Nos. 99-464, 99-5614, 99-6259, 99-6302, and 99-6378

In the Supreme Court of the United States

EDMON GASAWAY, PETITIONER
v.
UNITED STATES OF AMERICA

MARKUS D. CHOPANE, PETITIONER
v.
UNITED STATES OF AMERICA

EDWIN T. LIMBRICK, PETITIONER
v.
UNITED STATES OF AMERICA

JYI R. MCCRAY, PETITIONER
v.
UNITED STATES OF AMERICA

MASONTAE HICKMAN, PETITIONER
v.
UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioners' convictions for robbery that "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce," in violation of the Hobbs Act, 18 U.S.C. 1951.

2. Whether the district court erred in instructing the jury on the required elements of a Hobbs Act offense.

3. Whether the district court committed reversible error in allowing two case agents to remain in the courtroom throughout petitioners' trial.

4. Whether the district court committed reversible error in admitting the redacted confessions of non-testifying defendants at petitioners' joint trial.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

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No. 99-464

EDMON GASAWAY, PETITIONER
v.
UNITED STATES OF AMERICA

No. 99-5614

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OPINIONS BELOW

The per curiam opinion of the en banc court of appeals, affirming petitioners' convictions by an equally divided court (Gasaway Pet. App. 1-32), is reported at 179 F.3d 230. The order of the en banc court of appeals vacating the panel opinion (Chopane Pet. App. B)[1] is reported at 165 F.3d 1020. The panel opinion of the court of appeals (Pet. App. C1-C34) is reported at 151 F.3d 446. The opinion of the district court denying petitioner McCray's pre-trial suppression motion is reported at 948 F. Supp. 620.

JURISDICTION

The judgment of the en banc court of appeals was entered on June 21, 1999. The petition for a writ of certiorari in No. 99-5614 was filed on August 6, 1999. The petition for a writ of certiorari in No. 99-464 was filed on September 16, 1999. The petitions for a writ of certiorari in Nos. 99-6259, 99-6302, and 99-6378 were filed on September 20, 1999 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On October 18, 1996, a 17-count, third superseding indictment was returned in the United States District Court for the Eastern District of Texas, charging petitioners with various robbery, conspiracy, and related firearms offenses. Following a jury trial, petitioner Hickman was convicted on seven counts of obstruction of commerce by robbery, in violation of 18 U.S.C. 1951 and 2 (Counts 4, 6, 8, 10, 12, 14, and 16), and seven

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[1] Unless otherwise specified, "Pet. App." hereafter refers to the appendix to the petition in No. 99-5614, that of Markus Chopane.

counts of using or carrying a firearm during and in relation to the commission of a crime of violence, in violation of 18 U.S.C. 924(c)(1) and 2 (Counts 5, 7, 9, 11, 13, 15, and 17). Hickman Judgment 1. Petitioner McCray was convicted on one count of conspiracy to obstruct, delay, and affect commerce by robbery, in violation of 18 U.S.C. 1951 (Count 1); three counts of obstruction of commerce by robbery (Counts 2, 14, and 16); and three counts of using or carrying a firearm during and in relation to a crime of violence (Counts 3, 15, and 17). McCray Judgment 1. Petitioner Gasaway was convicted on Count 1, on two counts of obstruction of commerce by robbery (Counts 14 and 16), and on two counts of using or carrying a firearm during and in relation to a crime of violence (Counts 15 and 17). Gasaway Judgment 1. Petitioner Limbrick was convicted on Count 1, on two counts of obstruction of commerce by robbery (Counts 6 and 8), and on two counts of using or carrying a firearm during and in relation to a crime of violence (Counts 7 and 9). Limbrick Judgment 1.[2] Petitioner Chopane was convicted on Count 1, on one count of obstruction of commerce by robbery (Count 2), and on one count of using or carrying a firearm during and in relation to the commission of a crime of violence (Count 3). 2/13/97 Chopane Judgment 1.

Petitioner Hickman was sentenced to a total of 3,180 months' imprisonment, to be followed by three years' supervised release. Hickman Judgment 2-3.[3] Peti-

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[2] Limbrick was acquitted on two other robbery counts and two firearm counts (Counts 2, 3, 4, and 5). Limbrick Judgment 1.

[3] Hickman's sentence was composed of terms of 240 months' imprisonment on each of Counts 4 and 6-17, and 60 months'

tioner McCray was sentenced to a total of 627 months' imprisonment, to be followed by three years' supervised release. McCray Judgment 2-3.[4] Petitioner Gasaway was sentenced to a total of 387 months' imprisonment, to be followed by three years' supervised release. Gasaway Judgment 2-3.[5] Petitioner Limbrick was sentenced to a total of 1020 months' imprisonment, to be followed by three years' supervised release. Limbrick Judgment 2-3.[6] Petitioner Chopane was sentenced to a total of 111 months' imprisonment, to be followed by three years' supervised release. 2/13/97 Chopane Judgment 2-3.[7]

The court of appeals affirmed all of the convictions and sentences except the sentence of Chopane. Pet. App. C1. The court vacated Chopane's sentence and remanded for resentencing. *Ibid.* On rehearing en banc, the court of appeals affirmed all the convictions by an equally divided court, and once again vacated Chopane's sentence and remanded for resentencing.

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imprisonment on Count 5, all terms to run consecutively. Hickman Judgment 2.

[4] McCray was sentenced to concurrent terms of 87 months on each of Counts 1, 2, 14, and 16, a consecutive term of 60 months on Count 3, and consecutive terms of 240 months on each of Counts 15 and 17. McCray Judgment 2.

[5] Gasaway was sentenced to concurrent terms of 87 months on each of Counts 1, 14, and 16, a consecutive term of 60 months on Count 15, and a consecutive term of 240 months on Count 17. Gasaway Judgment 2.

[6] Limbrick was sentenced to consecutive terms of 240 months on each of Counts 1, 6, and 8, a consecutive term of 60 months on Count 7, and a consecutive term of 240 months on Count 9. Limbrick Judgment 2.

[7] Chopane was sentenced to concurrent terms of 51 months on Counts 1 and 2, and a consecutive term of 60 months on Count 3. 2/13/97 Chopane Judgment 2.

Gasaway Pet. App. 1-2. On remand, Chopane was resentenced to 101 months' imprisonment, to be followed by three years' supervised release. 8/31/99 Chopane Judgment 2-3.

1. Between March and June 1994, petitioners were involved in a series of armed robberies of businesses and restaurants in a three-county area in East Texas. In the course of the robberies, they killed one person and injured another. A sixth man, Roderick Mouton, testified for the government in exchange for a guilty plea to misprision of a felony. Pet. App. C2-C6.

On March 15, 1994, two men, later identified as petitioners McCray and Chopane, entered a Subway Sandwich Shop in Beaumont, Texas, just before closing. Armed with a handgun and a shotgun, the men robbed the store of $230 and fled. Pet. App. C2.

On April 1, 1994, two men robbed the Church's Chicken restaurant in Jasper, Texas. They accosted an employee of Church's just after she had closed the restaurant and forced her and a co-worker back inside. The men stole $1848 from the restaurant's safe. One of the robbers was armed with a revolver, and several unfired .32 caliber bullets were later recovered from the scene. Petitioner Hickman subsequently confessed to the crime; his fingerprints were recovered from a .32 caliber revolver that was used in a later robbery, and the gun was shown to have a defect that would have allowed ammunition to fall out of it. Pet. App. C2-C3.

On April 20, 1994, an employee of the Catfish Cabin restaurant in Jasper, Texas, was closing the restaurant when he was accosted by a man who put a gun to his head. The employee saw three other robbers crouched down a short distance away. When another restaurant employee came outside, the robbers discharged their firearms, and the restaurant employees fled in their

cars. Petitioner Hickman later confessed to the crime, and petitioner Limbrick was also identified as one of the participants. Pet. App. C3.

On May 2, 1994, two men broke into the Peking Restaurant in Beaumont, Texas. In the course of the robbery, the men shot David Wu and Xiao Wu; Xiao Wu was killed. Petitioner Hickman confessed to taking part in the crime. Petitioner Limbrick admitted driving the getaway car and disassembling a shotgun used in the robbery. Pet. App. C3-C4.

At 1:30 a.m. on May 17, 1994, two armed men entered an AutoZone auto parts store, where several employees were stocking auto parts. The robbers demanded that the manager open the safe, and the men fled with between $1300 and $1400. One of the robbers shot at the manager as they ran from the store. Petitioner Hickman later confessed to participation in the robbery. Pet. App. C4.

At 1:00 a.m. on May 21, 1994, two armed men entered a Church's Chicken restaurant in Beaumont, Texas, forced the employees to open the safe, and robbed it of $1160. Petitioner Hickman admitted to the robbery. Pet. App. C4.

At about 11:30 p.m. on June 1, 1994, the manager of the Dairy Queen in Silsbee, Texas, was accosted by a gunman as she left with the day's receipts—$1100 in cash and $200 in checks. More robbers appeared, and the manager dropped the money and the restaurant keys before fleeing to a nearby store. When pursued by passersby, the robbers threw clothing and other items from the windows of their car. Two handguns and other evidence were later recovered; one of the guns was a .32 caliber revolver, which was missing its center pin and had petitioner Hickman's fingerprints on it. Petitioners Hickman, McCray, and Gasaway were con-

victed of participating in the Dairy Queen robbery. Pet. App. C5-C6.

On June 21, 1994, four men robbed the Hardee's Restaurant in Beaumont, Texas. The robbers forced several employees back inside the restaurant at gunpoint, ordered the manager to open the safe, and took about $2000. Petitioner Hickman was arrested hiding near the scene of the robbery; petitioners Hickman, McCray, and Gasaway were convicted of the robbery. Pet. App. C6.

Petitioners were charged with, *inter alia*, affecting commerce by robbery, in violation of the Hobbs Act, 18 U.S.C. 1951(a). The Hobbs Act establishes criminal penalties for any person who "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." *Ibid.* The government introduced evidence at trial that each of the victimized businesses either purchased products from outside the State or transferred its profits to an out-of-state national headquarters. Pet. App. C15.

2. The court of appeals vacated petitioner Chopane's sentence and remanded for resentencing. Pet. App. C27-C30.[8] In all other respects the court of appeals affirmed. *Id.* at C1-C34.

a. Petitioners challenged their convictions under the Hobbs Act, arguing that the government had failed to

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[8] Chopane's base offense level had been enhanced by two levels on the ground that he had "physically restrained" a victim during the Subway robbery. See Sentencing Guidelines § 2B3.1(b)(4)(B); Pet. App. C27. The enhancement was based on the district court's finding that Chopane had pointed a firearm at an employee, thereby restricting her movement. *Id.* at C28. The court of appeals found that to be an insufficient basis for applying Section 2B3.1(b)(4)(B). See Pet. App. C28-C30.

establish the requisite nexus between their crimes and interstate commerce. Pet. App. C15-C17. Relying on this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995), petitioners contended that "the Government is required to show that each robbery had a 'substantial' effect on interstate commerce in order to support convictions under the Hobbs Act." Pet. App. C15-C16. The court of appeals rejected that argument. Under its own circuit precedent, the court explained, a Hobbs Act conviction may be upheld if the individual offense has a "minimal" impact on interstate commerce, based on the aggregate effects on commerce of all such robberies. *Id.* at C16-C17 (citing *United States* v. *Robinson*, 119 F.3d 1205 (5th Cir. 1997), cert. denied, 522 U.S. 1139 (1998)). The court also rejected petitioner Hickman's claim that the district court had erred in instructing the jury that the government need only show a minimal impact on commerce to satisfy the Hobbs Act. The court held that the challenged instruction accurately stated the law and did not improperly remove the interstate commerce element from the jury's consideration. Pet. App. C17-C18.

b. Petitioners Gasaway and McCray argued that the district court had erred in admitting the redacted confessions of their co-defendants. Pet. App. C18-C21. They argued that the jury could have inferred the identity of the missing names despite the redactions, thereby violating their Confrontation Clause rights under this Court's decision in *Bruton* v. *United States*, 391 U.S. 123 (1968). Relying on *Gray* v. *Maryland*, 523 U.S. 185 (1998), which was decided after the trial in the instant case, the court of appeals agreed that the redacted confessions had been erroneously admitted. Pet. App. C19. The court held, however, that the admission

of the confessions was harmless beyond a reasonable doubt. *Id.* at C20-C21.

c. Two case agents who testified at petitioners' trial were permitted, over petitioners' objection, to sit at counsel table throughout the trial. Pet. App. C7-C8. Petitioners contended on appeal that the district court's decision to allow both of the agents to be present violated the sequestration rule of Federal Rule of Evidence 615.[9] The court of appeals held that "neither the Government nor the district court ha[d] articulated a sound basis justifying the exemption of two agents from the requirements of Rule 615," and that the district court had therefore abused its discretion by allowing both agents to remain in the courtroom. Pet. App. C9. The court held, however, that the error did not warrant reversal of the convictions because petitioners had not been prejudiced by the officers' presence at the trial. *Id.* at C10.

3. The court of appeals granted rehearing en banc to reconsider the panel's ruling on the interstate commerce element of the Hobbs Act counts. See Pet. App. B. In a brief per curiam opinion, the en banc court

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[9] Rule 615 states:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.

affirmed the convictions by an equally divided court. Gasaway Pet. App. 1-2.[10]

Judge Higginbotham, joined by seven other members of the court, filed a dissenting opinion. Gasaway Pet. App. 2-30. The dissenting judges acknowledged that this Court "has recognized an aggregation principle, by which Congress may reach an instance of an activity that itself does not 'substantially affect' commerce if a myriad of such instances in the aggregate have a substantial effect." *Id.* at 5. The dissent believed, however, that "individual acts cannot be aggregated if their effects on commerce are causally independent of one another." *Id.* at 6. The dissenting judges would have held that there are no meaningful "interactive effects for robbery," *id.* at 7, primarily because, in the dissent's view, robbery is properly characterized as noneconomic activity, *id.* at 7-19.

Judge DeMoss filed a separate dissenting opinion. Gasaway Pet. App. 30-32. Judge DeMoss stated that "[t]he legislative history of the Hobbs Act is replete with evidence that Congress passed the statute to combat highway robberies by labor union members." *Id.* at 32. He would have held the Act to be inapplicable to the robberies for which petitioners were convicted. *Ibid.*

ARGUMENT

1. Petitioners contend (Gasaway Pet. 7-12; Chopane Pet. 8-18; Limbrick Pet. 4-7; McCray Pet. 9-29; Hickman Pet. 8-20) that their Hobbs Act convictions should be reversed because the government failed to establish

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[10] The court unanimously agreed, for the reasons explained by the panel, to vacate and remand petitioner Chopane's sentence. Gasaway Pet. App. 1-2.

a sufficient link between their crimes and interstate commerce. That argument is without merit.

a. The Hobbs Act makes it a federal crime to commit (or attempt or conspire to commit) a robbery 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). That broad jurisdictional 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). Both before and after this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995), the Hobbs Act has been consistently understood to prohibit all interference by robbery with interstate commerce, even when the effect of such interference or attempted interference is slight. As the Second Circuit explained:

> Our cases have long recognized that the jurisdictional requirement of the Hobbs Act may be satisfied by a showing of a very slight effect on interstate commerce. * * * We now expressly hold that *Lopez* did not raise the jurisdictional hurdle for bringing a Hobbs Act prosecution. * * * [O]ur sister Circuits that have addressed this question have all so held.

United States v. *Farrish*, 122 F.3d 146, 148 (2d Cir. 1997) (brackets and internal quotation marks omitted), cert. denied, 522 U.S. 1118 (1998).

In keeping with that principle, the courts of appeals have repeatedly upheld Hobbs Act convictions where, as here, the victim of the robbery was a commercial establishment that regularly purchased supplies or sent profits across state lines. See, *e.g.*, *United States* v.

Arena, 180 F.3d 380, 389-390 (2d Cir. 1999) (robbery of medical facilities); *United States* v. *Paredes*, 139 F.3d 840, 841 (11th Cir.) (robbery of convenience stores), cert. denied, 525 U.S. 1031 (1998); *United States* v. *Hebert*, 131 F.3d 514, 518 (5th Cir. 1997) (robbery of bank, restaurant, and liquor stores), cert. denied, 523 U.S. 1101 (1998); *United States* v. *Robinson*, 119 F.3d 1205, 1215 (5th Cir. 1997) (robbery of liquor stores, convenience stores, and other retail and service establishments), cert. denied, 522 U.S. 1139 (1998); *United States* v. *Harrington*, 108 F.3d 1460, 1468-1469 (D.C. Cir. 1997) (robbery of restaurant); *United States* v. *Atcheson*, 94 F.3d 1237, 1243 (9th Cir. 1996) (robbery of ATM cards and use of ATM machines to withdraw cash), cert. denied, 519 U.S. 1156 (1997); *United States* v. *Bolton*, 68 F.3d 396, 398-400 (10th Cir. 1995) (robbery of restaurants, a scrap metal business, and credit cards from an individual), cert. denied, 516 U.S. 1137 (1996). The decision below, affirming petitioners' Hobbs Act convictions for robberies of businesses that purchased supplies in interstate commerce or transmitted profits to out-of-state national headquarters, is in accord with those decisions.

b. Relying primarily on this Court's decision in *Lopez*, the dissenting judges in the court of appeals would have held that a conviction under the Hobbs Act requires proof that a particular act of robbery has a "substantial" effect on interstate commerce. That legal theory is flawed in at least two respects.

i. The Court in *Lopez* reaffirmed that "Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." 514 U.S. at 558. The government's evidence established that the victimized

businesses in this case operated in interstate commerce by purchasing supplies from outside the State or transferring profits to out-of-state national headquarters. Pet. App. C15. Because the Hobbs Act as applied in this case served to protect "persons or things in interstate commerce," *Lopez*, 514 U.S. at 558, no "substantiality" requirement applies. Cf. *United States* v. *Robertson*, 514 U.S. 669, 671 (1995) (per curiam) (upholding racketeering conviction based on evidence that enterprise gold mine was "engaged in" interstate commerce, and finding it unnecessary to consider whether activities of the gold mine "affected commerce," on the ground that "[t]he 'affecting commerce' test was developed * * * to define the extent of Congress' power over purely intrastate commercial activities that nonetheless have substantial interstate effects.").[11]

ii. Even in cases where a "substantiality" requirement does govern the Commerce Clause analysis, the inquiry is not limited to the effects on commerce of a particular individual's conduct. Rather, the aggregate

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[11] Hobbs Act convictions have occasionally been reversed in cases involving robberies of *individuals*, where the evidence failed to show a sufficient nexus between the crime and any interstate commercial transaction. See *United States* v. *Quigley*, 53 F.3d 909 (8th Cir. 1995) (reversing Hobbs Act conviction for robbery of eighty cents and a pouch of tobacco from two individuals); *United States* v. *Collins*, 40 F.3d 95 (5th Cir. 1994) (same for robbery of individual where asserted commerce nexus was interference with individual's ability to attend a business meeting and make calls on a cellular phone), cert. denied, 514 U.S. 1121 (1995); cf. *United States* v. *Buffey*, 899 F.2d 1402 (4th Cir. 1990) (same for extortion of wealthy individual who would have used personal funds to pay). Because the victims of petitioners' robberies were business establishments operating in interstate commerce, those decisions are inapposite here.

effects of the regulated activity may be considered in determining whether the statute falls within the reach of the commerce power. As the Court in *Lopez* reaffirmed, "where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." 514 U.S. at 558 (emphasis omitted) (quoting *Maryland* v. *Wirtz*, 392 U.S. 183, 197 n.27 (1968)). The Hobbs Act's application to the robberies here is valid under that principle. Robbery involves a classic hallmark of economic activity—money changing hands outside a single household—and, in the aggregate, robberies of businesses that engage in interstate commerce unquestionably have a "substantial" effect on interstate commerce. The convictions in this case may therefore be sustained under the third as well as under the second category of permissible Commerce Clause legislation described in *Lopez*. See *id.* at 558-560.

iii. The petitions here need not be held pending this Court's decisions in *United States* v. *Morrison*, cert. granted, No. 99-5 (Sept. 28, 1999), *Brzonkala* v. *Morrison*, cert. granted, No. 99-29 (Sept. 28, 1999), and *Jones* v. *United States*, cert. granted, No. 99-5739 (Nov. 15, 1999). Although those cases present questions concerning the scope of Congress's authority under the Commerce Clause to address violent crime, they do not involve the commission of economically motivated offenses against commercial establishments that are themselves engaged directly in interstate commerce.

2. The district court in this case instructed the jury that the interstate commerce element of the Hobbs Act charges would be established "if the Government proves beyond a reasonable doubt that the businesses described in the Third Superseding Indictment cus-

tomarily purchased goods that originated from outside the State of Texas, such as items necessary for the function of the described businesses." Hickman Pet. 27. Petitioner Hickman contends (Hickman Pet. 26-27) that the instruction was erroneous because the court refused to instruct the jury that the government was required to demonstrate a "substantial" effect on interstate commerce. For the reasons stated above (see pp. 11-14, *supra*), the instructions on the interstate commerce element accurately stated the law, and petitioner's contrary argument lacks merit.

Relying on *United States* v. *Gaudin*, 515 U.S. 506 (1995), petitioner Hickman also argues (Hickman Pet. 27-29) that by giving the challenged instruction, the district court improperly usurped the jury's role. That claim is without basis. The district court did not reserve for itself the determination whether the requisite commercial nexus existed, compare *Gaudin*, 515 U.S. at 508; rather, it instructed the jury that the Hobbs Act's interstate commerce element was satisfied if the *jury* found that certain facts had been proved beyond a reasonable doubt. Both before and after this Court's decision in *Gaudin*, the courts of appeals have recognized that such instructions do not remove from the jury's consideration any element of the crime, but merely explain the law and allow the jury to resolve the pertinent factual issues. See, *e.g.*, *United States* v. *Shinault*, 147 F.3d 1266, 1277 (10th Cir.), cert. denied, 525 U.S. 988 (1998); *United States* v. *Castleberry*, 116 F.3d 1384, 1389 (11th Cir. 1997); *United States* v. *Parker*, 104 F.3d 72, 73 (5th Cir.) (en banc), cert. denied, 520 U.S. 1223 (1997); *United States* v. *Gomez*, 87 F.3d 1093, 1097 (9th Cir. 1996); *United States* v. *Hernandez-Fundora*, 58 F.3d 802, 809-812 (2d Cir.), cert. denied, 515 U.S. 1127 (1995); *United States* v. *Piche*, 981 F.2d

706, 716-717 (4th Cir. 1992); *United States* v. *Wunder*, 919 F.2d 34, 36 (6th Cir. 1990); *United States* v. *O'Malley*, 796 F.2d 891, 897-898 (7th Cir. 1986).[12]

3. Petitioner Hickman contends (Hickman Pet. 21-25) that the district court committed reversible error in allowing two case agents to remain in the courtroom throughout the trial. That contention lacks merit and presents no legal issue warranting this Court's review.

The court of appeals held that the district court had violated Federal Rule of Evidence 615 by permitting both agents to remain in the courtroom. It concluded, however, that the error did not require reversal of the convictions because petitioners had not been prejudiced by the agents' presence. Pet. App. C10.[13] The courts of appeals have consistently recognized that violations of Rule 615 are subject to harmless error analysis. See *United States* v. *Harris*, 39 F.3d 1262, 1268 (4th Cir. 1994); *United States* v. *Jackson*, 60 F.3d 128, 136-137 (2d Cir.), cert. denied, 516 U.S. 980 (1995); *United States* v. *Brewer*, 947 F.2d 404, 411 (9th Cir. 1991);

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[12] Petitioner Hickman also claims (Pet. 29-30) that the district court failed to instruct the jury on the required intent for the Hobbs Act counts. The record refutes that claim. The district court in fact instructed the jury that the defendants had to have "knowingly" committed robbery, as counsel for Hickman had requested at the charge conference. 1 R. 304; 22 R. 2379 (quoted in Gov't C.A. Br. 70). Petitioner does not contend either that he objected to that instruction or that he requested any additional instruction on the Hobbs Act's scienter element.

[13] The court of appeals found that the two agents "testified about different subject matter," and that one agent, in two instances during cross-examination, directly contradicted the other's prior testimony. Pet. App. C10. The court concluded on that basis that "the two officers' testimony was not 'tailored' due to the district court's failure to exclude one of them from the courtroom," and that the error was therefore harmless. *Ibid.*

United States v. *Pulley*, 922 F.2d 1283, 1286-1287 (6th Cir.), cert. denied, 502 U.S. 815 (1991); *United States* v. *Conners*, 894 F.2d 987, 991 (8th Cir. 1990).

United States v. *Farnham*, 791 F.2d 331 (4th Cir. 1986) (see Hickman Pet. 21-24), is not to the contrary. The court in *Farnham* appeared to presume prejudice to the defendant where two case agents were allowed to remain in the courtroom throughout the trial. 791 F.2d. at 334-335. The court explained that "any defendant in Farnham's position would find it almost impossible to sustain the burden of proving the negative inference that the second agent's testimony would have been different had he been sequestered." *Id.* at 335. The court acknowledged, however, that it was "bound by the harmless error rule." *Ibid.* It reversed the defendant's conviction only with respect to the one count to which the agent's testimony related, *ibid.*, explaining that with respect to the other two counts "the facts [we]re such that any presumption of prejudice is rebutted," *id.* at 336. The Fourth Circuit has since confirmed that under *Farnham*, "violations of Fed. R. Evid. 615 are subject to the harmless error rule." *Harris*, 39 F.3d at 1268. The court in *Harris* affirmed the defendants' convictions, explaining that any violation of Rule 615 that might have occurred in that case would not provide a ground for reversal because it "had no substantial influence on the jury verdict." *Ibid.*

Petitioner also refers (see Hickman Pet. 23-24) to purported inconsistencies among the courts of appeals regarding the circumstances under which Rule 615 permits two case agents to remain in the courtroom. The present case, however, provides an inappropriate vehicle for resolving that question. The court of appeals agreed with petitioner that the government

had failed to justify the presence of the two case agents, but it found that the error did not affect the jury's verdict. Because the applicability of harmless error analysis to claims under Rule 615 is well established, the court's disposition of the issue does not warrant further review.

4. Petitioner McCray challenges (Pet. 29-39) the court of appeals' holding that the introduction into evidence of the redacted statements of his non-testifying co-defendants was harmless error. That claim lacks merit and does not warrant this Court's review.

The district court admitted into evidence the confessions of petitioners Limbrick, McCray, and Hickman, which were redacted to delete all references to other defendants. Even as redacted, however, those statements made clear that others were involved in the crimes. Petitioners Gasaway and McCray moved for severance, arguing that their rights under the Confrontation Clause would be violated by admission of their co-defendants' confessions. They based that claim on *Bruton* v. *United States*, 391 U.S. 123 (1968), which held that the admission at a joint trial of a non-testifying defendant's confession that implicates a co-defendant may violate the co-defendant's right to cross-examine the witnesses against him. The district court denied the motion to sever. Relying on this Court's intervening decision in *Gray* v. *Maryland*, 523 U.S. 185 (1998), the court of appeals held that admission of the redacted confessions in petitioners' joint trial was error. Pet. App. C19.

The court of appeals concluded, however, that the error did not require reversal because it was harmless beyond a reasonable doubt in light of the ample evidence of McCray's and Gasaway's guilt. A principal witness testified from his personal knowledge about the

participation of the two men; other circumstantial evidence linked them to the crimes of which they were convicted; and McCray himself confessed to one of the robberies. Pet. App. C20-C21. McCray's factbound challenge to the court of appeals' harmless error determination raises no legal issue warranting this Court's review. Contrary to petitioner's suggestion (McCray Pet. 38-39), no uncertainty exists regarding the applicability of harmless error analysis to claims of *Bruton* error. This Court has repeatedly held that *Bruton* error may be harmless, see *Brown* v. *United States*, 411 U.S. 223, 231-232 (1973); *Schneble* v. *Florida*, 405 U.S. 427, 430-432 (1972); *Harrington* v. *California*, 395 U.S. 250, 252-254 (1969), and nothing in *Gray* casts doubt upon those precedents.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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