Supreme Court, U.S.
FILED

09 - 936 FEB 5 - 2010

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No. 09 -

IN THE

Supreme Court of the United States

RODREQUIS ARMANI COUNCIL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), the Hobbs Act (18 U.S.C. § 1951(a)) prosecution of local robberies that have only a *de minimis* effect on interstate commerce is an unconstitutional exercise of federal power.

PARTIES TO THE PROCEEDING

Petitioner Rodrequis Armani Council was defendant-appellant in the Court of Appeals.

Respondent United States of America was the plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner seeks a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fourth Circuit.

DECISION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unreported and is reprinted in the Appendix to the Petition ("App.") at 1a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on February September 10, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Commerce Clause, U.S. Const. art. I, § 8, cl.3, empowers Congress to "regulate [c]ommerce with foreign [n]ations, and among the several [s]tates, and with the Indian [t]ribes."

The Hobbs Act, 18 U.S.C. § 1951(a), makes it unlawful to "obstruct[], delay[], or affect[] commerce or the movement of any article or commodity in commerce, by robbery or extortion."

STATEMENT OF THE CASE

Petitioner Rodrequis Council robbed $209 from the Time Out Market, a convenience store in Waynesville, North Carolina. This petition presents the question whether the federal government may prosecute under the Hobbs Act, 18 U.S.C. § 1951(a), such a local, small-scale robbery that has at most a *de minimis* effect on interstate commerce.

1. In February 2008, petitioner's 14-year old sister went missing. Desperate to find her, petitioner

decided to appear on the local television evening news by getting arrested. As a star cornerback for the University of Louisville football team, petitioner calculated that news of his arrest would reach his sister and she would return home. Accordingly, petitioner walked into the Time Out Market in Waynesville, North Carolina with a loaded 9 mm pistol. A video recorder captured petitioner pointing the gun at the cashier, demanding that she "gimme your money and be quick," and left the store with $209 and the cashier's personal cell phone. He then drove to a nearby rest area and waited. He was arrested soon after, and his arrest was widely publicized locally. *See* Statement of Facts, App. 33a-35a, and Sentencing Hearing Transcript, App. 4a-18a.

2. The federal government charged petitioner with one count of interference with commerce by robbery and one count of using and brandishing a firearm during a crime of violence. App 36a. The State of North Carolina, charged petitioner with armed robbery. App 36a-37a. Petitioner moved to dismiss the federal case on the basis that his actions had insufficient effect on interstate commerce to trigger the Hobbes Act. He argued that the robbery of $209 and a personal phone did not have the effect on interstate commerce that *United States v. Lopez*, 514 U.S. 549 (1995), requires. Other than preserving the question presented by this petition, petitioner did not contest the government's allegations. He waived his right to a jury trial.

The district court denied the motion to dismiss. App. 36a. In the court's view, "it is not arguable that armed robberies of convenience stores and other retail establishments have a considerable aggregate effect on interstate commerce." App. 40a. Further-

more, "the minimal effects standard is a well[]settled principle in the Fourth Circuit." *Id.*

Petitioner was sentenced to consecutive prison sentences of 16 months for violating the Hobbs Act and 84 months for violating 18 U.S.C. § 924(c)(1)(A)(ii), which prohibits brandishing a firearm during a "crime of violence . . . for which the person may be prosecuted in a court of the United States." Petitioner argued below, and the government has not disputed, that his § 924(c)(1) conviction cannot stand if his robbery cannot be prosecuted under the Hobbs Act. At the time that petitioner's motion to dismiss was denied, state charges remained pending in Haywood County. App. 36a-37a.

3. The Court of Appeals (Wilkinson, Shed, Duncan) affirmed. App. 1a-3a. Citing *United States v. Williams*, 342 F.3d 350, 354 (4th Cir. 2003), the panel noted that the Hobbs Act's jurisdictional requirement "can be established by a minimal effect on interstate commerce." App. 2a. The panel stated that its "review of the record shows that there was sufficient evidence to establish jurisdiction to prosecute." *Id.*

REASONS FOR GRANTING THE PETITION

This case presents an important and recurring question about the proper scope of federal power: whether the Constitution permits the federal government to prosecute an individual who commits a local robbery which has at most a *de minimis* effect on interstate commerce. The courts of appeals are waiting for—indeed, many circuit-court judges have called for—this Court to consider whether the *de minimis* standard is justified by the Commerce Clause. This question is recurring, and this case presents a good vehicle for addressing it. The Court

should grant review.

I. THE DECISION BELOW CONFLICTS WITH PRECEDENT OF THIS COURT

A. Under *Lopez* and *Morrison*, It Is Improper To Disrupt the Federal Balance By Making Local Thefts Subject to Federal Prosecution

It is well-established that our Constitution "created a Federal Government of limited powers." *See Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Thus, while Congress may "regulate [c]ommerce . . . among the several [s]tates," U.S. Const. art. I, § 8, cl.3, there are "outer limits" to its authority to do so, *see Lopez*, 514 U.S. at 556-57; *see also United States v. Morrison*, 529 U.S. 598, 608 (2000) (Congress' "regulatory authority [under Commerce Clause] is not without effective bounds]").

In *Lopez*, this Court surveyed the history of its jurisprudence under the Commerce Clause and "identified three broad categories of activity that Congress may regulate under its commerce power": (1) the use of the channels of interstate commerce, (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce, 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; *see also Gonzales v. Raich*, 545 U.S. 1, 15-19 (2005); *Morrison*, 529 U.S. at 608-09.

In *Morrison*, this Court reaffirmed *Lopez*'s analytical framework and made clear that "noneconomic, violent criminal conduct" cannot be regulated "based solely on that conduct's aggregate effect

on interstate commerce." *Morrison*, 529 U.S. at 608-09, 617. As this Court previously noted, when rejecting the proposition that the Hobbs Act was intended to confer upon the federal government the authority to "polic[e] the orderly conduct of strikes," *United States v. Enmons*, 410 U.S. 396, 411 (1973), there is no indication in the Act's legislative history that Congress intended to encroach upon criminal prosecutions that had historically been the province of the states: "[n]either the language of the Hobbs Act nor its legislative history can justify the conclusion that Congress intended to work . . . such an unprecedented incursion into the criminal jurisdiction of the States," *id.*

B. The Decision Below Conflicts With *Lopez* And *Morrison*

Petitioner stole a couple hundred dollars from a convenience store and then waited to be arrested. Although petitioner's conduct was criminal (and was being prosecuted in state court), it hardly implicates any concerns of the federal government. Under *Lopez* and *Morrison*, petitioner's crime did not have the requisite relationship to interstate commerce and should not have been federally prosecuted.

1. The panel below erroneously concluded that petitioner's crime could be federally prosecuted because the Hobbs Act contains a jurisdictional element limiting its application to crimes that "obstruct[], delay[], or affect[] commerce." 18 U.S.C. § 1951(a); *see* App. 2a. Other courts of appeals have also adopted this rationale. *See, e.g., United States v. Capozzi*, 347 F.3d 327, 336 (1st Cir. 2003) ("Congress' inclusion of a jurisdictional element in the Hobbs Act addresses the *Lopez* Court's constitutional concern that congressional authority under the

Commerce Clause not become a 'general police power of the sort retained by the States'" (emphasis omitted)); *United States v. Fabian*, 312 F.3d 550, 555 (2d Cir. 2002) ("As the Hobbs Act requires a particularized jurisdictional showing, we find *Morrison* does not affect our requirement that 'the Government need only show a "minimal" effect on interstate commerce' to support Hobbs Act jurisdiction."); *United States v. Dobbs*, 449 F.3d 904, 912 (8th Cir. 2006) ("a statute with an express jurisdictional nexus to interstate commerce may be applied in circumstances where the actual connection to interstate commerce is small"); *United States v. Atcheson*, 94 F.3d 1237, 1242 (9th Cir. 2006) ("Because the Hobbs Act is concerned solely with *inter*state, rather than *intra*state, activities, we conclude that *Lopez*'s 'substantially affects' test is not applicable.") (emphasis added); *United States v. Harrington*, 108 F.3d 1460, 1465 (D.C. Cir. 1997) (*Lopez*, in recognizing the "central role that a jurisdictional element can play in the valid application of a federal criminal statute, clearly does not assume that a 'substantial' effect on interstate commerce need be shown in such a setting").

But the jurisdictional element merely states that the Hobbs Act reaches only those robberies that affect interstate commerce; it says nothing about *how large an effect* the Constitution requires. *See United States v. Bishop*, 66 F.3d 569, 594 (3d Cir. 1995) (Becker, J., dissenting) ("a jurisdictional element functions only to limit the regulation to interstate activity *or* to ensure that the intrastate activity which is regulated satisfies one of the three tests of congressional power."). As the Court explained in *Lopez*, the purpose of a jurisdictional element is to

"ensure, through case-by-case inquiry, that the [regulated activity] affects interstate commerce." 514 U.S. at 561. *Lopez*, however, supplies no basis to conclude that Congress has "the power to provide for a *lesser* relation to interstate commerce . . . simply by including a jurisdictional provision." *United States v. McFarland*, 311 F.3d 376, 394-95 (5th Cir. 2002) (per curiam; en banc) (Garwood, J., dissenting); *see also Morrison*, 529 U.S. at 616 ("[u]nder our written Constitution, . . . the limitation of congressional authority is not solely a matter of legislative grace"); *Lopez*, 514 U.S. at 557 ("[T]he scope of the interstate commerce power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them . . . would effectually obliterate the distinction between what is national and what is local . . ..") (internal quotation marks omitted); Andrew Weiss, Note, *Commerce-Clause in the Cross-Hairs: The Use of* Lopez-*Based Motions to Challenge the Constitutionality of Federal Criminal Statutes*, 48 Stan. L. Rev. 1431, 1456 (1995) ("[u]nder the 'logic' of [lower courts'] reasoning, the *Lopez* Court could have upheld § 922(q) if Congress had simply inserted a jurisdictional element into its text").

And for good reason. Under the lower courts' rationale, Congress could bring under federal control any intrastate activity that has a *de minimis* effect on interstate commerce simply by including a jurisdictional element in the statute. Almost every local crime—from loitering to vandalism—arguably has some *de minimis* effect on commerce. Thus, far from denying Congress "a 'general police power,'" *Capozzi*, 347 F.3d at 336 (quoting *Lopez*, 514 U.S. at 567), the

jurisdictional-element rationale improperly sanctions one. *See Bishop*, 66 F.3d at 596 (Becker, J., dissenting) ("majority's holding . . . permits Congress, through the inclusion of a meaningless interstate commerce provision, to 'convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States'" (emphasis omitted)).

2. In addition to endorsing the mistaken jurisdictional-element rationale, the district court below reasoned that "armed robberies of convenience stores and other retail establishments have a considerable aggregate effect on interstate commerce." App. 40a. *Accord, e.g., United States v. Bolton*, 68 F.3d 396, 399 (10th Cir. 1995) (considering whether "the Hobbs Act regulates activities which in aggregate have a substantial effect on interstate commerce"); *United States v. Guerra*, 164 F.3d 1358, 1361 (11th Cir. 1999) (Hobbs Act designed to "regulate[] general conduct . . . which in the aggregate affects commerce substantially").

That aggregate-effects rationale conflicts with this Court's precedent. Instead of upholding the regulation of any interstate activity that substantially affects commerce in the aggregate, "[this Court's] cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Morrison*, 529 U.S. at 613 (emphasis omitted); *see also id.* at 617 (Congress may not "regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce"). Most recently, in *Raich*, this Court distinguished the Controlled Substances Act from the statutes at issue in *Lopez* and *Morrison* on the ground that "the activities regulated by the CSA

are quintessentially economic." *Raich*, 545 U.S. at 25; *see also id.* at 35-36 (Scalia, J., concurring) ("In *Lopez* and *Morrison*, the Court . . . rejected the argument that Congress may regulate *noneconomic* activity based solely on the effect that it may have on interstate commerce through a remote chain of inferences.").

Nothing in *Raich* suggests that robbery is within the class of activity that may be aggregated for purposes of Commerce Clause analysis. *Raich* held that Congress could regulate the purely local production of a commodity—marijuana—even when it was "not produced for sale" because the "failure to regulate that class of activity would [have] undercut the regulation of the interstate market in that commodity." 545 U.S. at 18. As Justice Scalia explained in his concurrence, while Congress' power "'to make . . . regulation effective' commonly overlaps with the authority to regulate economic activities that substantially affect interstate commerce, and may in some cases have been confused with that authority, the two are distinct." *Id.* at 37 (Scalia, J., concurring); *cf. Lopez*, 514 U.S. at 574 (Kennedy, J., concurring) ("Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy.").

The Hobbs Act is not like the statutory provision at issue in *Raich*. It is not part of a comprehensive regulatory scheme comparable to the CSA. *See, e.g.*, *Harrington*, 108 F.3d at 1476 (Sentelle, J., dissenting) ("Congress did not undertake a general regulatory scheme of armed robberies."). Moreover, robbery of a few hundred dollars is not "commercial" in the "ordinary and usual sense of that term." *See, e.g.*, *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring)

(Gun Free School Zones Act "regulat[ed] an activity beyond the realm of commerce in the ordinary and usual sense of that term"). The term "commerce" is used to refer to "[b]uying and selling; the exchange of merchandise or services, esp. on a large scale." 1 New Shorter Oxford English Dictionary 451 (1993); *see also* Merriam-Webster's Collegiate Dictionary 231 (10th ed. 1997) ("the exchange or buying and selling of commodities, esp. on a large scale and involving transportation from place to place").

Of course, robbery does have an economic effect on the entity or individual robbed. But concluding that every robbery of a business affects interstate commerce requires assumptions about how that business would have used the money. When a robbery depletes the assets of a business engaged in interstate commerce, the depletion will not have even a *de minimis* effect on interstate commerce unless that depletion actually alters interstate purchasing decisions. There is no reason to believe, and no evidence on the record, that a $209 robbery did or was likely to do that. Additionally, the actual money stolen from a robbery may immediately be used to purchase other goods that have also moved in interstate commerce (as most have). Concluding that robbery affects interstate commerce (as opposed to the entity or individual robbed) requires assumptions about how the money would have been used by the true owner, as well as how it will be used by the person who stole it. Inquiring only as to whether a business's assets were depleted wrongly displaces the question of whether interstate commerce was affected.

The courts of appeals have nevertheless relied on purely speculative theories about commerce to affirm

convictions under the Hobbs Act. For example, the Third Circuit affirmed a Hobbs Act conviction of a defendant who had stolen personal property from a local chiropractor's office, explaining that because the acts had taken place "in [a] place of business" the nexus was met. *United States v. Rutherford*, 236 F. App'x 835, 841-42 (3d Cir. 2007). By showing that the business ultimately purchased a safer door and the "morale" of the staff was affected, the court found that the government had provided sufficient proof of a "potential effect" on interstate commerce. *Id.* at 842-43 (citing *United States v. Urban*, 404 F.3d 754, 767 (3d Cir. 2005)). Judges Ambro and McKee, concurring, wrote that "[b]y prosecuting [the defendant] at the federal level, the Federal Government . . . has overridden the default state criminal system in what looks like a classic state-law crime." *Rutherford*, 236 F. App'x at 845. In a similarly attenuated case, the Third Circuit confirmed a Hobbs Act conviction of a defendant who had merely attempted to rob a local grocery store. *United States v. Reyes*, No. 08-4783, 2010 U.S. App. LEXIS 1790 (3d Cir. Jan. 27, 2010).

Another recent example of the courts of appeals' expansive view of the Hobbs Act is *United States v. Rivera-Rivera*, 555 F.3d 277 (1st Cir. 2009), which affirmed the conviction of a defendant who robbed a lottery store in Puerto Rico. Judge Lipez dissented in part and asserted that "the [*de minimis*] standard cannot be applied so loosely that the interstate commerce element no longer serves to distinguish between federal and state crimes." *Id.* at 298. "Otherwise," he cautioned, "we risk turning every routine robbery into a federal offense." *Id.* As the majority had based its decision on the possible "future re-

placement" of "screens, cables and games," Judge Lipez remarked that the majority had reduced "the [*de minimis*] concept to a meaningless verbal incantation" that would enable "the Hobbs Act [to] embrace virtually all local robberies." *Id.* at 295, 298.

This case illustrates that the federal government is taking full advantage of the expansive local policing authority granted to it by the courts of appeals. Here, the government claimed that petitioner's robbery affected interstate commerce because goods that were present in the store had travelled in interstate commerce. App. 33a. But petitioner did not steal any of these goods. This is substantial interstate affect by osmosis. It shows the lengths to which the government is routinely ignoring any limit whatsoever to the local reach of the Hobbs Act.

In *Morrison*, this Court rejected reliance on assumptions and attenuated chains of causation in establishing an effect on interstate commerce, recognizing that "but-for causal chain from the initial occurrence of violent crime to every attenuated effect upon interstate commerce. . . 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." 529 U.S. at 615 (emphasis added). The federal prosecution of petitioner under the Hobbs Act for a purely local theft contravenes this Court's precedent.

II. NUMEROUS COURTS OF APPEALS JUDGES HAVE CALLED UPON THIS COURT TO RESOLVE THE QUESTION PRESENTED

In the years since *Lopez* was decided, every court of appeals has considered whether the *de minimis* standard remains constitutional following *Lopez*.[1] In every circuit, it is now settled that the *de minimis* standard is the appropriate analytical framework for assessing challenges to Hobbs Act convictions.

The apparent unanimity is deceptive. Often, courts of appeals have declined to disturb pre-*Lopez* precedent while requesting further guidance from this Court. On this view, even if the circuit's interpretation of the Hobbs Act conflicts with *Lopez* and *Morrison*, the circuit will not act absent instruction from this Court.

For example, Judge Torruella of the First Circuit, concurred in a decision affirming the conviction of a robbery of an individual in his private residence even though he believed that the majority's "interpretation of the Hobbs Act . . . extends Congress' power to regulate interstate commerce beyond what

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[1] *See, e.g., United States v. Jimenez-Torres*, 435 F.3d 3 (1st Cir. 2006); *United States v. Farrish*, 122 F.3d 146 (2d Cir. 1997); *United States v. Clausen*, 328 F.3d 708 (3d Cir. 2003); *United States v. Williams*, 342 F.3d 350 (4th Cir. 2003); *United States v. McFarland*, 311 F.3d 376 (5th Cir. 2002) (en banc); *United States v. Davis*, 473 F.3d 680 (6th Cir. 2007); *United States v. Peterson*, 236 F.3d 848 (7th Cir. 2001); *United States v. Dobbs*, 449 F.3d 904 (8th Cir. 2006); *United States v. Atcheson*, 94 F.3d 1237 (9th Cir. 1996); *United States v. Malone*, 222 F.3d 1286 (10th Cir. 2000); *United States v. Gray*, 260 F.3d 1267 (11th Cir. 2001); *United States v. Harrington*, 108 F.3d 1460 (D.C. Cir. 1997).

is authorized by the Constitution." *United States v. Jimenez-Torres*, 435 F.3d 3, 13 (1st Cir. 2006) (Torruella, J., concurring). He believed he had "no choice" but to follow circuit precedent until "the Supreme Court puts an end to the fictions that allow the apparently limitless aggrandizement of federal power into areas reserved to the states by the Constitution." *Id.* at 15.

Similarly, in the Sixth Circuit, Judge Suhrheinrich concurred because "the majority's decision is consistent with the law of this Circuit." *Baylor v. United States*, 517 F.3d 899, 903 (6th Cir. 2008) (Suhrheinrich, J., concurring). He further explained, however, that this result conflicted with *Lopez* and *Morrison* and could not be "what the Founding Fathers intended." *Id.* at 904. He thus expressed the "hope that the Supreme Court will consider the issue of whether the *de minimis* test survives *Lopez* and *Morrison*." *Id.*

Judges of the Seventh Circuit have also suggested this Court consider the question presented. *See United States v. Lemons*, 302 F.3d 769, 772-73 (7th Cir. 2002) ("We are bound by the ample Seventh Circuit precedent on this point. If, indeed, *Lopez*'s rationale calls into doubt our construction and application of section 922(g)(1), it is for the Supreme Court to so hold.").

To be sure, numerous court of appeals judges have urged that their circuit not wait for this Court to act. For example, eight Fifth Circuit judges joined a dissent arguing that the *de minimis* standard conflicts with this Court's precedent. *See McFarland*, 311 F.3d 377-410 (Garwood, J., dissenting from per curiam). *McFarland* affirmed, by an equally divided en banc court, the defendant's conviction of four

counts of Hobbs Act robbery for robbing three convenience stores and a liquor store. In one of the robberies, the defendant had stolen "about $50." *Id.* at 377-78. Although the eight judges who voted to affirm the conviction provided no rationale for their decision, eight judges dissented, forcefully arguing that the Hobbs Act cannot be constitutionally applied to the robbery of local retail stores. *Id.* at 396.

Similarly, in *Harrington*, Judge Sentelle dissented from the D.C. Circuit's court's application of the *de minimis* standard. He explained that "[t]he Supreme Court's majority opinion in *Lopez*, especially in light of the concurring language of three justices" led him "to believe that the United States' broad interpretation of the Hobbs Act robbery statute is directing us toward constitutionally dangerous ground." 108 F.3d at 1476. He further explained that a "'relatively trivial effect [if any] on commerce' should not be used as an excuse for the broad federalization of an otherwise state-governed crime." *Id.*

At this point, more than a decade after *Lopez*, there is no reason for this Court to postpone considering the Hobbs Act in light of *Lopez* and *Morrison*. There is fundamental disagreement in the courts of appeals as to how the test this Court set forth in *Lopez* should be applied in Hobbs Act cases. The circuit courts have continued to follow their pre-*Lopez* precedent only because many judges feel compelled to vote against their better judgment. This Court should relieve them of that burden.

III. THE CASE PRESENTS A GOOD VEHICLE FOR ADDRESSING THIS RECURRING ISSUE

The factual scenario raising the question at issue is recurring. As the cases discussed above indicate, the federal government repeatedly prosecutes individuals whose criminal activity has, at best, a *de minimis* effect on interstate commerce. Moreover, because the courts of appeals have all weighed in on this question, and there is internal division in at least four circuits, there are lengthy opinions that articulate all the various competing arguments. There is thus no need to wait for additional appellate consideration of the question.

Finally, this case is a particularly good vehicle to clarify the proper application of *Lopez* and *Morrison* in the federal criminal context. This question, *i.e.*, whether the *de minimis* standard survives *Lopez* and *Morrison*, was squarely presented below, so there is no concern about waiver. There are no other legal issues that could complicate the analysis. There was no jury trial and the evidence is not disputed. The state criminal charges against petitioner were pending when the district court ruled, illustrating that the federal government overrode "the default state criminal system in what looks like a classic state-law crime." *Rutherford*, 236 F. App'x at 845.

CONCLUSION

For the reasons stated, the Court should grant the petition.

Respectfully submitted,

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