CASE NO._____
SUPREME COURT OF THE UNITED STATES OF AMERICA

LEANDRA MARIO CHISHOLM, JR. PETITIONER

V.

PETITION FOR WRIT OF CERTIORARI

UNITED STATES OF AMERICA DEFENDANT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITES STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT IN COURT OF APPEALS
CASE NUMBER 21-3271

Respectfully submitted,

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QUESTIONS PRESENTED FOR REVIEW

I. Is an Interference of Commerce by Robbery conviction for the robbery of a single retail store beyond the scope of the Commerce Clause of the United States Constitution?

II. Should the jurisdiction clause of Interference of Commerce by Robbery be void for vagueness?

LIST OF ALL PARTIES TO THE PROCEEDING

PETITIONER/APPELLANT/DEFNDANT – LEANDRA MARIO CHISHOLM, JR.

RESPONDENT/APPELLEE/PLAINTIFF – UNITED STATES OF AMERICA

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The Defendant's Appeal to the Sixth Circuit was taken from a Judgment entered against him in his criminal case whereby the District Court of the Northern District of Ohio imposed a sentence of 149 months on March 9, 2021. The Judgment of the District Court is attached hereto in Appendix A. A timely appeal was taken from the Judgment and Sentence to the Sixth Circuit Court of Appeals. On January 24, 2022, the Sixth Circuit Court of Appeals affirmed the District Court's Sentence of the Petitioner. Said Opinion is attached hereto in Appendix B.

STATEMENT OF JURISDICTION

The basis of the subject matter jurisdiction of the United States District Court for the Northern District of Kentucky was 18 U.S.C. §1951(a), 18 U.SC. §922(c)(1)(A)(ii) and 18 U.S.C. §922(g)(1) for which the Defendant, Leandra Chisholm, was indicted. A Final Judgment and Sentence was rendered by the District Court on March 9, 2021. The Defendant filed his Notice of Appeal on March 15, 2021. The basis for the jurisdiction of the Court of Appeals is Fed. R. App. P. 3 and 28 U.S.C. §1291. The jurisdiction of Supreme Court of the United States is invoked pursuant to 28 U.S.C. §1254(1) and SCR 10 and 13(1). The United States of America is a party, and the Solicitor General of the United States has been served with this Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U.S. Constitution Article 1, Section 8, Clause 3: The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States…To regulate commerce with foreign nations, and among the several states, and with the Indian tribes

2. U.S. Constitution Amendment V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. 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 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—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(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.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101–115, 151–166 of Title 29 or sections 151–188 of Title 45.

STATEMENT OF THE CASE

On June 20, 2020, the police department of Solon, Ohio received a call of a robbery that occurred at a retail AT&T store. Upon arrival at the scene, the clerk of the store reported that a male subject entered the store and appeared to look like he wanted to a purchase an item. Thereafter, the clerk reported that the man pulled a gun from his bag, pointed it at her and told the clerk to go to the safe and empty the contents into his bag. According to the clerk, she fell to the floor and the man pulled her back to her feet. Thereafter, she emptied the safe that contained approximately 25 cell phones. After this, the clerk reported that the man pulled zip ties from his bag and tied her hands and told her to wait 30 minutes or he would shoot her. She further advised that the cell phones had a tracking device. (Complaint, R.E.1 at ID#3-4). Thereafter the police used the tracking device to locate Mr. Chisholm's car. The police performed a traffic stop, located the bag of cell phones in his car and an unloaded pistol. On the way to the police station, Mr. Chisholm stated he was caught and asked how much time he was looking at. (Complaint, R.E.1 at ID#4-5, and Presentence Report, R.E. 16, ID#4).

After being escorted to an interview room at the police station, Mr. Chisholm cooperated and admitted to the robbery. However, his version of the robbery was a little different. He stated that he did not point the gun at the clerk. He did not tie her arms, but gave her the zip ties for her to tie her own arms. He said that he could tell she was scared and told her to give him a hug and to kiss his mask just to show her that was not going to hurt her. (Presentence Report, R.E. 16, ID#4-5).

All of the phones, except one, were immediately recovered. The estimated value of the missing cell phones was about $1000.00. (Presentence Report, R.E. 16, ID#55 and paragraph 8).

During Mr. Chisholm's change of plea hearing, the United States set forth the factual basis for Mr. Chisholm's plea to Interference with Commerce by Robbery.

> On or about June 22nd on 2020, in the Northern District of Ohio, Eastern Division, the Defendant did unlawfully obstruct, delay and affect commerce as that term is defined in Title 18 United States Code 1951(b)(3) and the movement of article and commodities in such commerce, by robbery, as that term is defined in United States Code 1951(b)(1), in that the defendant did unlawfully take and obtain cellular phones in the custody, presence and possession of the AT&T store located at 33631 Aurora Road, Solon, Ohio against the employees will by the means of actual and threatened force, violence, fear of immediate injury of said employee and further displayed and brandished a firearm in the presence of that employee…the cell phones taken from the store were manufactured outside the state of Ohio and of the United States, and therefore, had moved in and affected interstate and/or foreign commerce.

(Change of plea hearing, R.E. 31, ID#151-153). Mr. Chisholm was asked by the Court if he agreed that this rendition of facts could be proved beyond a reasonable doubt and responded in the affirmative. (Change of plea hearing, R.E. 31, ID#153). The District Court then adjudged Mr. Chisholm guilty.

REASONS FOR GRANTING THE WRIT

I. Is an Interference of Commerce by Robbery conviction for the robbery of a single retail store beyond the scope of the Commerce Clause of the United States Constitution?

The question of whether a single robbery of a retail store is within the scope of the Commerce Clause to invoke Federal jurisdiction is an important question of Federal law which should be settled by the Supreme Court of the United States. The overly broad reading of the Commerce Clause in relation Interference with Commerce by Robbery is a bit staggering. In the Sixth Circuit alone it has been applied to the robbery of a

Chattanooga bar because the bar bought alcohol from a Georgia distributor and served Atlanta customers. *See United States v. Davis*, 473 F.3d 680, 683–84 (6th Cir. 2007). Likewise, the robbery of a Little Caesars in Cleveland sufficed because the store purchased its flour from Minnesota, its pizza sauce from California, and its cheese from Wisconsin. *See United States v. Baylor*, 517 F.3d 899, 903 (6th Cir. 2008). Similarly, the robbery of a Family Dollar Store's cash register satisfied the commerce element because this Memphis store sold goods originating from outside Tennessee. *See United States v. Frazier*, 414 F. App'x 782, 782–83 (6th Cir. 2011). *Also see* Opinion of Sixth Circuit attached in Appendix B at page 3. However, after a thorough review of the historic expansion of the Commerce Clause, the "in any way or degree obstructs, delays, or affects commerce" as set forth in the Interference with Commerce by Robbery statute does not survive the current interpretation of the Supreme Court of its application to criminal cases.

In *Bond v. United States*, 572 U.S. 844, 134 S.Ct. 2077 (2014), the Supreme Court was presented with an issue concerning whether the United States could pursue the defendant for violation of 18 U.S.C. §229 for using a chemical when she sought revenge against her husband's lover. The Supreme Court held that the federal government had no business prosecuting a chemical warfare crime for chemicals found in a kitchen cupboard. In its beginning analysis of the *Bond* case, the Supreme Court stated:

> In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder. The States have broad authority to enact legislation for the public good -- what we have often called a " police power." United States v. Lopez, 514 U.S. 549, 567, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995). The Federal Government, by contrast, has no such authority and " can exercise only the powers granted to it," McCulloch v. Maryland, 17 U.S. 316, 4 Wheat. 316, 405, 4 L.Ed. 579 (1819), including the power to make "all Laws which shall be necessary and proper for carrying into Execution" the enumerated powers, U.S. Const., Art. I, § 8, cl. 18. For nearly two centuries it has been

> "clear" that, lacking a police power, " Congress cannot punish felonies generally." Cohens v. Virginia, 19 U.S. 264, 6 Wheat. 264, 428, 5 L.Ed. 257 (1821). A criminal act committed wholly within a State " cannot be made an offence against the United States, unless it have some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States." United States v. Fox, 95 U.S. 670, 672, 24 L.Ed. 538 (1878).

Bond at 2086

Despite the Constitutional prohibition limiting the federal government from becoming a national police power to punish felonies generally, the Supreme Court has even ruled that drug dealers robbing other drug dealers is a matter for federal prosecution. *See Taylor v United States*, 136 S.Ct. 2074 (2016) (based on federal regulation of controlled substances). Justice Thomas was the lone dissenter in *Taylor*. Justice Thomas states in his dissent:

> In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder. The States have broad authority to enact legislation for the public good -- what we have often called a " police power." The Federal Government, by contrast, has no such authority and " can exercise only the powers granted to it," including the power to make " all Laws which shall be necessary and proper for carrying into Execution" the enumerated powers, U.S. Const., Art. I, § 8, cl. 18. For nearly two centuries it has been clear that, lacking a police power, Congress cannot punish felonies generally. A criminal act committed wholly within a State " cannot be made an offence against the United States, unless it have some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States.

Taylor at 2087 (internal citations omitted). As set forth by Justice Thomas, the federal government's power to punish robberies is limited to only those situations where such laws are necessary and proper to enumerated powers given to the federal government by the Constitution. "[C]ommerce as originally understood at the founding of this country is limited to the buying and selling of goods across state lines. Robbery is not buying, it is

not selling and cannot plausibly be described as a commercial transaction ('trade or exchange for value'). *Taylor* at 2084 (internal citations omitted).

The provision in question in the case at bar is found in 18 U.S.C. §1951(a) which states "whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce by robbery….shall be fined under this title or imprisoned not more than twenty years or both." 18 U.S.C. §1951(a). This is an incredibly expansive jurisdictional statement in its use of "any way or degree". The Petitioner argues that this "any way or degree" flies in the face of requiring a substantial connection to commerce before Federal Jurisdiction kicks in. Simply put, in the criminal context, the de minimis approach or "effect in the aggregate" should not be used to invoke this statute in relation to retail store robbery. At the very least, it should to apply to a single retail store robbery.

Courts, including the Supreme Court, have been wrestling with exactly where to draw the line on federal police power verses that of the state. When does a federal law overreach or step over that line? In *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court determined that a federal law prohibiting the possession of a firearm within a school zone crossed that line. In *Lopez*, the Supreme Court rendered a historical view of the expansion of the Commerce Clause power. From the Court's review, it identified three broad categories that the Federal government may regulate under the Commerce Clause. *See Lopez* at 558. The first category is the channels of interstate commerce. This is Congress' power to control things in connection with highways and rivers that move commerce among the states. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). The second is the power of Congress to regulate the

instrumentalities of commerce even if originating from intrastate activities, such as trains, planes and automobiles. *See Southern Railway Company v. United States*, 222 U.S. 20 (1911). The final category set forth in *Lopez* is the power to regulate activities that have a substantial impact on commerce. *See Lopez* at 558-59. The *Lopez* Court concluded that based on the great weight of case law, the proper test of the federal government regulation of activities within this third category is "substantially affects" interstate commerce. *Id.*

Further in *Lopez*, the Supreme Court set forth and extensive and historical view of the Commerce Clause. The Lopez Court started out with the language of the clause itself and former Chief Justice Marshall's interpretation that "[c]ommerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." *Lopez* at 553. For nearly a century after this interpretation, cases dealing with the Commerce Clause mainly focused on state legislation that discriminated against interstate commerce. *See* id. Then, the Commerce Clause was extended to intrastate laws passed by a state that were so intermingled with interstate commerce that it with would impact interstate commerce. See Id. at 554. Laws that effected commerce directly where within Congress's power to enact, but not those that only had an indirect impact. This distinction was rooted in the fear that otherwise "there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government." See id. at 555. However, then came *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1 (1937) which upheld the National Labor Relations Act and departed from the direct and indirect impact

standard. See Id. It is from the case of *NLRB* that we then get the substantial relation to interstate commerce standard.

Thereafter, in *Wickard v. Filburn*, 317 U.S. 111 (1942) the plaintiff filed suit because of a penalty assessed due to marketing quotas for wheat under the Agriculture Act of 1934. The Supreme Court upheld the Act under the Commerce Clause because even though the wheat grown on the Plaintiff's farm was trivial, it was not so trivial when taking into account others similarly situated and doing the same thing. This was the origination of the aggregate idea and was a general regulatory scheme concerning quotas of wheat.

Every single one of these cases did not deal with a criminal statute that imposed punishment on our citizens. Furthermore, there were still limits on the vast power of Congress to pass laws effectively obliterating the distinction between what is local and what is national and thus creating a completely centralized government. See Id. 557.

In relation to the criminal statue of possessing a weapon in a school zone, the Supreme Court said that that by its terms it has nothing do with the any sort of economic enterprise. This statute did not relate to a larger regulatory scheme that connected to commercial activity that a specific intrastate activity (i.e. possessing a weapon in a school zone) would undercut, which viewed in the aggregate, would impact national commerce. *See Id.* The school zone possession crime did not have a nexus element to interstate commerce.

However, in the case at bar, there is a specific element that the robbery must affect commerce. The basis of the nexus to commerce is simply the phones were manufactured outside of the state of Ohio and shipped to the store that Mr. Chisholm

robbed. The cell phone business in the United States is several billion dollar a year industry and the estimated value of the one cell phone that was not recovered was $1000.00. (Presentence Report, R.E. 16, ID#5). [1] It is hard to imagine the impact a single retail store robbery can have on such an industry or the United States, even if the entire value the phones he stole were counted ($25,000.00). The only conceivable way would be under the *de minimis* standard by looking at the robbery in the aggregate. However, as set forth by Judge Suhrheinrich, the Supreme Court expressly rejected the aggregation theory in *United States v. Morrision*, 529 U.S. 598 (2000). *See United States v. Baylor, 517 F.3d 899, 903-4 (6th Cir. 2008)*. *De minimus* is defined by Black's Law Dictionary as trifling and minimal, which is a far cry from "substantial". *See* Black's Law Dictionary, Eighth Edition (1999).

In *United States v. Morrison*, the Supreme Court was reviewing the civil penalty portion of an Act concerning gender-based violence. There, the Court stated that in *Lopez* its focus was on the criminal, non-economic nature of the conduct and central to its analysis. *See United States v. Morrison*, 529 U.S. 598, 610 (2000). The *Morrison* Court also stated that gun possession in school zones had a very attenuated connection to commerce. *See Id.* At 612. The "cost of crime" and "national productivity" rationales were specifically rejected in *Lopez*. *See Id. at 612-13.* Regardless that affecting commerce through robbery is an element of the crime in the case at bar, it is still Congress electing a remedy "over a wider, and more purely intrastate body of violent

[1] According to statita.com the value of cell phone sales in the United State in 2019 was 77.5 billion dollars. *See* https://www.statista.com/statistics/191985/sales-of-smartphones-in-the-us-since-2005/

crime." Although the Supreme Court in *Morrison* did not adopt a categorical rule against the aggregation principle, it did say "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Morrison* at 613. "**We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."** *Morrison* at 617 (emphasis added). There must be a clear distinction between what is national and what is within the province of the states. *See id.* The jurisdictional application of "any way or degree obstructs, delays or affects commerce" of 18 U.S.C. §1951 blurs the line between state and national power and should be declared unconstitutional. The application of federal jurisdiction under the Commerce Clause in the case at bar should be rejected by the Supreme Court as beyond the scope of the Commerce Clause.

II. Should the jurisdiction clause of Interference of Commerce by Robbery be void for vagueness?

The expansive statement of Congress that a robbery that in "any way or degree obstructs, delays or impedes commerce" should trigger federal jurisdiction really has led to arbitrary prosecution. If one steals a candy bar by robbing a store, then the federal government can choose to prosecute. In the case at bar, Mr. Chisholm argues that his single robbery of a retail store is such an arbitrary application of the Hobbs Act. There is no organized crime involved in his case, there is no implication of organized labor activities, and beyond an extreme *de minimis* impact on commerce, as will be addressed below, there is no justifiable basis to choose him for prosecution. His case is one out of

the hundreds of armed robberies that occur in states. The only aspect that makes his case any different is the federal government's decision to prosecute him. Judge Suhrheinrich's dissent in *Baylor* leads to this point. The effect of the Courts' continual upholding of the *de minimis* test for crimes under the Hobbs Act leads to every local robbery of a business in the United States being a federal crime. *See Baylor* at 904. The only apparent deciding factor about whether someone faces federal prosecution is not the statute itself, but whether the United States decides to prosecute.

In *Kolender v. Lawson*, 461 U.S. 352 (1983), the Supreme Court found a California statue as written and as construed by the state court was void for vagueness. The Supreme Court held, "the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *See Kolender* at 357. There is also another principle in the void for vagueness doctrine and that is legislatures must provide minimal guidelines to guide enforcement of a particular statue. Where a statute fails in this respect, it leads to sweeps of allowing policemen, prosecutors, and juries to pursue their personal predilections. The Supreme Court voided the statute in *Kolender* because the statute as construed by the state court did not provide a standard of what a person must do in order to be convicted of a crime.

The Supreme Court has rejected the idea of the "cost of crime" impacting the economy was sufficient for Commerce Clause purposes. *See United States v. Morrison*, 529 U.S. 598, 612-613 (2000). As it stands now, the main deciding factor is if the federal government wants to single out a defendant for prosecution. Since this case deals

directly with a subject that has always been historically a matter for state authorities, i.e. protecting the public from violent crime, Congress should not be allowed to circumvent this power of the states by using the broad jurisdictional basis of "any way or degree." Criminal laws have always been based on clear notice of what activity should be deemed criminal. In the case at bar, there is no question that a defendant is on notice not to commit a robbery. However, this is a line that the state must draw, but not the federal government unless the impact on interstate commerce is substantial.

> [F]air warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible, the line should be clear.

United States v. Bass, 404 U.S. 336, 348 (1971) (citing to *McBoyle v. United States*, 283 U.S. 25, 27 (1931). In the case at bar, there is no clear warning to common people that would tell them when they have crossed the line of a federal crime. If Mr. Chisholm had a committed a string of robberies in many states, the Hobbs Act robbery would be justified. If Mr. Chisholm had robbed a truck driver hauling cell phones on the highway across country, then Hobbs Act robbery is justified. However, extending federal prosecution to the robbery of 25 cell phones from a run-of-the-mill mobile phone store is too much. There really is no guidance or fair notice in Hobbs Act robbery concerning when the federal government should or could decide to prosecute and usurp the power of the states to prosecute this violent crime. Therefore, the Supreme Court should deem the jurisdictional statement in Hobbs Act Robbery as being void for vagueness.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should be issued from the Supreme Court to review the Opinion of the United States Court of Appeals from the

Sixth Circuit filed on January 24, 2022. It is only the Supreme Court that can answer this question concerning the scope of the Commerce Clause and the line between national and state power.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Jeffrey C. Rager, attorney for the petitioner Leandra Mario Chisholm, Jr., hereby certifies that the original and ten copies of this Petition for Writ of Certiorari were mailed to the Office of the Clerk, Supreme Court of the United States, 1 First Street NE Washington, DC 20543; and that a true copy of the foregoing Petition was served by mail with first-class postage prepaid, upon the Solicitor General of the United States, Room 5616, Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001; Lauren McMullen Ford, United States Attorney's Office, 801 West Superior Avenue, Suite 400, Cleveland, OH 44113; Leandra Chisholm, Jr., Inmate No. 67685-060, FPC Gilmer, P.O. Box 6000, Glenville WV 26351, by first class mail, on this the 14th day of February, 2022.

This 14th day of February, 2022.

Jeffrey C. Rager
Jeffrey C. Rager

APPENDIX A

APPENDIX A: Judgment of the Northern District Court of Ohio, United States v. Chisholm, Jr., Case No. 20-cr-00412-1 entered on March 9, 2021 at District Court Docket Entry 22.

APPENDIX B

APPENDIX B: Opinion of the Court of Appeal for the Sixth Circuit affirming, United States of America v. Chisholm, Jr., Case No. 21-3271 entered on January 24, 2022 at Docket Entry 30-2.