

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2017

JEREMY W. HARRIS,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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Issues Presented

1. Whether the interstate commerce element of a Hobbs Act robbery can be established under an aggregation theory where the total value of the items taken from a local convenience store is \$10.00 (one beer and one pack of cigarettes).
2. Whether robbery is an “economic activity” for purposes of the Commerce Clause.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jeremy W. Harris (“Harris”) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Citation to Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit, affirming Harris’s conviction and sentence is styled: *United States v. Jeremy W. Harris*, 712 Fed. Appx. 108 (2d Cir. 2018).

Jurisdiction

The opinion of the United States Court of Appeals for the Second Circuit, affirming the Petitioner’s conviction and sentence was announced on February 28, 2018 and is attached hereto as Appendix A. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the date of the judgment. This Court’s jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

U.S. Constitution

U.S. Const. art. I, § 8, cl. 3

The Congress shall have Power To . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Federal Statute

Title 18 U.S.C. § 1951

Interference with commerce by threats or violence

(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.

Federal Rule of Criminal Procedure

Fed. R. Crim. P. 11(b)(3) Determining the Factual Basis for a Plea.

Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

Statement of the Case

Harris pled guilty to a one-count information charging him with Hobbs Act Robbery, in violation of 18 U.S.C. § 1951(a). The district court sentenced him to 151 months in prison, three years of supervised release, a \$500 fine, and (most notably) \$10 in restitution. The jurisdiction of the federal district court was invoked pursuant to Title 18 U.S.C. § 3231 (“The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.”). Harris was convicted of violating Title 18 U.S.C. § 1951(a).

Harris argued on appeal that the factual basis supporting his plea was not sufficient to establish the element of “effect on interstate commerce,” given that the factual basis established nothing more than Harris had displayed a firearm in a 7-Eleven store and taken one beer and one pack of cigarettes with a total value of \$10.00. More specifically, Harris argued that robbery is not an economic activity, and because it is not an economic activity, it cannot be aggregated to achieve a substantial effect on interstate commerce.

The Second Circuit nonetheless upheld Harris's conviction (citing Second Circuit precedent) based upon the aggregation theory:

The Hobbs Act "regulates activities which, in the aggregate, have a substantial effect on interstate commerce; hence, the *de minimus* character of individual instances arising under the statute is of no consequence." . . . [W]e have held that the robbery of a local enterprise may affect commerce "if the robbery impairs the ability of the local enterprise to acquire – whether from out-of-state or in-state suppliers – goods originating out of state." . . . In this case, the factual basis supporting Harris's plea demonstrates that his crime affected interstate commerce. In pleading guilty, Harris accepted that he stole a can of beer and a package of cigarettes from a 7-Eleven convenience store.

Harris, 712 Fed. Appx. at 110.

First Reason for Granting the Writ: The Second Circuit's reliance on the aggregation theory in a local robbery is in conflict with Supreme Court authority.

A Supreme Court consideration in granting a petition for writ of certiorari includes when "a United States court of appeals has . . . decided an important federal question that conflicts with relevant decisions of [the Supreme] Court." Sup. Ct. R. 10(c).

(a) Commerce clause

The Constitution authorizes Congress to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” Art. I, § 8, cl. 3. The Supreme Court has identified three broad categories of activity Congress may regulate under its commerce power: (1) the channels of interstate commerce, (2) the instrumentalities of interstate commerce, and (3) those activities that substantially affect interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558 (1995). Under “channels of interstate commerce,” Congress regulates interstate commerce itself – “barring from interstate commerce a class of goods or people.” *United States v. Patton*, 451 F.3d 615, 621 (10th Cir. 2006).¹ “Instrumentalities”² are the means of interstate commerce, such as ships and railroads, and Congress may regulate intrastate activities that threaten these instrumentalities. *Id.* Under the third category, Congress

¹ See e.g. *United States v. Darby*, 312 U.S. 100, 117-19 (1941) (sustaining statute prohibiting shipment in interstate commerce of goods produced for interstate commerce by employees whose wages and hours do not conform to the requirements of the Fair Labor Standards).

² See e.g. *Southern R. Co. v. United States*, 222 U.S. 20, 26-27 (1911) (upholding Safety Appliance Act equipment requirements as applied to cars of interstate carrier moving on interstate railroad line even though particular cars were carrying only intrastate traffic).

has authority to regulate purely local activities that are part of an economic “class of activities” that have a *substantial effect* on interstate commerce. *Gonzales v. Raich*, 545 U.S. 1, 17 (2005).

Beer and cigarettes are neither channels nor instrumentalities of interstate commerce. Therefore, for the factual basis herein to have been sufficient to support Harris’s guilty plea, robbery of these items must somehow fit within the third category of commerce; i.e., having a substantial effect.

(b) When can intrastate conduct be aggregated to demonstrate a “substantial effect” on interstate commerce?

“Congress’s power . . . is not limited to regulation of an activity that by itself substantially affects interstate commerce, but also extends to activities that do so only when aggregated with similar activities of others.” *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 549 (2012). “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.” *Perez v. United States*, 402 U.S. 146,

154 (1971). However, this third “intrastate activity that substantially affects” category only applies where that activity is economic in nature. *Taylor v. United States*, ---U.S.---, 136 S. Ct. 2074, 2079–80 (2016). “Economic” has to do with the buying, selling, and bartering, or transporting for those purposes. *Zivotofsky ex rel. Zivotofsky v. Kerry*, - --U.S.---, 135 S. Ct. 2076, 2104 (2015) (Breyer, J., concurring).

Examples where the Supreme Court has upheld, based upon the aggregation principle, federal statutes that regulate intrastate conduct include the following: *Gonzales v. Raich*, 545 U.S. 1, 22 (2005) (“Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, . . . and concerns about diversion into illicit channels, we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the [federal Controlled Substance Act].”); *Taylor*, 136 S. Ct. at 2080 (“Under *Raich*, the market for marijuana, including its intrastate aspects, is “commerce over which the United States has jurisdiction.” It therefore 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.”)³; *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 276-280 (1981) (Surface Mining and Reclamation Control Act of 1977 upheld where challenged provisions constituted a complex regulatory scheme governing surface coal mining operations, requiring, among other things, land restoration, use of dams, and spoil disposal); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 120 (1942) (Regulation prescribing the minimum price to be paid producers for all milk marketed in the Chicago area upheld where approximately forty percent of which came from out-of-state, rejecting the contention that the regulations could not under the Commerce Clause be applied to a local milk marketer all of whose business was entirely intrastate, given that “... the marketing of

³ *Taylor’s* holding was limited to robberies from drug dealers: “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.” *Taylor*, 136 S.Ct. at 2082.

intrastate milk which competes with that shipped interstate would tend seriously to break down price regulation of the latter.”); *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942) (Supreme Court upheld the authority of Congress to prohibit the domestic consumption of a home-grown commodity, where that prohibition was an indirect and supplemental, but still essential, means of enforcing regulations on the national market in that commodity); *Katzenbach v. McClung*, 379 U.S. 294, 199-301 (1964) (Title II of the Civil Rights Act of 1964 upheld in part based on congressional testimony indicating a clog upon interstate travel worked by the virtual apartheid of racial discrimination regarding restaurant services); *United States v. Sullivan*, 332 U.S. 689, 698 (1948) (upholding application of the misbranding provision of the Federal Food, Drug, and Cosmetic Act to local sales of drugs); *Perez v. United States*, 402 U.S. 146, 157 (1971) (“[L]oan sharking in its national setting is one way organized interstate crime holds its guns to the heads of the poor and the rich alike and syphons funds from numerous localities to finance its national operations.”). In each and every one of these cases, the

activity at issue (1) was economic activity, and (2) was heavily federally regulated.

On the other hand, examples where the Supreme Court has *not* upheld federal statutes that regulate intrastate conduct based on the aggregation principle include the following two cases. In *United States v. Lopez*, 514 U.S. 549 (1995), a high school student was charged under a federal statute that criminalized knowingly possessing a firearm in a school zone. *Id.* at 551. The Court noted that the Commerce Clause has limits. *Id.* at 559. The Court held that because the statute had nothing to do with economic enterprise, and because it was not part of a larger regulation of activity, it could not be upheld under the Commerce Clause:

Section 922(q) is a criminal statute that by its terms has nothing to do with “commerce” or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the *aggregate*, substantially affects interstate commerce. (emphasis added)

Id. at 561. The Court went on to address the Government’s “aggregation” arguments:

The Government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. . . . Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. . . . The Government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation’s economic well-being. As a result, the Government argues that Congress could rationally have concluded that § 922(q) substantially affects interstate commerce.

We pause to consider the implications of the Government’s arguments. *The Government admits, under its “costs of crime” reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. . . .* Similarly, under the Government’s “national productivity” reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. 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. Thus, *if we were to accept the Government’s arguments, we are hard pressed to posit*

any activity by an individual that Congress is without power to regulate. (emphasis added)

Id. at 563-64.

The possession of a gun in a local school zone is in no sense an economic activity that might, *through repetition elsewhere*, substantially affect any sort of interstate commerce. (emphasis added)

Id. at 567.

In *United States v. Morrison*, 529 U.S. 598 (2000), a college coed who was raped by members of the football team brought a civil suit under a federal statute (42 U.S.C. §13981) that was part of the Violence Against Women Act of 1994. *Id.* at 601-02, 605. The football players argued that the statute was unconstitutional; the United States intervened to defend §13981's constitutionality. *Id.* at 504. The Court, notwithstanding congressional findings regarding the serious impact gender-motivated violence has on victims and their families, and relying on *Lopez*, held the statute to be outside the limits of the Commerce Clause:

Gender-motivated crimes of violence *are not, in any sense of the phrase, economic activity*. While we need not adopt a categorical rule against *aggregating the effects of any noneconomic* activity in order to decide these cases, 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. (emphasis added)

Id. at 613.

Given these [congressional] findings and petitioners' arguments, the concern that we expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority seems well founded. . . . The reasoning that petitioners advance seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce. If accepted, petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, *aggregated* impact of that crime has substantial effects on employment, production, transit, or consumption. Indeed, if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part. (emphasis added)

Id. at 615. Neither *Lopez* nor *Morrison* involved economic activities that were heavily federally regulates. Thus, the aggregation principle did not apply.

(c) Robbery is generally a state crime

“In our federal system, [internal quotes omitted] Congress cannot punish felonies generally . . . ; it may enact only those criminal laws that are connected to one of its constitutionally enumerated powers, such as the authority to regulate interstate commerce.” *Torres v. Lynch*, ---U.S.---, 136 S. Ct. 1619, 1624–25 (2016). “States possess primary authority for defining and enforcing the criminal law.” *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993). Traditionally robbery is a local offense. *United States v. Silverio*, 335 F.3d 183, 186 (2d Cir. 2003).

(d) the instant case

As to the instant case, keeping in mind that in order to use the aggregation principle to get to a substantial effect on interstate commerce, the regulated activity has to be economic in nature, robbery does not involve “buying, selling, and bartering, or transporting for those purposes.” Therefore, robbery is not an economic activity. Second Circuit precedent has treated robbery as an economic activity under a “costs of crime” analysis, an analysis condemned by the Supreme Court in *Lopez*. Thus, the aggregation principle should not be applied to robbery.

Second Reason for Granting the Writ: The Second Circuit's opinion is in conflict with the legislative history of the Hobbs Act.

Congress enacted the Hobbs Act's predecessor in 1934. See Anti-Racketeering Act, ch. 569, 48 Stat. 979 (1934). The Anti-Racketeering Act prohibited violence in furtherance of a plan to injury commerce through coercion or extortion. *Scheidler v. Nat'l Org. for Women, Inc.*, 547 U.S. 9, 18 (2006). The 1934 Act does not appear to have ever been applied to robberies of local retail stores. *United States v. McFarland*, 311 F.3d 376, 387 n. 20 (5th Cir. 2002) (Garwood J., dissenting from affirmance of panel decision). In 1946, Congress enacted the Hobbs Act in response to the Supreme Court's opinion in *United States v. Local 807*, 315 U.S. 521 (1942) wherein the Court held that the Anti-Racketeering Act "did not apply to the activities of members of a New York City truck drivers union who, by violence or threats, extracted payments for themselves from out-of-state truckers in return for the unwanted and superfluous service of driving the trucks to and from the city." *McFarland*, 311 F.3d at 382; *See also United States v. Green*, 350 U.S. 415, 418-20 (1956) ("The legislative history makes clear that the new

[Hobbs] Act was meant to eliminate any grounds for future judicial conclusions that Congress did not intend to cover the employer-employee relationship;” “The city truckers in the *Local 807* case similarly were trying by force to get jobs from the out-of-state truckers by threats and violence”). The discussions surrounding the enactment of the Hobbs Act “focused almost entirely on the interruption of commodity shipments actually moving in interstate commerce, principally agricultural commodities being carried by truck across state lines.” *McFarland*, 311 F.3d at 386.

Third Reason for Granting the Writ: The Second Circuit’s reliance on an aggregation theory is in conflict with other Circuits.

A Supreme Court consideration in granting a petition for writ of certiorari includes when “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter.” Sup. Ct. R. 10(a). Some Circuits agree with the Second Circuit and have held that robbery is the sort of activity that can be analyzed in the aggregate, irrespective of whether

the particular robbery at issue affected interstate commerce.⁴ Other Circuits have held that the robbery at issue must, in and of itself, have had at least a minimal effect on interstate commerce.⁵ And still other Circuits have held that the robbery at issue must only have a potential or possible effect on interstate commerce.⁶

⁴ *United States v. Tillery*, 702 F.3d 170, 173-74 (4th Cir. 2012) (“When determining whether a robbery had a minimal effect on interstate commerce, we do not look at the impact of the immediate offense, but [internal quotes omitted] whether the relevant class of acts has such an impact.”); *United States v. Baylor*, 517 F.3d 899, 902 (6th Cir. 2008) (“We found persuasive the Tenth Circuit’s reasoning . . . that if a statute regulates an activity which, through repetition, in aggregate has a substantial effect on interstate commerce, the *de minimis* character of individual instances arising under the statute is of no consequence[.]”); *United States v. Bolton*, 68 F.3d 396 (10th Cir. 1995) (“[W]e conclude that the Hobbs Act regulates activities which in aggregate have a substantial effect on interstate commerce.”).

⁵ *United States v. Villafranca*, 260 F.3d 374, 377 (5th Cir. 2001) (“The defendant’s activity on interstate commerce “need only be slight” but cannot be “attenuated.”); *United States v. Peterson*, 236 F.3d 848, 851-52 (7th Cir. 2001) (“We have long held that the government need only show some actual, even if *de minimis*, effect, or, where there is no actual effect, a realistic probability of an effect, on interstate commerce to bring robbery within its prosecutorial reach.”), *abrogated on other grounds*, *Taylor v. United States*, 136 S.Ct. 2074 (2016); *United States v. Williams*, 308 F.3d 833, 838 (8th Cir. 2002) (Actual rather than probable effect on interstate commerce is required); *United States v. Guerra*, 164 F.3d 1358, 1361 (11th Cir. 1999) (“We observe, again, that the Hobbs Act contains an express jurisdictional element that ensures that the individual robbery charged affects interstate commerce.”); *United States v. Harrington*, 108 F.3d 1460, 1465 (D.C. Cir. 1997) (“We agree with the nearly unanimous judgment of those federal courts that have reviewed this type of challenge after *Lopez*, that the proper question for a court reviewing a claim that the evidence was insufficient to satisfy a federal statute’s ‘jurisdictional element’ remains whether the evidence was sufficient to show an ‘explicit’ and ‘concrete’ effect on interstate commerce[.]”).

⁶ *United States v. Catalan-Roman*, 585 F.3d 453, 462 (1st Cir. 2009) (“[T]his circuit’s settled case law [has held] that a robbery need only have [internal quotes omitted] a

Fourth Reason for Granting the Writ: There is a disagreement among the Circuits as to whether or not robbery is an economic activity.

The Third, Fourth, Ninth, Tenth, and Eleventh Circuits have all explicitly held robbery to be an economic activity.⁷ The Seventh Circuit, on the other hand has noted, “the Hobbs Act does not suggest that robbery is an economic activity[.]” *United States v. Peterson*, 236 F.3d 848, 852 (7th Cir. 2001), *abrogated on other grounds*, *Taylor v. United States*, 136 S.Ct. 2074 (2016). The Fifth Circuit has produced two vigorous dissents, arguing that robbery is not an economic activity, and

realistic probability of a de minimus effect on interstate commerce" to bring it within the reach of the Hobbs Act.”); *United States v. Powell*, 693 F.3d 398, 402 (3d Cir. 2012) (“[W]e have stressed that [internal quotes omitted] proof of a *de minimis* effect on interstate commerce is all that is required for conviction under the Hobbs Act. . . . Moreover, the effect may be potential, not actual.”); *United States v. Temkin*, 797 F.3d 682, 690 (9th Cir. 2015) (“[P]roof of a potential impact on interstate commerce is sufficient.”).

⁷ *United States v. Shavers*, 693 F.3d 363, 372 (3d Cir. 2012) (Robbery is “indisputably economic.”); *United States v. Williams*, 342 F.3d 350, 354 (4th Cir. 2003) (describing robbery as a “quintessentially economic activity”); *United States v. Lynch*, 282 F.3d 1049, 1052-53 (9th Cir. 2001) (“The Hobbs Act presents us . . . with the difficulty of analyzing activities that always carry with them an economic component. By definition, robbery . . . involve[s] the forced transfer of currency or of goods that can be exchanged for currency.”); *United States v. Morris*, 247 F.3d 1080, 1087 (10th Cir. 2001) (“We have held that the Hobbs Act regulates economic activity[.]”); *United States v. Gray*, 260 F.3d 1267, 1274 (11th Cir. 2001) (“[T]he Hobbs Act plainly and undeniably regulates economic activity.”).

because it is not an economic activity, it cannot properly be aggregated to show an effect on interstate commerce.

In *United States v. Hickman*, 179 F.3d 230 (5th Cir. 1999), Judge Higginbotham (joined by seven other judges) dissented to the Court's failure to grant *en banc* rehearing. The case involved a series of robberies of businesses in east Texas. Judge Higginbotham's arguments included the following statements:

We would hold that substantial effects upon interstate commerce may not be achieved by aggregating diverse, separate individual instances of intrastate activity where there is no rational basis for finding sufficient connections among them.

Id. at 231.

Taking a child's lemonade is as potentially covered as any other robbery, at least as long as we are free to aggregate all robberies.

Id.

There is no basis either in the original understanding or in the case law for including robbery in economic activity. Robbery is not selling, buying, or bartering, and it does not produce anything. It effects only the transfer of resources, and an involuntary transfer at that.

Id. at 237-38.

The ad hoc and random use of the Hobbs Act to prosecute local robberies masks the dramatic reach of federal power required to sustain them.

Id. at 243.

In *United States v. McFarland*, 311 F.3d 376 (5th Cir. 2002), Judge Garwood (along with seven other judges), dissenting from an affirmance of an equally divided *en banc* court, set forth at length his arguments against the panel's decision to affirm the defendant's Hobbs Act convictions involving four robberies of local convenience stores in Fort Worth, Texas. The following comments are instructive:

[I]t may be seriously doubted [based on a review of legislative history] that Congress then contemplated that it was making a federal crime the "plain vanilla" cash robbery from a local retail store of the sort here involved.

Id. at 383.

This legislative history strongly suggests to us that Congress in enacting the Hobbs Act was concerned with protecting against relatively direct obstruction of the actual movement of goods in interstate commerce, and did not contemplate its application to robberies of local retail stores such as those here.

Id. at 387.

Robbery is the "activity" regulated by the Hobbs Act, and we conclude that for these purposes robbery cannot be considered a commercial activity. Robbery does have an economic effect. But so, too, do not only all thefts of any kind from any victim

but also, for example, virtually all criminal homicides.

Id. at 396-97.

And, we are aware of no Commerce Clause case in which the Supreme Court has applied the aggregation principle to a class of activities where contours of the class are not reasonably inferable from the language of the challenged statute or regulation. Moreover, the approach of allowing aggregation simply because of "the infliction of economic harm" (or the "depletion of . . . assets") equally supports making a federal offense of any crime (say any criminal homicide or assault producing serious bodily injury) so long as it causes economic harm or depletes economic resources and hence in some way or degree affects interstate commerce-in the same sense as does a fifty dollar robbery or a fifty cent shoplifting from a victim (whether an individual or a local retailer) who purchases items made in another state-and so long as the aggregate effect of all such crimes on interstate commerce is substantial.

Id. at 397.

[W]e conclude that the 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[.]

Id. at 409.

Conclusion

For the foregoing reasons, Petitioner Harris respectfully urges this Court to grant a writ of certiorari to review the opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

/s/ John A. Kuchera
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Certificate of Service

This is to certify that a true and correct copy of the above and foregoing petition for writ of certiorari has this day been mailed by the U.S. Postal Service, First Class Mail, to the Solicitor General of the United States, Room 5614, Department of Justice, 10th Street and Constitution Avenue, N.W. Washington, D.C. 20530.

SIGNED this 25th day of May, 2018.

/s/ John A. Kuchera
John A. Kuchera, Attorney for
Petitioner Jeremy W. Harris

Appendix A

United States v. Harris

United States Court of Appeals for the Second Circuit

February 28, 2018, Decided

No. 17-786-cr

Reporter

712 Fed. Appx. 108 *; 2018 U.S. App. LEXIS 4949 **; 2018 WL 1081226

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JEREMY W. HARRIS, Defendant-Appellant.

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: [****1**] Appeal from a judgment of the United States District Court for the Western District of New York. (Wolford, J.).

United States v. Harris, 2017 U.S. Dist. LEXIS 38799 (W.D.N.Y., Mar. 17, 2017)

Core Terms

interstate commerce, robbery, district court, guilty plea

Counsel: For Appellant: John A. Kuchera, Waco, Texas.

For Appellee: Monica J. Richards, Assistant United States Attorney, for James P. Kennedy, Jr., United States Attorney for the Western District of New York, Buffalo, New York.

Judges: PRESENT: BARRINGTON D. PARKER, PETER W. HALL, RAYMOND J. LOHIER, JR., Circuit Judges.

Opinion

[*109] SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Defendant Jeremy W. Harris ("Harris") appeals from the judgment of the district court convicting him, after pleading guilty pursuant to a *Federal Rule of Criminal Procedure 11(c)(1)(C)* plea agreement, of one count of *Hobbs Act* robbery, in violation of *18 U.S.C. § 1951(a)*. On appeal Harris argues that the district court lacked subject matter jurisdiction in his case because the Information charging him with a violation of *18 U.S.C. § 1951* does not allege that his conduct had a substantial effect on interstate commerce. Likewise, Harris claims that there are

insufficient facts to support his guilty plea because the theft of a can of beer and a package of cigarettes from a 7-Eleven convenience store does not have a substantial effect [**2] on interstate commerce.

We review the sufficiency of a charging instrument *de novo*. United States v. Geibel, 369 F.3d 682, 698 (2d Cir. 2004). When, as in this case, the defendant fails to object to a purported Rule 11 violation before the district court, we review for plain error. United States v. Youngs, 687 F.3d 56, 59 (2d Cir. 2012). In so doing, we assume the parties' familiarity with the facts and record of the prior proceedings, which we reference only as necessary to explain our decision to affirm the district court's decision.

I. The Sufficiency of the Information

"In order to sustain a challenge to the district court's jurisdiction, the defendant who has pleaded guilty must establish that the face of the [charging instrument] discloses that the count or counts to which he pleaded guilty failed to charge a federal offense." Hayle v. United States, 815 F.2d 879, 881 (2d Cir. 1987). Rule 7(c)(1) of the Federal Rules of Criminal Procedure requires that an information contain a "plain, concise, and definite written statement of the essential facts constituting the offense charged." In a Hobbs Act prosecution, we do not require that an information "specify the precise nature of the effect upon interstate commerce that the government intends to prove at trial." United States v. Alfonso, 143 F.3d 772, 776 (2d Cir. 1998). Rather, a charging instrument is sufficient so long as it (1) "contains the elements of the offense charged and fairly informs a defendant of the [**3] charge against which he must defend" and (2) "enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." Hamling v. United States, 418 U.S. 87, 117, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974).

Here, the Information specifies that Harris robbed a 7-Eleven on August 19, 2015. The Information alleges that Harris "did unlawfully obstruct, delay and affect, and attempt to obstruct, delay and affect, commerce" by robbery, in violation of 18 U.S.C. § 1951. The Information further specifies that Harris's crime involved theft of commercial goods from a commercial establishment. The Information, therefore, was sufficient to provide the district court subject matter jurisdiction because it contains the essential elements of a Hobbs Act robbery and contains enough detail to enable Harris to prepare for his defense and to bar future prosecutions for the same conduct.

II. Rule 11 Violation

Harris claims that there were insufficient facts to support his guilty plea because the theft of a beer and a package of cigarettes from a 7-Eleven does not have a substantial effect on interstate commerce.¹ [**110] In his view, if his crime "comes within the ambit of the Hobbs Act,

¹In entering into the Rule 11(c)(1)(C) plea agreement, Harris agreed to waive his right to appeal or collaterally attack his sentence. This waiver does not affect our Rule 11 analysis because we do not strictly enforce appeal waivers where the defendant alleges an insufficient factual basis for the plea. United States v. Adams, 448 F.3d 492, 497 (2d Cir. 2006).

then the Hobbs Act has completely swallowed every local robbery in America." Appellant's Br. at 17.

The Hobbs **[**4]** Act makes it unlawful "in any way or degree" to obstruct, delay, or affect "commerce or the movement of any article or commodity in commerce, by robbery or extortion . . ." 18 U.S.C. § 1951(a). In a Hobbs Act prosecution, the requirement that the robbery affect interstate commerce is an element of the offense charged and jurisdictionally "critical" because federal jurisdiction rests on interference with interstate commerce. Stirone v. United States, 361 U.S. 212, 218, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960). Importantly, however, the government's burden in proving a nexus to interstate commerce is minimal. United States v. Shareef, 190 F.3d 71, 75 (2d Cir. 1999). The Hobbs Act "regulates activities which, in the aggregate, have a substantial effect on interstate commerce; hence, the 'de minimis' character of individual instances arising under [the] statute is of no consequence." United States v. Elias, 285 F.3d 183, 188 (2d Cir. 2002) (quoting United States v. Leslie, 103 F.3d 1093, 1100 (2d Cir. 1997)). Indeed, the government may establish an interstate nexus by introducing evidence that the robbery was of a business that purchases commodities that travel "in interstate commerce." United States v. Jones, 30 F.3d 276, 285 (2d Cir. 1994). Likewise, we have held that the robbery of a local enterprise may affect interstate commerce "if the robbery impairs the ability of the local enterprise to acquire—whether from out-of-state or in-state suppliers—goods originating out-of-state." Elias, 285 F.3d at 189.

In this case, the factual **[**5]** basis supporting Harris's plea demonstrates that his crime affected interstate commerce. In pleading guilty, Harris accepted that he stole a can of beer and a package of cigarettes from a 7-Eleven convenience store. He agreed that 7-Eleven operates stores all over the country and that 7-Eleven purchases goods to stock its shelves from vendors located both within and outside of New York. On these facts, the government established a sufficient nexus between Harris's crime and interstate commerce.

We have considered Harris's remaining arguments on appeal and find them to be without merit. We **AFFIRM** the judgment of the district court.