997/1997USAM_Title%209%20Criminal_Part4.pdf.

[2] United States Attorney Manual §9-131.000 *et seq.*, *available at* https://www.justice.gov/jm/jm-9-131000-hobbs-act-18-usc-1951

brandishing of a firearm in relation to a crime of violence, in violation of 18 U.S.C. §§2 and 924(c)(1)(A)(ii).

## II. The Robbery

On March 23, 2018, two black males masked in bandanas robbed Penn-Wood Market, a small mom-and-pop convenience store that serves its local residential neighborhood in Minneapolis. TR., Vol. I, 54, 58:13–15, 70:4–7, 120–22, 149:11–14; TR., Vol. II, 278:13–16; TR., Vol. III, 542:14–18. The suspects made off with close to $1400 in cash, and did not steal any goods. TR., Vol. III, 542:14–18. Shortly thereafter, officers with the Minneapolis Police Department received a dispatch stating that the suspects had fled in a gray Nissan. TR., Vol. I, 124–25. After spotting a vehicle matching that description, officers pursued the vehicle, then lost sight of it before subsequently locating the vehicle crashed into a garage. Mr. Farah and Mr. Spencer were arrested within a half hour after police set up a multi-block perimeter around the vehicle, and were charged with the robbery at Penn-Wood Market. *Id.* at 124-25, 132-37. 145, 147, 149-54; Tr. Vol. II, 286-87.

## III. Evidence Related to Interstate Commerce

The Government called Penn-Wood Market's owner, Ahmed Al- Hawwari, to testify at Spencer's trial. Al-Hawwari testified that the store, situated in a low-income residential neighborhood, deals mainly in groceries, snacks, candy, and tobacco products. TR., Vol. III, 536:24–537:18, 545:24–546:16. He testified those products are mainly purchased from Core-Mark International's nearby distribution center in Minnesota. *Id.* at 536:19–537:4. Al-Hawwari identified no other supplier for Penn-Wood Market. The Government further questioned Al-Hawwari on where

he banks. Al-Hawwari testified that he banks at a branch of MidWest Bank in Minnesota. *Id.* at 540:19–541:5. When the Government asked whether MidWest Bank has branches outside of Minnesota, Al-Hawwari was not certain and testified only, "I think they do." *Id.*[3]

The Government also called Mark Capatina, a regional sales manager at Core-Mark. Capatina testified that several products Core-Mark ultimately sells to Penn-Wood Market—such as Pop-Tarts, Pringles, Wrigley gum, Jack Link's beef jerky, Hostess products, Tombstone pizzas, and cigarettes—originate from outside of Minnesota. *Id.* at 561:1–563:15.

At the close of evidence, Spencer moved for acquittal under Fed. R. Crim. P. 29 on the express grounds that the Government had not presented sufficient evidence that the robbery affected interstate commerce. Appx. at A18. The district court denied Spencer's motion. *Id.* at A24.

## IV. Obstruction-of-Justice Sentencing Enhancement

In calculating Spencer's sentencing range under the Guidelines, the district court applied a two-level enhancement for obstruction of justice under U.S.S.G. §3C1.1 for conversations Spencer had with his ex-girlfriend, in which he encouraged her to "do some legal research on . . . pleading the Fifth." The Guidelines' Notes are clear that "[t]his provision is *not* intended to punish a defendant for the exercise of a constitutional right." *Id.* at note 2 (emphasis added). Correspondingly, conduct

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[3] In fact, MidWest Bank does not have branches outside of Minnesota, but this was not introduced into evidence. *See Locations and Hours,* MidWest Bank, *available at* https://www.midwestbank.net/about-us/locations-hours.html (last visited Dec. 9, 2021).

covered by the obstruction of justice enhancement would include "threatening, intimidating, or otherwise *unlawfully* influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so." *Id.* at Note. 4(A) (emphasis added). Notwithstanding these directives, the district court—affirmed by the Eighth Circuit—applied the enhancement to Spencer, making them the first courts to hold that merely explicitly informing someone of the existence of a constitutional right supports the obstruction-of-justice enhancement. The facts relevant to the enhancement are set out below.

### A. Spencer Suggests that Andrea McCarver "Research . . . Pleading the Fifth."

Spencer spoke with Andrea McCarver, his ex-girlfriend, in an undated jail call before trial. In the call, McCarver—the owner of the gray Nissan implicated in the robbery—repeatedly worried why the Government wants her to testify and what the Government believes her involvement with the robbery to be. In response, Spencer gave her the following advice:

> I don't know, the only thing I can tell you man is you gotta do some research. Research, uhh, do some legal research on, it's called pleading the Fifth. If they ain't give you no favors, they ain't giving you nothing in exchange for what's going on, get on your phone and look that sh** up. That's the only hope your a** got. They gonna make you do everything they saying they want because they got your a** scared, so they gonna make you do that sh**.

Gov't. Sent. Ex. B, at 5:35. Spencer also suggested that she contact his attorney for advice. *Id.* at 1:51.

### B. The District Court Orders that McCarver Either Obtain Counsel to Advise Her on Her Fifth Amendment Rights or Receive Immunity from the Government Before Testifying

In anticipation of McCarver's testimony, Spencer filed a motion asking the district court to preclude the Government from eliciting testimony that Spencer had suggested to McCarver she "research … pleading the Fifth." TR., Vol. II, 262, 268:19–269:4. The Government wanted to elicit this testimony from her to insinuate that Spencer suggested she "research … pleading the Fifth" to protect himself. *Id.* at 264:22–265:4. But if the Government elicited such testimony, defense counsel explained, the defense would be forced to bring out all the reasons "why [Spencer] would advise her to take the Fifth, because of her own personal jeopardy, not to protect him." *Id.* at 264:14–18. For example, defense counsel explained, McCarver would need to be cross-examined regarding her potential involvement as an accessory and other "serious exposure" "related to the robbery. *Id.* at 391:1–6. Thus, defense counsel was concerned that McCarver was in jeopardy of incriminating herself while testifying, and McCarver did not have counsel to advise her of her Fifth Amendment rights. *Id.* at 268:19–269:4; *see also id.* at 262–73, 388–97

The district court denied Spencer's motion, *id.* at 389:8–17, but "underst[ood] the nature of the jeopardy that [McCarver] face[d]," if the Government were to question her about the jail call. *Id.* at 395:9–12. Accordingly, the district court insisted that McCarver either "obtain counsel now" or "get[ ] immunity … so again jeopardy is not an issue." *Id.* at 396:16–397:3. In light of the district court's stance,

the Government relented and mooted the issue by "declin[ing] to inquire" with McCarver about whether Spencer suggested that she research pleading the Fifth. *Id.* at 397.

### C. The District Court Applies Obstruction-of-Justice Enhancement Based on Spencer's Advice to McCarver

At sentencing, the Government again raised Spencer's statement to McCarver that she "research . . . pleading the Fifth"—this time as a basis for the district court to apply a two-level sentencing enhancement under U.S.S.G. §3C1.1. Spencer objected, but the district court applied the enhancement, concluding:

> The obstruction of justice enhancement applies when a defendant does not advise a witness to stay silent for the witness's own protection, but instead advises a witness to stay silent for the defendant's benefit by concealing the defendant's involvement in illegal activity.
>
> Here the undisputed facts demonstrate that Mr. Spencer's advice to Ms. McCarter [sic] was not intended for her benefit, but instead was intended to conceal his involvement in illegal activity for his own benefit.
>
> Nothing in Mr. Spencer's statements to her suggest that he was acting for her benefit and such conduct qualifies as obstruction of justice for the purpose of enhancement.

Appx. at A38.[4] Applying the enhancement increased the Guidelines range for Spencer's Hobbs Act conviction up from a range of 51-63 months to a range of 63-78 months. The district court imposed a within-Guidelines sentence of 72 months on

[4] The Government argued at sentencing that another jail call between Spencer and McCarver justified application of the obstruction-of-justice enhancement, but the district court did not rely on this call to impose the enhancement, referring only to "Mr. Spencer's advice." Appx. at A38 (14:9–20).

the Hobbs Act conviction, and the mandatory minimum term of 84 months on the corresponding firearms count, for a total term of 156 months. Appx. at A54, A67.

## V. Appeal to Eighth Circuit

Spencer timely appealed his conviction and sentence to the court of appeals, which affirmed the district court in every respect. Appx. at A1–A13. Spencer squarely asked the Eighth Circuit to reconsider its holding in *United States v. Dobbs*, 449 F.3d 904 (8th Cir. 2006), and related decisions, in which the circuit had held that "robberies from small commercial establishments qualify as Hobbs Act violations so long as the commercial establishments deal in goods that move through interstate commerce." Appellant Spencer's Opening Br. at 32, *United States v. Spencer*, No. 20-1142 (quoting *Dobbs*, 449 F.3d at 912). The panel did not disagree with Spencer's characterization of his case as one with even less of a connection to interstate commerce than any of the Eighth Circuit's past Hobbs Act precedents,[5] but nonetheless affirmed based on Spencer's acknowledgment that "departing from this Court's precedents would require a decision by the Eighth Circuit *en banc* or the United States Supreme Court." Appx. at A9 n.3.

The Eighth Circuit likewise rejected Spencer's objection to the obstruction of justice enhancement. The court concluded the proposition "that encouraging someone to exercise her constitutional rights can constitute obstruction of justice if the individual's purpose in providing the encouragement is to conceal his illegal activity" was foreclosed by circuit precedent, relying on a case where the defendant

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[5] *See generally* Oral Argument, *United States v. Spencer*, No. 20-1142 (8th Cir. Mar. 17, 2021), http://media-oa.ca8.uscourts.gov/OAaudio/2021/3/201142.MP3.

never explicitly encouraged researching or invoking the Fifth Amendment. Appx. at A11 (citing *United States v. McMannus*, 496 F.3d 846, 850 (8th Cir. 2007), *overruled on other grounds by Pepper v. United States*, 562 U.S. 476 (2011)). The Eighth Circuit declined to reconsider the case *en banc*, Appx. at A75, and this petition timely followed.

## REASONS FOR GRANTING THE WRIT

### I. Certiorari Should be Granted to Address the Tension Between Circuit Courts' Extension of the Hobbs Act to the Robbery of Any Commercial Establishment and this Court's Recognition that Congress' Commerce Clause Power is Limited and is not Intended to Intrude upon States' Traditional Criminal Authority

#### A. The Required Nexus between a Robbery and Interstate Commerce under the Hobbs Act is an Important Question of Federal Law that Should be Decided by this Court

The required nexus between a robbery and interstate commerce under the Hobbs Act implicates the outer bounds of Congress' authority to regulate activity in our federal system, under the Commerce Clause, and under the Necessary and Proper Clause.

The power to punish a crime like robbery is historically reserved to the States. *Lopez*, 514 U.S. at 564. Although Congress has authority to punish crimes in federal territories and enclaves, *see* U.S. Const. Art. I, §8, cl. 17; Art. IV, §3, cl. 2, "Congress cannot punish felonies generally." *Cohens v. Virginia*, 19 U.S. 264, 428 (1821). "The Constitution expressly delegates to Congress authority over only four specific crimes: counterfeiting securities and coin of the United States, Art. I, §8, cl. 6; piracies and felonies committed on the high seas, Art. I, §8, cl. 10; offenses

against the law of nations, *ibid.*; and treason, Art. III, §3, cl. 2." *Taylor v. United States*, 136 S. Ct. 2074, 2082–83 (2016) (Thomas J., dissenting).

Congress' authority to punish robberies at all arises first and foremost from the Commerce Clause. U.S. Const., Art. I, Sec. 8, Cl. 3. The Commerce Clause gives Congress the power to regulate activities and instrumentalities falling into three categories: (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "those activities having a substantial relation to interstate commerce . . . *i.e.,* those activities that substantially affect interstate commerce." *Lopez,* 514 U.S. at 558–59 (citations omitted). The Hobbs Act, seeking to harness this authority, "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has [under the Commerce Clause] to punish interference with interstate commerce by extortion, robbery or physical violence." *Stirone*, 361 U.S. at 215. But unlike the activities underlying other Commerce Clause jurisprudence, robbery is not itself commercial activity. *Taylor*, 136 S. Ct. at 2083 (Thomas, J., dissenting) ("Robbery is not buying, it is not selling, and it cannot plausibly be described as a commercial transaction . . . ."); *United States v. McFarland*, 311 F.3d 376, 409 (5th Cir. 2002) (Garwood, J., dissenting) ("[T]he Hobbs Act's here relevant proscription of *any* robbery that 'in any way or degree . . . affects commerce' does not constitute a regulation of commercial activity, notwithstanding that all robberies have *some* economic effect. . . ."). So, to be constitutionally permissible, application of the

Hobbs Act to robberies must also be "necessary and proper" to the exercise of Congress's Commerce Clause power. Art. I, Sec. 8, Cl. 18. To qualify as "necessary and proper," the means chosen by Congress must be "appropriate" and "plainly adapted" to the end Congress seeks to achieve." *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819).

The upshot of the foregoing is that the required nexus between a robbery and interstate commerce under the Hobbs Act necessarily implicates the extent to which Congress and the federal government may constitutionally regulate all commercial and non-commercial activities. This Court has already recognized that "[d]ecisions of this Court have assumed that Congress did not intend the Hobbs Act to have so broad a reach" so as to "federalize much ordinary criminal behavior . . . that typically is the subject of state, not federal prosecution." *Scheidler*, 547 U.S. at 20. But the Court has never articulated where the line is as to the scope of Congress' Commerce Clause authority to criminalize robbery, what is typically a state offense. To the contrary, on at least two occasions, this Court has expressly left open the question of what nexus to interstate commerce the Government must prove to establish a violation of the Hobbs Act. *See Taylor v. United States*, 136 S. Ct. 2074, 2082 (2016) ("Our holding today is limited to cases in which the defendant targets drug dealers for the purpose of stealing drugs or drug proceeds. We do not resolve what the Government must prove to establish Hobbs Act robbery where some other type of business or victim is targeted."); *see also Stirone v. United States*, 361 U.S. 212, 215 (1960).

The time is now for the Court to clarify a clear limiting principle to distinguish between those robberies which affect interstate commerce and those that do not. Without such a principle, courts "are hard pressed to posit any activity by an individual that Congress is without power to regulate." *See Lopez*, 514 U.S. at 564. This Court should grant the present petition to clarify this important issue of federal law.

### B. The Required Nexus Between a Robbery and Interstate Commerce is an Important and Recurring Question which, in the Absence of Guidance from this Court, Has Led to a Patchwork of Ad Hoc Decisions with No Limiting Principles that Are Inconsistent with this Court's Decisions

In the absence of guidance from this Court as to what robberies affect interstate commerce, the lower courts have scarcely found a robbery that Congress cannot constitutionally punish under the Hobbs Act—a result plainly at odds with the fact that the power to punish a crime like robbery is historically reserved to the States. In fact, the lower courts have all but adopted the "costs of crime" and "national productivity" arguments that this Court expressly rejected in *Lopez*. *See* 514 U.S. at 564 ("Under the theories that the Government presents in support of §922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign."). According to the lower courts, a robbery affects interstate commerce for purposes of the Hobbs Act even when:

- A defendant robs two victims of $350 to $400 on their person while the victims are moving a stove into a residential building's basement where the victims also kept supplies like peat moss for their local, informal landscaping business and the victims had purchased those

supplies from local suppliers who had, in turn, sourced the supplies from out of state. *United States v. Wilkerson*, 361 F.3d 717, 720, 730 (2d Cir. 2004).

- A defendant's robbery "depletes the assets of an inherently economic enterprise" such as a pawn shop, regardless of whether a connection between the pawn shop and interstate commerce is shown. *United States v. Stevens*, 539 F. App'x 192, 194 (4th Cir. 2013) (internal quotations and citation omitted).

- A defendant robs and murders victim at the victim's home, the victim owned a gas station which purchased fuel from out of state, and the gas station closed because of the murder. *United States. v. Jimenez-Torres*, 435 F.3d 3, 7 (1st Cir. 2006).

- A defendant robs a grocery store and the robbery was ostensibly the "primary cause" of the owner's decision to close the store nine months later. *United States v. Thompson*, 263 F. App'x 158, 159 (2d Cir. 2008)

- A defendant's robbery of a doctor's office affects the "morale and productivity" of the office and patient appointments are rescheduled. *United States v. Rutherford*, No. 06-1437, 2007 U.S. App. LEXIS 30763, at *18 (3d Cir. June 26, 2007).

- A defendant steals a car from a Manhattan parking garage, which garage regularly served cars bearing license plates from New Jersey and Connecticut, and the garage is near "access routes" that would be used by cars that have crossed state lines. *United States v. Farrish*, 122 F.3d 146, 149 (2d Cir. 1997).

- A defendant robs a brothel that routinely uses condoms manufactured out-of-state. *United States v. Lopez*, 860 F.3d 201, 214 (4th Cir. 2017)

The decisions of the Eighth Circuit that led to the decision in Spencer's case further evidence the way the lower courts—again, left without guidance from this Court—have increasingly enlarged Congress' power under the Hobbs Act without a consistent limiting principle:

- In *United States v. Farmer*, 73 F.3d 836, 843 (8th Cir. 1996), the court of appeals held that a single robbery of a Hy-Vee convenience store had a sufficient effect on interstate commerce because, not only did Hy-Vee sell products from all over the world, Hy-Vee itself was "an

interstate chain" with "162 food stores, 38 convenience stores, and 20 drug stores in seven states."

- Although *United States v. Vong,* 171 F.3d 648, 654 (8th Cir. 1999) did not involve an interstate chain like Hy-Vee, the *Vong* court nonetheless applied *Farmer* to the robbery of jewelry from several Minnesota jewelry stores and found a sufficient effect on interstate commerce because the defendant admitted that the jewelry stores purchased the jewelry in interstate commerce.
- The court of appeals in *United States v. Dobbs*, 449 F.3d 904, 911–12 (8th Cir. 2006) extended *Farmer* and *Vong* even further. *Dobbs* did not involve an interstate chain like the Hy-Vee in *Farmer* or the robbery of valuable goods purchased in interstate commerce like the jewelry in *Vong*. Rather, like Mr. Spencer's case, *Dobbs* involved the robbery of cash from a single mom-and-pop convenience store. Unlike Mr. Spencer's case, however, the convenience store was located in Dubuque, Iowa, on the tri-state border of Iowa, Illinois, and Wisconsin. *Id.* at 908. Substantial testimony and store records, moreover, showed that many of the store's customers were from out of state. *Id.* Additionally, the convenience store's direct wholesale supplier maintained its warehouse out of state. *Id.*
- In *United States v. Daniel*, 887 F.3d 350, 358 (8th Cir. 2018), the court of appeals took *Dobbs* a step further. The *Daniel* court found a substantial effect on interstate commerce where the defendant robbed cash from a Perryville, Missouri general store that "sells gasoline, liquor, and cigarettes that are all supplied or manufactured outside Missouri." *Id.* The interstate chain of *Farmer*, the robbery of goods purchased in interstate commerce in *Vong*, and the border location and out-of-state customers of *Dobbs* were, in effect, no longer relevant. *See Daniel*, 887 F.3d at 858. "For better or for worse," the *Daniel* court stated, the interstate-commerce requirement can be met simply if the commercial establishment "deal[s] in goods that move through interstate commerce." *Id.* at 359.

In Spencer's case, the Eighth Circuit continued its expansion of Congress' authority under the Hobbs Act. Indeed, the facts in Spencer's case are even further removed from interstate commerce than the facts in *Daniel*, which appears to have at least involved a direct out-of-state supplier. Here, the Government did not show that Penn-Wood Market directly obtained any goods from an out-of-state supplier. The only showing made by the Government of the robbery's purported effect on

interstate commerce was testimony that the goods sold at the store originated from an in-state distribution center that sourced the goods from out of state. *See* TR., Vol. III, 536:1–22, 561:1–563:15. The Eighth Circuit's affirmance of the Hobbs Act conviction here based on *Dobbs* makes Judge Heaney's concurrence in that case prescient—that even when "[i]t is hard to imagine a robbery of a commercial establishment with less of a connection to interstate commerce" than a mom-and-pop convenience store, "[u]nder the current state of the law in this circuit, it is hard to conceive any robbery of any entity involved in selling any product, that would not affect interstate commerce." *Dobbs*, 449 F.3d at 914 (Heaney, J., concurring).

This Court should grant the present petition to bring order to the lower court decisions and give lower courts a limiting principle as to the Hobbs Act's reach.

### C. The Court of Appeals Erred in the Present Case

The panel in Spencer's case was bound by the Eighth Circuit's precedent holding that "robberies from small commercial establishments qualify as Hobbs Act violations so long as the commercial establishments deal in goods that move through interstate commerce." *Dobbs*, 449 F.3d at 912. The Eighth Circuit further declined to reconsider its precedent *en banc*.

The Eighth Circuit's decision in Spencer's case and its prior precedent does not provide a limiting principle consistent with the Constitution's constraints on Congress to punish crimes like robberies. Indeed, a robbery of a child's lemonade stand would meet the criteria for an effect on interstate commerce under Eighth Circuit precedent if the child purchased the lemons from a local store that in turn

purchased the lemons from out of state (a near certainty for a lemonade stand located anywhere in the Eighth Circuit's jurisdiction). This Court should grant the present petition to correct the Eighth Circuit's error and hold that the robbery itself must have a direct effect on interstate commerce in order to come within the ambit of the Hobbs Act. Such a rule follows from this Court's Commerce Clause jurisprudence and is rooted in the Constitution's withholding from Congress a plenary police power. *See Taylor*, 136 S. Ct. at 2082–89 (Thomas, J., dissenting). Against this standard, Spencer's conviction cannot stand. The mere robbery of cash from a local neighborhood convenience store that sells snacks like Pop-Tarts and Pringles is insufficient to show that the defendant's conduct actually affected (or obstructed or delayed) interstate commerce.

### D. Spencer's Case is the Appropriate Vehicle for the Court to Decide this Important Question

Spencer's case presents the Court with a clean opportunity to decide the question presented. First, this case stands at the very outer bounds of Congress' Commerce Clause authority. In *Dobbs*, a Hobbs Act case involving a mom-and-pop convenience store, Judge Heaney observed that "[i]t is hard to imagine a robbery of a commercial establishment with less of a connection to interstate commerce than this one." *Dobbs*, 449 F.3d at 915 (Heaney, J., concurring). But here, you have just that. In *Dobbs*, the convenience store was at least located at a tri-state border and sole to residents of other states, while here, the uncontroverted testimony was instead that the Penn Wood Market served its local North Minneapolis neighborhood. Moreover, unlike most Hobbs Act cases, the Government did not

present evidence supporting numerous theories of an effect on interstate commerce. The only interstate-commerce evidence fairly presented by the Government was that Penn-Wood Market sold goods which it sourced from an in-state supplier which in turn sourced at least some of those goods from out of state.

Second, the law is fully developed in the circuit courts and thus ripe for this Court's review. Here, despite this case standing at the outer bounds of Congress' Commerce Clause authority, the Eighth Circuit panel deemed itself strictly bound by that court's past precedents to affirm the Hobbs Act conviction. Appx. at A9 n.3 The time for this Court's review is now.

* * * * *

This Court should grant the petition and decide that, for intrastate robberies that do not otherwise affect "commerce over which the United States has jurisdiction," 18 U.S.C. §1951(b)(3), the Hobbs Act, in accordance with constitutional limits, only punishes a robbery when the Government proves that the robbery itself affected interstate commerce.

## II. Certiorari Should be Granted Because the Imposition of a Sentencing Enhancement for Suggesting that a Witness with Undisputed Jeopardy of Incriminating Herself "Research" Her Fifth Amendment Rights, Conflicts with this Court's Recognition in *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703–04 (2005), that it is Not Criminally Punishable to Suggest to Someone that they Invoke their Right Against Compelled Self-Incrimination

It is axiomatic that an individual "may not be punished for exercising a protected statutory or constitutional right." *United States v. Goodwin*, 457 U.S. 368, 372 (1982). It similarly follows that an individual may not be criminally punished for informing or encouraging someone else to exercise their constitutional

rights, particularly the right against self-incrimination under the Fifth Amendment. After all, if "[t]he Fifth Amendment privilege is so fundamental to our system of constitutional rule" that it demands that law enforcement inform individuals of that right, it strains credulity that another person could be criminally punished for providing someone else with that same information. *See Miranda v.* Arizona, 384 U.S. 436, 468–69 (1966).

Yet that is precisely what happened here. The court of appeals held that the following statement by Spencer to his ex-girlfriend, a prosecution witness that allegedly lent her car to Spencer for the robbery, was obstruction of justice under U.S.S.G. § 3C1.1:

> I don't know, the only thing I can tell you man is you gotta do some research. Research, uhh, do some legal research on, it's called pleading the Fifth. If they ain't give you no favors, they ain't giving you nothing in exchange for what's going on, get on your phone and look that sh** up. That's the only hope your a** got. They gonna make you do everything they saying they want because they got your a** scared, so they gonna make you do that sh**.

Govt. Sent. Ex. B, 5:35–6:43. Even assuming (but not conceding) that Spencer made this statement only to benefit himself—which the court of appeals believed justified its holding, *see* Appx. at A10–A11—Spencer's statement does not and should not constitute obstruction of justice as a matter of law.

### A. The Decision of the Court of Appeals Conflicts with this Court's Decision in *Arthur Andersen*, the Federal Witness Tampering Statute, the Text of U.S.S.G. §3C1.1, and the Constitution Itself.

In *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703–04 (2005), this Court expressly stated that, for purposes of the federal witness tampering statute,

18 U.S.C. §1512(b), "'persuading' a person 'with intent to . . . cause' that person to 'withhold' testimony or documents from a Government proceeding or Government official is not inherently malign." As its first example of such "innocuous" conduct, this Court described the exact conduct for which the district court in Spencer's case applied the obstruction-of-justice enhancement—advising a loved one of their Fifth Amendment rights. *Id.* at 704 ("Consider, for instance, a mother who suggests to her son that he invoke his right against compelled self-incrimination . . . ;"). This Court then explained how a conviction under the witness tampering statute requires a showing the defendant acted with a "consciousness of wrongdoing." *Id.* at 706. That is, the Government must not only show that that a defendant committed a wrongful act, but that the defendant was also conscious that the act was wrongful.

Consistent with *Arthur Andersen*, lower courts interpreting the federal witness tampering statute have held there is no violation when the defendant merely seeks to persuade the witness to use a legal right. In *United States v. Doss*, 630 F.3d 1181, 1189–90 (9th Cir. 2011), for example, the court considered whether a defendant violated the statute when he asked his wife to exercise her marital privilege and not testify against him. The *Doss* court, relying on *Arthur Andersen*, concluded that "a defendant could not be shown to act with 'consciousness of *wrongdoing*' merely by asking a spouse to withhold testimony (that may properly be withheld under the marital privilege) absent some *other* wrongful conduct, such as coercion, intimidation, bribery, suborning perjury, etc." 630 F.3d at 1190 (emphasis in original) (quoting *Arthur Andersen*, 544 U.S. at 706).

The same standard necessarily applies under U.S.S.G. § 3C1.1, which describes witness tampering under the Guidelines as "threatening, intimidating, or otherwise *unlawfully* influencing" a witness. §3C1.1, cmt. 4(A) (emphasis added). In other words, unless the Government shows that the defendant's conduct was threatening or intimidating (which the Government never alleged and the district court never found here), the Government must show that the defendant's conduct constituted a violation of law such as bribery, suborning perjury, or tampering within the meaning of the federal witness tampering statute as interpreted in *Arthur Andersen*. *See Doss*, 630 F.3d at 1189–90.

Here, the decisions of the court of appeals and the district court squarely conflict with *Arthur Andersen*, the federal witness tampering statute, and the text of U.S.S.G. §3C1.1. Not only do the decisions penalize Spencer for the foremost example of "innocuous" conduct identified by this Court in *Arthur Andersen*, there was no finding whatsoever that Spencer acted with any "consciousness of wrongdoing" in advising McCarver to "research . . . pleading the Fifth." Instead, the court of appeals and the district court focused on Spencer's alleged motivation in advising McCarver. Appx. at A12, A38. But a selfish motivation does not transform an "innocuous" act into an unlawful act. Nor does it evidence that Spencer had any "consciousness of wrongdoing" because Spencer's act was inherently lawful. *Arthur Andersen*, 544 U.S. at 706. Nothing is unlawful about suggesting that a witness research her Fifth Amendment rights—especially when, as the district court stated, that same witness is in "jeopardy" of incriminating

herself during her testimony. TR., Vol. II, 395:9–12. Nor is there anything wrong about suggesting that a witness invoke her Fifth Amendment rights if the Government does not give her any favors—especially when the District Court concluded that same witness "need[ed] to obtain counsel" or "get[ ] immunity" before testifying. *Id.* at 396:16–397:3.

Significantly, the decision of the court of appeals inherently conflicts with our understanding of justice and constitutional rights. No court has ever held until now that merely informing someone of the existence of a constitutional right supports the obstruction-of-justice enhancement. Constitutional rights are inherent to our understanding of justice, so telling someone to exercise (or, more accurately, "research") their constitutional rights cannot be obstruction of justice. This is particularly the case in the context of the Fifth Amendment, where this Court has instead held that it is a right so sacrosanct that individuals are *required* to be informed by others of their right. *See generally Miranda*, 384 U.S. 436. Moreover, the Guidelines themselves provide that the enhancement "is not intended to punish a defendant for the exercise of a constitutional right" and make no distinction between who exercises the constitutional right or the motivations behind exercising the constitutional right. U.S.S.G. §3C1.1, cmt. 2. But right now in the Eighth Circuit, as Spencer's case illustrates, defendants can receive additional jail time for merely informing someone of their constitutional rights. Certiorari is required to correct this error.

### B. This Case is the Proper Vehicle to Address This Issue

This case is the proper vehicle to address this issue. The constitutional right was clearly at issue—Spencer explicitly referenced the constitutional right, "pleading the Fifth," by name. What is more, the district court itself expressly recognized that the witness's Fifth Amendment rights were legitimately at issue, and required that the witness be given the opportunity to meet with counsel before being called to testify. And the imposition of the two-level obstruction-of-justice enhancement here was not mere harmless error. After the district court erroneously calculated the Guidelines range as 63 to 78 months, the district court imposed a within-Guidelines sentence of 72 months on Count 1. If the district court had not erred and applied the obstruction-of-justice enhancement, Spencer would have a Guidelines range of 51 to 63 months, and his current sentence would be above this range. And the district court did not make clear that she would have imposed the same sentence without the obstruction-of-justice enhancement. The district court's error in calculating the Guidelines ranges is thus a "significant procedural error" properly before this Court that would require remand for resentencing. *See Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345–47 (2016) (internal quotation and citations omitted).

* * * * *

This Court should grant the petition and hold, consistent with its decision in *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703–04 (2005), that a defendant does not unlawfully influence a witness for purposes of U.S.S.G. §3C1.1

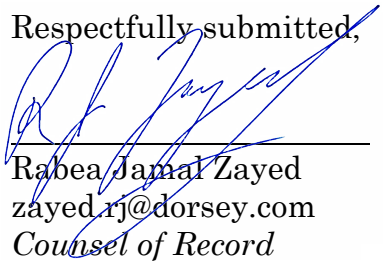
when the defendant suggests that a witness with undisputed jeopardy of incriminating herself to "research" her Fifth Amendment rights.

## CONCLUSION

For the reasons set forth above, Spencer respectfully requests this Court to grant the writ.

This the 13th day of December, 2021.

Respectfully submitted,



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