No. 11-634

In the Supreme Court of the United States

DIN CELAJ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence against petitioner, including his stipulation that "marijuana is grown outside of the state of New York and travels in interstate and foreign commerce to arrive in the New York City area," his statement to an undercover police officer that he was in the business of stealing marijuana, his concession at trial that he had been a marijuana dealer, and his statements to the undercover officer that his marijuana suppliers were in other States, was sufficient for a rational jury to conclude that petitioner's criminal conduct affected interstate commerce, as required by the Hobbs Act, 18 U.S.C. 1951.

2. Whether the Hobbs Act, 18 U.S.C. 1951, precludes a conviction for attempted robbery where the defendant did not come into personal contact with the intended victim.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 649 F.3d 162.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 2011. The petition for a writ of certiorari was filed on November 18, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on one count of conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951; two counts of attempted Hobbs Act robbery, in violation of 18 U.S.C. 1951 and 2; one count of Hobbs Act robbery,

in violation of 18 U.S.C. 1951 and 2; three counts of brandishing or unlawfully possessing a firearm in connection with a crime of violence, in violation of 18 U.S.C. 924(c); one count of conspiring to distribute and to possess with the intent to distribute 50 kilograms or more of marijuana, in violation of 21 U.S.C. 846; one count of conspiring to transport stolen motor vehicles, in violation of 18 U.S.C. 371; one count of transporting stolen motor vehicles, in violation of 18 U.S.C. 2312 and 2; and one count of conspiring to commit mail fraud, in violation of 18 U.S.C. 1341 and 1349. Pet. App. 19a-21a. The district court sentenced petitioner to 601 months of imprisonment, to be followed by three years of supervised release. *Id.* at 21a-22a. The court of appeals affirmed. *Id.* at 1a-18a.

1. Beginning at least in 2007, petitioner headed a criminal gang that engaged in car thefts, armed robberies, and drug dealing in the New York City area. Petitioner's crew included Darren Moonan, a former New York City Police Department (NYPD) officer; Jason Montello, a life-long robber and drug dealer; Moheed Oasman, a drug addict and fraudster; Ali Zherka and Rabindra Singh, both expert car thieves; and Robert Melville, another man with a violent criminal past who had met petitioner in prison. Pet. App. 3a; Gov't C.A. Br. 3.

Between January 2007 and July 2007, petitioner and his crew stole more than 20 high-end vehicles. Petitioner took the stolen vehicles to a lot in the Bronx, where he would sell them to an individual who was, in fact, an undercover NYPD officer. Petitioner was an accomplished car thief, and he broke into three separate Lexus vehicles in front of the undercover officer to demonstrate his skills. In total, petitioner brought 23 stolen

cars to the undercover officer during this six-month period. Pet. App. 3a; Gov't C.A. Br. 4.

Petitioner also told the undercover officer about his drug-dealing activities. He told the officer that he sells marijuana, which he obtains "from Florida or from Michigan through contacts in Canada," or by stealing it from other drug dealers. Pet. App. 4a. Petitioner stated that the stolen marijuana "could be [from] * * * Arizona or it could be haze. You never know." Gov't C.A. Br. 5. Petitioner explained to the undercover officer that he steals marijuana by "knock[ing] down [the] doors" of the drug dealers, claiming to be a Drug Enforcement Administration (DEA) agent, and seizing the marijuana. Pet. App. 4a; Gov't C.A. Br. 4-5 (brackets in original). Petitioner noted that he and his crew had obtained 248 pounds of marijuana by stealing it in this manner. Pet. App. 4a; Gov't C.A. Br. 5. In one recorded conversation, petitioner bragged to the undercover officer, "I get weed once a month—in like any quantity * * * but see the thing is this, I'm not buying it, I'm stealing it." Pet. App. 4a.

In one such robbery, in April 2007, petitioner and his crew drove to the home of a Bronx drug dealer named "George." When they arrived, petitioner and Moonan, both of whom had firearms and wore police shields around their necks, approached the door to the home with Melville accompanying them. Petitioner knocked on George's door, and George's brother answered. Petitioner announced that he was a police officer, brandished his gun, pointed it at George's brother, and told him to subdue a dog that was barking from within the home. Once inside, petitioner and Moonan took George's brother to the living room and forced him to sit on the floor, while Melville began searching for drugs,

money, and guns. Melville located approximately one pound of marijuana, some cash, and a firearm. Melville gave the money to petitioner and kept the marijuana and gun for himself. Petitioner and the crew then went to a warehouse believed to be George's "stash house." They broke into the building and found a room containing approximately 100-150 pounds of marijuana and $300-$400 in single dollar bills. Over the course of the following weeks, they sold that marijuana in the New York City area. Pet. App. 4a-5a; Gov't C.A. Br. 6-7.

The group next attempted to rob a Long Island drug dealer named Bobby Brown. With petitioner, Montello guided the crew—including Moonan, Melville, and "Ro," an associate of Montello's—to Brown's home. Petitioner and Moonan approached the house with guns in their waistbands and police shields around their necks. Melville joined them on the way up to the door, "dressed as [an] undercover police officer." Pet. App. 6a (brackets in original). Montello and Ro stayed behind as lookouts. After reaching the house, petitioner knocked on the door, and both he and Moonan drew their guns and yelled that they were the "police." When Brown opened the door, petitioner and Moonan forced him down on the floor at gunpoint to check for weapons. Almost immediately thereafter, an alarm went off in Brown's home. Startled by the alarm, petitioner, Moonan, and Melville ran from Brown's home and fled the scene in Montello's car. Pet. App. 5a-6a; Gov't C.A. Br. 7-8.

The next day, the same crew (except for Ro) attempted to rob Eric Knierim in Sayville, on Long Island. The group knew that Knierim owned a glass company, from which he had cash on hand, and also sold marijuana and cocaine. Petitioner, Moonan, and Montello approached Knierim's home together, and Melville stayed behind in

the car. Petitioner and Moonan had guns and police shields, and all three (including Montello) were dressed as undercover police officers. When they got to the door, they knocked and announced themselves as the "police." Knierim, however, was not at home; his cleaning lady answered the door and offered to call Knierim for them. Petitioner, Moonan, and Montello aborted the robbery plan and left the premises. Pet. App. 6a-7a; Gov't C.A. Br. 8-9.

2. A grand jury in the Southern District of New York indicted petitioner on numerous drugs, weapons, and Hobbs Act robbery offenses. Indictment 1-11; see Pet. App. 7a-8a. The case proceeded to a nine-day jury trial. Pet. App. 8a. The government's evidence at trial included court-authorized wire interceptions of petitioner and others, various recorded conversations between petitioner and the undercover police officer, and the testimony of the undercover officer and four members of petitioner's crew who agreed to cooperate—Oasman, Melville, Montello, and Moonan. *Ibid.*; Gov't C.A. Br. 5-6. Petitioner did not testify and did not call any witnesses on his behalf. Pet. App. 8a.

After the government had presented its case, the parties submitted a stipulation that stated: "It is hereby stipulated and agreed * * * that marijuana is grown outside of the state of New York and travels in interstate and foreign commerce to arrive in the New York City area." Pet. App. 53a-54a. The government entered into the stipulation in lieu of calling a DEA agent as an expert witness to testify about the interstate nature of the marijuana trade. *Id.* at 8a. Petitioner then moved for a judgment of acquittal on all the Hobbs Act and 18 U.S.C. 924(c) counts. Pet. App. 30a-31a; see Fed. R. Crim. P. 29. Petitioner did not argue that the govern-

ment failed to prove the jurisdictional element of the Hobbs Act; instead, he challenged the sufficiency of the evidence to prove the violation charged in these counts. *Id.* at 31a-42a. The district court denied the motion from the bench. *Id.* at 52a.

After both parties rested, the district court instructed the jury. In particular, the court instructed the jury on the Hobbs Act requirement that a robbery affect interstate commerce, stating that

> it is not necessary for you to find that the defendant intended or anticipated that the effect of his acts would be to affect commerce or that he had a purpose to affect commerce. All that is necessary is that the natural effect of the acts committed in furtherance of the crime charged in each count would in any way have affected commerce.
>
> Thus . . . if you find beyond a reasonable doubt that the defendant believed that the robbery victim possessed narcotics to be distributed or the proceeds derived from the sale of narcotics, you must determine whether the effect of the defendant's actions was or would be to actually or potentially affect commerce in narcotics in any way or degree, whether that effect was harmless or not.

Pet. App. 9a (quoting jury instructions).

The jury found petitioner guilty on all counts except one robbery count and an associated firearms charge. Pet. App. 9a. The district court sentenced petitioner to 601 months of imprisonment, to be followed by three years of supervised release. *Id.* at 9a-10a; Gov't C.A. Br. 2, 10.

3. The court of appeals affirmed. Pet. App. 1a-18a. The court first rejected petitioner's argument that the

evidence at trial was insufficient to establish the jurisdictional element of the Hobbs Act. *Id.* at 12a-15a. The court determined that the parties' stipulation that "marijuana is grown outside of the state of New York and travels in interstate and foreign commerce to arrive in the New York City area," combined with petitioner's statement to the undercover police officer that he was in the business of stealing marijuana and petitioner's concession at trial that he had been a marijuana dealer, permitted the jury reasonably to conclude that petitioner's criminal actions affected interstate commerce, as required by the Hobbs Act. *Id.* at 14a-15a. The court also found an "independent reason" that petitioner's claim failed: he had "waived any challenge to the sufficiency of the evidence that a robbery of a marijuana dealer would affect interstate commerce by entering into a factual stipulation that marijuana traveled in interstate and foreign commerce to arrive in New York." *Id.* at 15a n.4.

The court then rejected petitioner's argument that the district court erred in denying his Rule 29 motion as to the count relating to the attempted robbery of Knierim. Pet. App. 15a-17a. Petitioner had contended that the Hobbs Act precludes a conviction for attempted robbery where the perpetrator did not come into personal contact with the intended victim, relying on *People* v. *Rizzo*, 158 N.E. 888 (N.Y. 1927). See Pet. App. 10a. The court stated that petitioner provided no federal authority in support of his "novel interpretation" of the Hobbs Act and that *Rizzo* is "inapposite and not inconsistent with federal authority in any event." *Id.* at 15a.

The court explained that *Rizzo* does not address whether the perpetrator must personally confront the intended victim to be guilty of attempted robbery; in-

stead, *Rizzo* addresses how close a defendant must come to committing a crime to be guilty of attempt. Pet. App. 16a-17a. Further, the court explained, *Rizzo's* requirement that a defendant "come within a 'dangerous proximity' of committing a crime to be guilty of attempt," *id.* at 16a (quoting *Rizzo*, 158 N.E. at 889), is "virtually identical to the federal requirement that a defendant must take a 'substantial step' toward the commission of a crime to be guilty of attempt," *id.* at 17a (quoting *United States* v. *Fernandez-Antonia*, 278 F.3d 150, 162-163 (2d Cir. 2002)). The court observed that petitioner was properly convicted of attempted robbery under both *Rizzo* and federal law because, when he and his crew went to Knierim's home with guns and police shields, announced themselves as law enforcement, and spoke with Knierim's housekeeper, they took a "substantial step," "far beyond 'mere preparation,'" toward commission of a robbery. *Ibid.* (citing *United States* v. *Yousef*, 327 F.3d 56, 134 (2d Cir.), cert. denied, 540 U.S. 933 (2003)). Because the court saw no meaningful difference between the New York and federal attempt requirements, it did not address whether Congress intended to adopt *Rizzo* when it enacted the Hobbs Act. *Id.* at 17a n.5.

ARGUMENT

Petitioner renews (Pet. 9-25) his contentions that the evidence against him, including the stipulation about the interstate nature of marijuana, was insufficient to establish the jurisdictional element of the Hobbs Act and that the Hobbs Act precludes a conviction for attempted robbery if the defendant was not in the presence of the intended victim. The court of appeals correctly rejected those contentions and its decision presents no conflict

with the decision of any other circuit. Further review is therefore unwarranted.

1. a. The Hobbs Act makes it a federal crime to commit (or attempt or conspire to commit) a robbery or extortion that "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce." 18 U.S.C. 1951(a). This Court has held that the statute's broad language demonstrates "a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence." *Stirone* v. *United States*, 361 U.S. 212, 215 (1960); see also *Scheidler* v. *National Org. for Women, Inc.*, 537 U.S. 393, 408 (2003). That interpretation is consistent with the general principle that the phrase "affects commerce" is presumed to reflect congressional intent to exercise "the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause." *NRLB* v. *Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963) (per curiam; emphasis omitted); accord, *e.g., Carr* v. *United States*, 130 S. Ct. 2229, 2239 (2010).

Both before and after this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995), the Hobbs Act has been understood to prohibit all interference with interstate commerce by robbery or extortion, even when the effect of such interference or attempted interference is slight. Accordingly, courts of appeals have consistently upheld Hobbs Act convictions where the assets of a commercial enterprise were the target of a robbery and where the robbery depleted those assets, even if the depletion was minimal. See, *e.g.*, *United States* v. *Ossai*, 485 F.3d 25, 31 (1st Cir.) (robbery of doughnut shop), cert. denied, 552 U.S. 919 (2007); *United States* v. *Elias*, 285 F.3d 183, 187-189 (2d Cir.) (robbery of grocery

store), cert. denied, 537 U.S. 988 (2002); *United States* v. *Robinson*, 119 F.3d 1205, 1212-1215 (5th Cir. 1997) (robberies of check-cashing stores), cert. denied, 522 U.S. 1139 (1998); *United States* v. *Smith*, 182 F.3d 452, 453, 456-457 (6th Cir. 1999) (robberies of grocery and party stores), cert. denied, 530 U.S. 1206 (2000); *United States* v. *Dobbs*, 449 F.3d 904, 911-912 (8th Cir. 2006) (robbery of " 'mom and pop' convenience store"), cert. denied, 549 U.S. 1233 (2007); *United States* v. *Nelson*, 137 F.3d 1094, 1102 (9th Cir.) (robbery of jewelry store), cert. denied, 525 U.S. 901 (1998); *United States* v. *Curtis*, 344 F.3d 1057, 1070-1071 (10th Cir. 2003) (robberies of convenience stores and restaurants), cert. denied, 540 U.S. 1157 (2004); *United States* v. *Guerra*, 164 F.3d 1358, 1360-1361 (11th Cir. 1999) (robbery of gas station); *United States* v. *Harrington*, 108 F.3d 1460, 1468-1469 (D.C. Cir. 1997) (robbery of restaurant). That principle is squarely applicable to this case because petitioner specifically targeted the transactions, capital, and inventory of illegal drug-trafficking businesses.

b. Petitioner contends that the court of appeals erred in finding sufficient evidence of an affect on interstate commerce because, he claims, it relied only on "generalized evidence that marijuana travels in interstate commerce." Pet. 14; see Pet. 10-17. He also asserts that the court's decision conflicts with the Seventh Circuit's decision in *United States* v. *Peterson*, 236 F.3d 848 (2001). He is mistaken on both scores.

As an initial matter, this case is not a suitable vehicle to consider petitioner's sufficiency-of-the-evidence claim, because the court of appeals held that petitioner has expressly waived that claim. In particular, in addition to holding that there was sufficient evidence on the jurisdictional element, the court found an "independent

reason to affirm [petitioner's] conviction—namely that [petitioner] waived any challenge to the sufficiency of the evidence that a robbery of a marijuana dealer would affect interstate commerce by entering into a factual stipulation that marijuana traveled in interstate and foreign commerce to arrive in New York." Pet. App. 15a n.4. Although petitioner now takes issue with the court's conclusion that he waived the claim, Pet. 8 n.3, that fact-bound contention does not merit this Court's review. And in light of the court of appeals' waiver holding, certiorari would be unwarranted here even if the court of appeals were wrong about the sufficiency of the evidence or there was disagreement in the circuits on that issue.[1]

In any event, the court of appeals' decision finding the evidence sufficient is correct and presents no conflict with *Peterson*. Contrary to petitioner's contention (Pet. 15), the court did not hold that generalized evidence of the interstate nature of the marijuana trade is sufficient to establish the jurisdictional element of the Hobbs Act. Rather, the court relied on the fact that "the government offered not only the stipulation but also [peti-

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[1] Moreover, the court of appeals' conclusion that petitioner waived a challenge to the sufficiency of the evidence on the jurisdictional element is correct. At trial, the government planned to call an expert witness to testify about the interstate nature of the marijuana trade. The government's witness was present in the courthouse and ready to take the witness stand. Petitioner's counsel then made a strategic decision to eliminate the need for, and the potential downside of, expert testimony by stipulating that "marijuana is grown outside of the state of New York and travels in interstate and foreign commerce to arrive in the New York City area." Pet. App. 53a-54a; see *United States* v. *Olano*, 507 U.S. 725, 733-734 (1993). In his mid-trial Rule 29 motion, petitioner understandably did not challenge the sufficiency of proof with respect to the interstate commerce element of the Hobbs Act. See pp. 5-6, *supra*.

tioner's] statement to the undercover police officer that he was in the business of stealing marijuana and his concession at trial that he had been a marijuana dealer. *Together*, this evidence permitted the jury reasonably to conclude that [petitioner's] criminal actions had a nexus with interstate commerce." Pet. App. 15a (emphasis added). Indeed, petitioner told the undercover officer that he obtains marijuana "from Florida or from Michigan through contacts in Canada" and that his stolen marijuana "could be * * * Arizona or it could be haze. You never know." *Id.* at 4a; Gov't C.A. Br. 5.

The court of appeals' decision is consistent with *Peterson*. *Peterson* held that "the Hobbs Act requires individualized proof that the robbery charged affected interstate commerce." 236 F.3d at 855. That is the same legal standard the court of appeals applied in this case. See Pet. App. 11a-12a (citing *United States* v. *Parkes*, 497 F.3d 220 (2d Cir. 2007), cert. denied, 552 U.S. 1220 (2008), and *United States* v. *Needham*, 604 F.3d 673 (2d Cir.), cert. denied, 131 S. Ct. 355 (2010)). Petitioner acknowledges that the Second Circuit "has explicitly recognized, at least in principle, that the Hobbs Act requires the Government to satisfy the jurisdictional element with 'particularized evidence as to the interstate nature' of the alleged robbery." Pet. 14 (quoting *Parkes*, 497 F.3d at 226); see also Pet. 15-16 n.5 (citing *United States* v. *Perrotta*, 313 F.3d 33, 38 (2d Cir. 2002)).

In the decision below, the court of appeals cited its recent decision in *United States* v. *Needham*, *supra*, which held, consistent with *Peterson*, that "[i]n every case, the government must prove that the alleged offense had some effect on interstate commerce—not simply that the general activity, taken *in toto*, has such an effect." *Needham*, 604 F.3d at 684; see also *id*. at 685

(citing *Peterson, supra*). The court here did not reach the same outcome as in *Needham*, though, because it found sufficient evidence to meet that requirement here but not there. Pet. App. 14a-15a. Petitioner's challenge thus amounts to a fact-bound disagreement with the court of appeals' conclusion about the sufficiency of the evidence, rather than any disagreement about the governing legal rules.[2] Therefore, this Court's review of the first question presented is not warranted.

2. Petitioner contends (Pet. 17-22) that, in a prosecution for attempted robbery under the Hobbs Act, the government must prove that the perpetrator and the victim were in each other's presence, and he asserts that the court of appeals' decision to the contrary conflicts with *United States* v. *Nedley*, 255 F.2d 350 (3d Cir. 1958). Neither contention is correct.

a. The court of appeals correctly found no "presence" requirement for an attempted robbery conviction under the Hobbs Act. Such a requirement is not in the text of the statute, and petitioner has cited no federal authority supporting his view. See Pet. App. 15a.[3] Peti-

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[2] To the extent petitioner suggests (Pet. 14-15) that the decision below is inconsistent with other Second Circuit cases, such a claim would not warrant this Court's review. See, *e.g.*, *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

[3] Petitioner contends (Pet. 21-22) that the Hobbs Act includes a "presence" requirement because it defines robbery as "the unlawful taking or obtaining of personal property from the person or in the presence of another." 18 U.S.C. 1951. But that text sets out what is necessary for a conviction for a completed robbery offense, not what is necessary for a conviction for attempted robbery. For attempted robbery, as explained (pp. 16-17, *infra*), the defendant must take a "substantial step" toward the commission of the crime, but need not complete it. See also Pet. App. 17a. Petitioner does not identify any federal court that has

tioner contends that such a requirement should be added because Congress incorporated into the Hobbs Act a "presence" rule from *People* v. *Rizzo*, 158 N.E. 888 (N.Y. 1927). As the court of appeals explained, *Rizzo* does not hold that, as a matter of law, a person may not be guilty of attempted robbery when he has not confronted the person whose property he intends to steal. Pet. App. 16a. Rather, the question in *Rizzo* was how close a defendant must come to committing an intended crime to be guilty of attempt. 158 N.E. at 889; see Pet. App. 16a. The *Rizzo* Court stated that "[t]he act or acts must come or advance very near to the accomplishment of the intended crime," and "there must be an overt act shown," and "[t]here must be dangerous proximity to success." 158 N.E. at 889 (internal quotation marks and citation omitted). Applying that general rule to the specific facts in *Rizzo*, the court held that the defendants—who had been driving around looking for a man they intended to rob but never found him—had not gone far enough in their plans to be convicted of attempted robbery. *Id.* at 889-890.

Petitioner has not identified any court that has held that *Rizzo* established a "requirement," Pet. 20, that one cannot be guilty of attempted robbery unless he was in the presence of his intended victim. The *Rizzo* court itself stated that the "method of committing or attempting crime varies in each case, so that the difficulty, if any, is not with this rule of law regarding an attempt, which is well understood, but with its application to the facts." 158 N.E. at 889. In *Rizzo*, the court simply held

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held that the text of the Hobbs Act requires the defendant be in the victim's presence to be convicted of attempted robbery.

that the "dangerous proximity" standard had not been met on the facts before it. *Id*. at 889-890.

New York courts have thus cited *Rizzo* for the proposition that a defendant must come "very near to the accomplishment of the intended crime" for an attempt conviction to stand. See, *e.g.*, *People* v. *Di Stefano*, 345 N.E.2d 548, 549, 555 (N.Y. 1976); *People* v. *Mahboubian*, 543 N.E.2d 34, 42 (N.Y. 1989); *People* v. *Naradzay*, 855 N.Y.S.2d 779, 781 (N.Y. App. Div. 4th Dep't 2008). But as the court of appeals pointed out (Pet. App. 16a), they have not cited *Rizzo* for the proposition that, as a matter of law, a defendant is not guilty of attempted robbery when he has not found the person whose property he intends to steal. Indeed, in *Mahboubian*, the New York Court of Appeals recognized that "the boundary where preparation ripens into punishable conduct depends greatly on the facts of the particular case." 543 N.E. at 42.

Petitioner contends (Pet. 21-22) that the court of appeals' decision conflicts with *Nedley*, where the Third Circuit held, in interpreting the Hobbs Act, that courts "are required to look to the New York Penal Laws relating to robbery and the construction given them by the New York courts." 255 F.2d at 355. The decision below does not conflict with *Nedley*, for two reasons. First, *Nedley* did not address the particular question whether a defendant may be found guilty of attempted robbery when he has not found the person whose property he intends to steal. Instead, it addressed whether threats and a beating during a labor-union dispute in the transportation industry could be considered "robbery" in light of the fact that that offense typically requires an unlawful taking. *Id.* at 357-358. Second, the decision below does not conflict with the more general statement

in *Nedley* that the court would "look to the New York Penal Laws relating to robbery and the construction given them by the New York courts." *Id.* at 355. As explained, *Rizzo* does not establish a bright-line "presence" requirement. See pp. 14-15, *supra*. And the court stated that, on the issue *Rizzo* addressed, New York law and federal law are essentially the same. Pet. App. 17a. For those reasons, the court of appeals expressly declined to "address [petitioner's] contention that Congress adopted *Rizzo* when it looked to New York criminal law to define robbery under the Hobbs Act." *Id.* at 17a n.5. Its decision does not conflict with *Nedley*.

b. The court of appeals correctly found sufficient evidence to support the attempt conviction. Under federal law, "[i]n order to establish that a defendant is guilty of an attempt to commit a crime, the government must prove that the defendant had the intent to commit the crime and engaged in conduct amounting to a substantial step towards the commission of the crime." *United States* v. *Yousef*, 327 F.3d 56, 134 (2d Cir.) (internal quotation marks omitted), cert. denied, 540 U.S. 933 (2003). "For a defendant to have taken a 'substantial step,' he must have engaged in more than 'mere preparation,' but may have stopped short of 'the last act necessary' for the actual commission of the substantive crime. A defendant may be convicted of attempt even where significant steps necessary to carry out the substantive crime are not completed, so that 'dangerous persons [may be apprehended] at an earlier stage . . . without immunizing them from attempt liability.'" *Ibid.* (citations omitted; brackets in original). "Determining whether particular conduct constitutes a substantial step is 'so dependent on the particular factual context of each case that, of necessity, there can be no litmus test

to guide the reviewing courts.'" *United States* v. *Crowley*, 318 F.3d 401, 408 (2d Cir.) (quoting *United States* v. *Manley*, 632 F.2d 978, 988 (2d Cir. 1980), cert. denied, 449 U.S. 1112 (1981)), cert. denied, 540 U.S. 894 (2003). As the court of appeals recognized, that standard is "virtually identical" to the standard in *Rizzo*. Pet. App. 17a. Petitioner has not identified any decision—including *Nedley*—to the contrary.

The court of appeals held that a rational juror here could have found that petitioner's conduct went beyond "mere preparation" and constituted a "substantial step" toward commission of a robbery because petitioner and his associates knew the location of Knierim's home, approached it with guns and police shields, announced themselves as the "police," and spoke with Knierim's housekeeper. Pet. App. 17a. That fact-bound conclusion is correct and merits no further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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