No. _____

IN THE

Supreme Court of the United States

SHAMEKE WALKER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

MICHAEL O. HUESTON, ESQ.
Counsel for Petitioner
16 Court Street, Suite 1800
Brooklyn, New York 11241
718-246-2900
mhueston@nyc.rr.com

February 9, 2021

QUESTION PRESENTED

1. Should the Court grant certiorari to review whether Hobbs Act robbery, 18 U.S.C. § 1951(b), categorically fails to constitute "a crime of violence" to support a conviction under 18 U.S.C. § 924(c); and to decide whether the district court erred in its instruction because it charged that Hobbs Act Robbery was "a crime of violence"?

2. Should the Court grant certiorari in order to resolve a conflict among the circuits as to whether plain error is established where an indictment fails to set forth an essential element of an offense, the district court fails to instruct a jury as to an essential element of an offense, and a jury returns a verdict of guilty without any finding that an essential element of the offense has been proven beyond a reasonable doubt?

3. Should the Court grant certiorari in order to consider whether the district court abused its discretion in: i) permitting introduction of an in-court identification at trial of Walker by his Probation Officer; and ii) permitting introduction of an out-of-court identification of Walker at trial by the alleged robbery victim?

4. Should the Court grant certiorari in order to consider whether the district court appropriately denied Walker's motion, pursuant to Fed. R. Crim. P. 33, where he argued: i) Count Three (a violation of 18 U.S.C. § 924(c)) should have been dismissed, and that the jury instruction was also in error because Hobbs Act

robbery is categorically not "a crime of violence"; ii) that there was the spoliation of surveillance videos; and iii) an impaired juror deliberated to verdict?

5. Should the Court grant certiorari in order to consider the Panel erred when it found that the district court had wrongly held that New York Robbery in the Second Degree is not a "violent felony" for purposes of the Armed Career Criminal Act?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 14.1, the following list identifies all of the parties appearing here and in the court below.

The Petitioner here is Shameke Walker. The Respondent here and in all prior proceedings discussed herein is the United States of America.

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

TABLE OF CONTENTS

Appendices

TABLE OF AUTHORITIES

STATUTES, RULES, REGULATIONS AND GUIDELINES

OPINIONS BELOW

The relevant district court decisions in United States v. Walker, 15 Cr. 388 (E.D.N.Y) are: June 9, 2016, Pretrial Order attached at the Appendix A; July 7, 2016, Order attached at Appendix B; August 2, 2016, Amended Memorandum and Order, which is set forth in a reported decision *United States v. Walker*, 315 F.R.D. 154 (E.D.N.Y. 2016) and attached at Appendix C; May 16, 2018, Order attached at Appendix D; and May 17, 2018, Memorandum and Order, which is set forth in a reported decision *United States v. Walker*, 314 F. Supp. 3d 400 (E.D.N.Y. 2018) at Appendix E. The Judgment of Conviction is attached at Appendix F.

The relevant district court decision in United States v. Walker, 07 Cr. 347 (E.D.N.Y.) is a June 4, 2018 Order attached at Appendix G.

The Opinion of the Court of Appeals for the Second Circuit is set forth in a reported decision *United States v. Walker*, 974 F.3d 193 (2d Cir. 2020) attached at Appendix H. The Court of Appeals for the Second Circuit's November 19, 2020, Order denying a panel rehearing, or a rehearing *en banc*, is attached at Appendix I.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

PERTINENT STATUTORY PROVISIONS

18 U.S.C. § 922(g)

It shall be unlawful for any person—

> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

* * * *

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 924(c).

Under § 924(c)(3), "crime of violence" is defined as follows:

> (3) For purposes of this subsection, the term "crime of violence" means an offense that is a felony and –
>
> > (A) has an element the use, attempted use, or threatened use of physical force against the person or property of another, or
> >
> > (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 1951(b)(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.

New York Penal Law § 160.00 Robbery; defined.

Robbery is forcible stealing. A person forcibly steals property and commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another for the purpose of:

> 1. Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or
>
> 2. Compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids

in the commission of the larceny.

New York Penal Law 160.10 Robbery in the second degree.

A person is guilty of robbery in the second degree when he forcibly steals property and when:

1. He is aided by another person actually present; or

2. In the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime:

(a) Causes physical injury to any person who is not a participant in the crime; or

(b) Displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm; or

3. The property consists of a motor vehicle, as defined in section one hundred twenty-five of the vehicle and traffic law.

PRELIMINARY STATEMENT

In July 2016, Walker was found guilty by a jury of Counts One through Four of a four-count, second-superseding indictment in United States v. Shameke Walker, 15 Cr. 388 (E.D.N.Y) alleging: 1) Hobbs Act robbery, 18 U.S.C. § 1951(a); 2) committing physical violence in furtherance of a Hobbs Act robbery, 18 U.S.C. § 1951(a); 3) possessing, brandishing, and discharging a firearm during a crime of violence, 18 U.S.C. § 924(c); and 4) being a felon in possession of ammunition, 18 U.S.C. § 922(g)(1).

Walker was on supervised release in United States v. Walker, 07 Cr. 347 (E.D.N.Y) and charged with a violation for committing the aforementioned crime.

Walker filed the relevant pretrial motions: 1) to dismiss Count Three, the 18 U.S.C. § 924(c) count; and 2) to suppress an overly suggestive photo array. The district court denied both applications.

Walker filed motions *in limine* regarding a variety of issues, including to: 1) preclude evidence that the alleged victim identified Walker in a photo array prior to trial; 2) exclude any in-court identification of Walker as the person in a surveillance video of the robbery by his probation officer; and 3) exclude further fingerprint evidence and to preclude a substitute police fingerprint examiner from testifying at trial.

The Government also submitted *in limine* motions to: 1) permit the in-court identification by Walker's Probation Officer of Walker as the person in a surveillance video committing the robbery; and 2) preclude the defense from

questioning the alleged victim about his prior domestic violence convictions. The district court denied the defense's applications, but granted the Government's applications.

Walker also raised an issue regarding the lack of authenticity and the spoliation of surveillance videotapes that the district court disagreed with.

Post trial, Walker moved to dismiss Count Two as multiplicitous, which the Court granted. Walker also moved for a new trial based on: 1) the need to dismiss Count Three for a failure to state a claim; 2) the spoliation of video surveillance evidence; and 3) having an impaired juror deliberate to verdict on Counts One through Three. The motion was denied.

At sentencing, Walker argued that his criminal history did not make him an Armed Career Criminal, pursuant to the Armed Career Criminal Act, 18 U.S.C. § 924(e) ("ACCA"), or a Career Offender, pursuant to U.S.S.G. § 4B1.1. The Probation Department and the Government disagreed. The district court found that New York Robbery in the Second Degree is not a "violent felony" under the ACCA and that Walker was not a Career Offender, and sentenced Walker to 10 years on Count Three to run consecutive to a sentence of time served on Counts One and Count Four.

Walker's violation of supervised release case was dismissed.

Walker appealed his convictions, arguing Count Three should have been dismissed for a failure to state a claim; and that the district court erred in deciding

several evidentiary motions against the defense and denying Walker's motion for a new trial.

The Government cross-appealed Walker's sentence, raising the sole issue: whether the district court erred in ruling that Walker was ineligible for the enhanced sentencing provision of the ACCA.

The parties filed supplemental briefs about whether *Rehaif v. United States*, 139 S. Ct. 2191 (2019) compelled reversal of Walker's conviction for violating 18 U.S.C. § 922(g)(1) at Count Four.

The Second Circuit issued its Opinion on September 11, 2020, denying Walker's appeal, but agreed with the Government, and concluded that the district court erred in determining that New York Robbery in the Second Degree is not a "violent felony" for purposes of the ACCA and remanded the case for resentencing to determine if Walker's two other "violent felonies" qualify as predicates under the ACCA.

Walker filed a petition for a rehearing and for a rehearing *en banc* that was denied on November 19, 2020.

STATEMENT OF THE CASE

1. Arrest and Motions

On July 16, 2015, the Bureau of Alcohol, Tobacco, Firearms and Explosives arrested Walker for a Hobbs Act robbery that allegedly occurred on June 13, 2015, at a grocery store in Brooklyn, New York. *See* Second Circuit Docket 18-1933, ECF ("ECF") 64-1 at 23 of 74. The Government further alleged that Walker discharged

his firearm during the commission of the robbery. *Id.* Walker was eventually indicted in a four count superseding indictment. ECF 64-2 at 65 of 192. Count One charged a violation of 18 U.S.C. § 1951(a), alleging that on or about June 13, 2015, Walker obstructed, delayed and affected commerce, and the movement of articles and commodities in commerce, by robbery of United States currency and commercial merchandise from an employee of a convenience store located at 669 Stanley Avenue, Brooklyn, New York. Count Two charged a violation of 18 U.S.C. § 1951(a) that duplicated the allegations in Count One, except added that Walker committed and threatened physical violence to John Doe # 1 and John Doe # 2 in furtherance of the robbery. Count Three alleged that Walker used a firearm in relation to Counts One and Two in violation of 18 U.S.C. § 924(c). Count Four alleged that on or about June 13, 2015, Walker was a felon in possession of Aguila 9mm Luger ammunition in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2), and 924(e)(1).

Walker was on supervised release because of a prior conviction for unlawfully possessing a firearm in United States v. Shameke Walker, 07 Cr. 347 (E.D.N.Y). ECF 122 at 7 of 21. In relevant part, the violation report charged that Walker violated the following mandatory condition of supervision: "Charge Two: "On or about June 13, 2015, the offender violated the following mandatory condition of supervision: *'The defendant shall not commit another federal, state or local crime.'* Specifically, on the above date the offender used and carried a firearm in relation to a crime of violence, in violation of federal law". *Id.* (emphasis in original).

Walker filed pretrial motions: 1) to dismiss Count Three, the 18 U.S.C. § 924(c) count[1] with prejudice for failure to state a claim; 2) to suppress a photo array; and 3) to suppress Walker's statements. ECF 69 at 14 of 84. Walker argued that Hobbs Act robbery as proscribed by 18 U.S.C. § 1951(b) categorically failed to constitute a crime of violence under § 924(c)(3)(A) (the "force clause") because it can be accomplished by placing one in fear of future injury to his person or property, which does not require a threat of violent physical force and does not require the intentional threat of the same. In light of *Johnson v. United States*, 576 U.S. 591 (2015)[2], the defense also argued that Count Two should be dismissed because § 924(c)(3)(B) was unconstitutionally vague and could not sustain a conviction.

Walker's motion to dismiss was denied and hearings were scheduled for his motions to suppress.[3] ECF 69 at 15, 16 of 84. Walker also filed motions *in limine* regarding a variety of issues, including asking the Court to: 1) preclude evidence that the alleged victim, Basel Almontaser, identified Walker in a photo array prior to trial; and 2) exclude any in-court identification by Walker's Probation Officer Tanya Parris as Walker being the person in the video committing the robbery. ECF 69 at 16, 17. The Government also submitted *in limine* motions, requesting among other things that: 1) P.O. Parris identify Walker on video surveillance at trial; and

---

[1]The original numerical order of the counts changed because of the superseding indictments.

[2](or "*Johnson II*").

[3]Walker withdrew his motion to suppress his statements because the Government decided not to introduce them except for impeachment.

2) preclude the defense from referring to the prior domestic violence convictions of Almontaser. *Id.*

There was no evidentiary hearing regarding the photo array; rather the court determined that it "seemed fair" and was not persuaded by the defense's arguments that the identification was not contemporaneous, that the photographs from the "wanted poster" were not from the robbery, and that it was improper bolstering and suggestive. ECF 69 at 17 of 84.

The court acknowledged that the identification by P.O. Parris presented a "problem" but thought she should be permitted to identify Walker at trial because she had seen him previously and was familiar with his physical movements and appearance. *Id.* The court was not persuaded by the defense's objections that because she was Walker's probation officer Walker would be limited in cross-examining her regarding bias and that her identification was tainted because she knew Walker was the main suspect. *Id.* The district court also explained that it would keep out the fact that she was Walker's probation officer; however the defense could go into the subject if it chose. ECF 69 at 17, 18 of 84; *see also* Appendix A.

The court agreed with the Government to keep out Almontaser's domestic violence convictions, but allowed the defense to cross-examine Almontaser regarding his alleged dealing of the drug K2 from the grocery store. ECF 69 at 18 of 84; *see also* Appendix C.

Walker also filed a motion *in limine* to exclude fingerprint evidence and to preclude a substitute police fingerprint examiner from testifying at trial; the court denied the motions. ECF 69 at 19 of 84; *see also* Appendix B.

Finally, as trial approached, Walker also raised a critical issue regarding the lack of authenticity and the spoliation of the surveillance videotapes; however, the court ruled that "based on what I've seen, I'm going to let the video in." ECF 69 at 20 of 84.

2. Trial

On July 11, 2016, Walker's jury trial commenced, and on July 15 and 18, 2016 respectively, he was convicted of Counts One through Three, then Count Four. ECF 69 at 21 of 84. The Government called seven witnesses.

New York City Police Department ("NYPD") Detective Yuan Newton testified about his working the crime scene, which included identifying such evidence as a "spent round shell casing"; his interview of Almontaser; his creation of a NYPD's crime stopper notification that led to Walker's apparent identification; the lifting of fingerprints from a cash register and cigarette carton; and the obtaining of DNA. ECF 69 at 21-23 of 84. He claimed that he "uploaded" the videos and did not "tamper" or "edit" them. ECF 69 at 22 of 84.

Almontaser testified, in pertinent part, that he identified Walker as the robber. ECF 69 at 23 of 84. He claimed that he gave and made all the store surveillance videos available to the police. ECF 69 at 24 of 84. He also testified that he identified Walker from a photo array. *Id.* Almontaser was cross-examined

extensively about the store's video surveillance system, and asserted that he did not alter or manipulate the recordings he provided to law enforcement officers. ECF 69 at 25, 26 of 84.

NYPD Police Officer Robert Youngs testified about his collection of evidence from the store, including the spent shell casing; his interview with Almontaser; the store's surveillance cameras; the DNA swab of the cash register; and the fingerprint collection from a cigarette carton. ECF 69 at 28, 29 of 84.

NYPD Detective Gerald Rex testified about his expertise; his role as the investigation's "second" examiner; and his examination of latent print cards used in the investigation. ECF 69 at 29-33 of 84. He testified that when he looked at all three print cards he noticed an additional print of value, and that he identified it as Walker's on June 9, 2016. ECF 69 at 29 of 84. Detective Rex gave varying versions of how many similarities he found between Walker's prints, the latent print and his diagram. ECF 109 at 27 of 60. He noted that there was a statement in the latent print file "Case open to finger" from June 16, 2015, which meant that there was an open finger that was not identified among the fingerprints that were recovered. ECF 69 at 32 of 84. In June 2015, three of the prints were identified as Almontaser's, and the fourth was unidentified. *Id.* Detective Rex stated that the fourth fingerprint was only identified as Walker's in June 2016 when the police had Walker's fingerprints to compare. ECF 69 at 32, 33 of 84.

Christopher Kamnik from the Office of Chief Medical Examiner, Department of Forensic Biology for the City of New York, testified that DNA samples collected

at the store excluded both Almontaser and Walker as contributors. ECF 69 at 34 of 84.

In pertinent part, Detective Patricia Lezcano testified that she was the "first" examiner, and that she received the file on June 16, 2015. *Id.* She said that there were "three of the lift cards" and they were all of value and that she identified on each of the three cards a fingerprint belonging to Almontaser. ECF 69 at 35 of 84. She claimed that there was a "fourth print within the cards" that remained open on one of the lifts. *Id.* She testified that she inputted "all three cards" into the "database" and it did not provide a suspect to compare. *Id.*

Detective Lezcano also testified that in June 2016, during her conversations with the prosecutors she told them that there was still an "open finger" or "fourth fingerprint", and the prosecutors provided her with Walker's identity to compare. *Id.* She made the comparison and claimed it matched Walker. *Id.* She admitted that in her worksheet regarding the "open" fingerprint that there was no mention of another unidentified print. ECF 69 at 36 of 84.

P.O. Parris testified about how many times she and Walker had met, and described his appearance. ECF 69 at 36 of 84. She identified Walker on the surveillance video as the robber. *Id.* On cross, she confirmed that she had known about the case against Walker since 2015, and had been given the surveillance video to review prior to trial. *Id.*

The defense called a cognitive neuroscientist who discussed how cognitive or unintended bias can lead fingerprint examiners to reach the wrong results; the

court decided that the testimony could also be used for counsels' arguments regarding eyewitness identification bias. ECF 69 at 26-28 of 84. The defense also put on an investigator who discussed her canvassing of the area for video cameras. ECF 69 at 37 of 84.

There was a discussion regarding whether Walker would have to show his gold fronts to the jury and it was agreed that he would stand up and smile during the defense's summation. *Id.*

The defense argued its motions, pursuant to Federal Rule of Criminal Procedure 29; in particular, Walker argued that Counts One, Hobbs Act robbery, and Count Two, violence in furtherance of Hobbs Act robbery, were multiplicitous. *Id.* The court let the two counts go to the jury. *Id.*

The jury was charged regarding the elements of substantive Hobbs Act robbery, with the district court defining the term robbery as a taking "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." ECF 69 at 48, 49 of 84; and ECF 109 at 26 of 60.

Regarding Count Four, two stipulations were read into evidence after Walker was found guilty of Counts One through Three, regarding Walker being a prior felon and the recovered cartridge casing being manufactured in Mexico and traveling in interstate commerce. ECF 69 at 37 at 84. The jury was charged regarding the elements of being a felon-in-possession, which did not charge that Walker belonged

to the relevant category of persons barred from possessing a firearm. ECF 122 at 8-11 of 21.

After the jury found Walker guilty of Counts One through Three, the district court received a note from a juror asking to be excused because of the juror's concern about Walker, since she had a nightmare based on a prior experience; the defense moved for a mistrial, which the court denied, and the juror was excused on consent of both parties; and Walker was convicted of Count Four. ECF 69 at 21, 37, 38 of 84.

3. Post Trial and Sentencing

The district court granted Walker's Rule 29 motion to dismiss Count Two as multiplicitous. ECF 69 at 39 of 84.

Walker filed a motion, pursuant to Federal Rule of Criminal Procedure 33, asking that the court grant his motion to vacate the convictions because: 1) his conviction on Count Three should be dismissed for a failure to state a claim; 2) the spoliation of surveillance videos necessary to the defense; and 3) an impaired juror deliberated to verdict, which the district court denied. ECF 69 at 39 of 84; *see also* Appendix D.

At sentencing, Walker argued that his criminal history did not require either a sentence enhancement pursuant to the ACCA or the Career Offender Guideline, U.S.S.G. § 4B1.1, because: 1) with respect to the Career Offender Guideline, the "instant offenses" were not "crimes of violence," and 2) with respect to both the Career Offender Guideline and the ACCA, his relevant prior convictions were not

"violent felonies" or "crimes of violence." ECF 109 at 12-14, 32-59 of 60. The Probation Department and the Government argued the contrary. *Id.*

The Government argued that three of Walker's prior convictions were relevant in considering sentencing enhancements under the ACCA and Career Offender Guideline: 1) in 1991, Robbery in the Second Degree (Aided by Another), New York Penal Law § 160.10(1) where Walker was sentenced to 54 months' incarceration; 2) in 1999, Strong Arm Robbery, South Carolina Penal Law § 16-11-330(A) where Walker was sentenced to 10 years' incarceration; and 3) in 2010, Aiding and Abetting Assault with a Dangerous Weapon with Intent to do Bodily Harm, 18 U.S.C. § 113(a)(3) where Walker was sentenced to 18 months' in prison. *Id.*

The district court found that New York Robbery in the Second Degree is not a "violent felony" under the ACCA, and stated that it was thus "unnecessary" to review Walker's other possible predicate convictions, and found that Walker was not a Career Offender. ECF 109 at 14 of 60; *see also* Appendix E.

The district court's sentencing memorandum and statement of reasons set forth the basis for the decision. Appendix E. Judge Weinstein noted that because Walker was convicted of 18 U.S.C. § 922(g), that under the ACCA, the court determines whether Walker, in addition to his instant conviction of 18 U.S.C. § 922(g), committed three prior "violent felony" offenses, pursuant to 18 U.S.C. § 924(e). Appendix E. The district court noted that robbery is not an enumerated offense, so it had to determine under the force clause whether or not it was a violent

felony. Appendix E. The court then noted: "Although the ACCA does not define 'physical force' as used in the statute, the Supreme Court has held that 'in the context of a statutory definition of '*violent* felony,' the phrase 'physical force' means *violent* force—that is, force capable of causing physical pain or injury to another person.' *Johnson v. United States,* 559 U.S. 133, 140 (2010)[4] (emphasis in original)."). Appendix E.

The district court stated, "Because second degree robbery is a divisible statute the court must use the modified categorical approach and examine which of the three types of second-degree robbery Walker was convicted of.") Appendix E (*citing Buie v. United States*, 2017 WL 3995597, at *5 (S.D.N.Y. Sept. 8, 2017)). Thus, the court determined Walker's N.Y.P.L. § 160.10(1) conviction "cannot qualify as a predicate offense under the ACCA, since second-degree robbery, even when aided by another, may be accomplished without violent force." Appendix E.

The district court sentenced Walker to 10 years on Count Three, using a firearm during a "crime of violence", 18 U.S.C. § 924(c), to run consecutive to a sentence of time served on Count One, Hobbs Act robbery, 18 U.S.C. § 1951(a), and Count Four, felon in possession of ammunition, 18 U.S.C. § 922(g)(1). Appendix E.

4. Appeal

Walker appealed his convictions, raising: whether the district court should have dismissed Count Three, which charged Walker with discharging a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c) and

[4](or "*Johnson I" or "Curtis Johnson"*).

also if the district court's instruction concerning Count Three was erroneous; whether the district court abused its discretion in: 1) denying Walker's motions to preclude: a) the introduction at trial of new found fingerprint evidence; b) Walker's Probation Officer from identifying Walker at trial as the robber; and c) Almontaser testifying about his identification of Walker in a photo array prior to trial; and 2) permit the defense to cross-exam Almontaser about his domestic violence convictions; and whether it was error to deny Walker's motion, pursuant to Fed. R. Crim. P. 33, for a new trial based on: 1) his conviction on Count Three should have been dismissed for a failure to state a claim; 2) the spoliation of surveillance videos necessary to the defense; and 3) having an impaired juror deliberate to verdict on Counts One through Three. ECF 69; *see also* Appendix H.

The Government cross-appealed the sentence, raising the sole issue: whether the district court erred in ruling that Walker was ineligible for the enhanced sentencing provision of the ACCA. ECF 93.

There was supplemental briefing regarding whether *Rehaif v. United States*, 139 S. Ct. at 2191, compelled reversal of Walker's conviction for violating 18 U.S.C. § 922(g)(1) at Count Four, with Walker arguing jurisdictional defect and plain instructional error. ECF 122, 128, 131.

The Second Circuit issued its Opinion on September 11, 2020, finding no basis to disturb Walker's convictions on Count Three (Discharging a Firearm in violation of 18 U.S.C. § 924(c)) or Count Four (Being a Felon in Possession of Ammunition in violation of 18 U.S.C. § 922(g)(1)); no abuse of discretion in the

district court's evidentiary rulings or in its denial of Walker's motion for a new trial; but concluded that the district court erred in determining that New York Robbery in the Second Degree is not a "violent felony" for purposes of the ACCA; and so affirmed Walker's judgment of conviction and remanded the case for resentencing to determine if Walker's two other "violent felonies" qualify as predicates under the ACCA. Appendix H.

Walker petitioned for a rehearing and for a rehearing *en banc*, which was denied on November 19, 2020. Appendix I.

REASONS FOR GRANTING THE PETITION

I. Hobbs Act robbery, 18 U.S.C. § 1951(b), categorically fails to constitute "a crime of violence" to support a conviction under 18 U.S.C. § 924(c)

Walker argued that his § 924(c) conviction, at Count Three, should be dismissed because substantive Hobbs Act robbery includes threats to property, and therefore, categorically, is not a "crime of violence." The Panel stated: "[Walker's] arguments with respect to Count Three, the firearm-in-crime-of-violence count, are foreclosed by our opinion in *United States v. Hill*, 890 F.3d 51, 60 (2d Cir. 2018)[5], in which we held that Hobbs Act robbery qualifies, categorically, as a crime of violence under the elements clause of 18 U.S.C. § 924(c)." Appendix H at A50.

[5](or *"Hill II"*).

Respectfully, Walker asks this Court to consider that *Hill* is wrongly decided. Below we discussed *United States v. Bowen*, 936 F.3d 1091 (10th Cir. 2019)[6], where the Tenth Circuit held: "Because defendant's conviction for witness retaliation through property damage under 18 U.S.C.S. § 1513(b)(2) did not qualify as a crime of violence under § 924(c)(3)(A) as it did not have as an element the use of violent force, defendant was actually innocent of § 924(c)(1), and his 28 U.S.C.S. § 2255 motion was timely and should have been granted." *Bowen*, at 1091. There, the Tenth Circuit observed:

> The Supreme Court has never defined the contours of the phrase "physical force" in the context of a statute, like § 924(c)(3)(A), that applies to crimes involving property damage. Rather, the Supreme Court has defined the term "physical force" as that term was used in § 924(e)(2)(B), which defines a "violent felony" as a felony that "has as an element the use, attempted use, or threatened use of physical force *against the person of another*." 18 U.S.C. § 924(e)(2)(B) (emphasis added); accord *Stokeling* [*v. United States*, 139 S. Ct. 544, 548 (2019)]; *Curtis Johnson*, 559 U.S. at 137-38. We must therefore apply the Supreme Court's principles and reasoning from these cases to a statute, unlike the one the Supreme Court was faced with, that defines a crime of violence as one that "has as an element the use, attempted use, or threatened use of physical force against the . . . property of another." § 924(c)(3)(A).

Bowen, at 1105, 1106 (footnote omitted). And the Tenth Circuit continued:

> As with force applied against or towards people, not all force applied against property is "inherently violent."

---

[6]In *United States v. Melgar-Cabrera*, 892 F.3d 1053, 1065 (10th Cir. 2018), the Tenth Circuit held that Hobbs Act robbery is a crime of violence under the elements clause, but did not analyze the issue of acts against "property".

Stokeling, 139 S. Ct. at 553 (quotations omitted). Some is the equivalent of offensive touching. *See Curtis Johnson*, 559 U.S. at 139-40. It is, of course, easy to imagine any number of actions (such as spray-painting another's car) that damage property but do not have the same inherent violence as overcoming the will of a robbery victim. The question, therefore, is: What amount of force against property qualifies as "violent force"? *Id.* at 140.

Although *Stokeling* held that a minimal amount of force—when directed against the person of another—satisfies *Curtis Johnson's* definition of "violent force," *Stokeling* so held because force applied against or towards a person "need not cause pain or injury or even be prolonged" to be violent. 139 S. Ct. at 553. It was enough that the robbery statute at issue required the perpetrator to overcome the will of his victim. *Id.* This is not so of crimes against property; there is not inherent violence in, for example, spray-painting another's car, *see* [*United States v.*] *Edwards,* 321 F. App'x [481, 483 (6th Cir. 2009)], or "threatening to throw paint on [another's] house, . . . or . . . to pour chocolate syrup on his passport," *Hill II*, 890 F.3d at 57 (alterations omitted). Nothing about those actions is inherently violent, so the mere fact that they damage property cannot make them crimes of violence under § 924(c)(3).

For these reasons, we conclude that the Supreme Court's ruling in *Curtis Johnson* cannot be applied to § 924(c)(3) in the same way the dissent and *Hill II* interpret it. That is, in the context of § 924(c)(3)'s definition of crime of violence, "physical force against the . . . property of another," § 924(c)(3)(A), does not just mean force that "did or could cause physical pain or injury," Dissent at 14.

We are left, then, with the Supreme Court's guidance about when a crime is a crime of violence. In *Curtis Johnson*, the Court defined physical force as "violent force." 559 U.S. at 140. In *Leocal* [*v. Ashcroft*, 543 U.S. 1 (2004)] the Court exhorted that "we []not forget that we ultimately are determining the meaning of the term 'crime of violence,'" and the "ordinary meaning of this term . . . suggests a category of violent, active crimes." 543 U.S. at 11.

> Finally, in *Stokeling*, the Court acknowledged that force applied against or towards a person, "need not cause pain or injury or even be prolonged" to be violent. 159 S. Ct. at 553. Although spray-painting another's car damages that person's property, we cannot conclude that the mere fact that it damages property means that it requires "violent force," *Curtis Johnson*, 559 U.S. at 140, or makes it a crime of violence under § 924(c)(3).

Bowen, at 1107, 1108.

After oral argument, Walker also notified the Second Circuit, *see* ECF 138, that a Northern District of California district court had granted a 28 U.S.C. § 2255 motion, vacating a defendant's 18 U.S.C. § 924(c) convictions because it determined that substantive Hobbs Act robbery is categorically not a "crime of violence." *See United States v. Chea*, No. 98-cr-20005-1 CW, 2019 U.S. Dist. LEXIS 177651 (N.D. Cal. Oct. 2, 2019). The district court explained: "Thus, the plain language of § 1951(b)(1) clearly supports the notion that committing Hobbs Act robbery by causing fear of future injury to property does not require the use or threatened use of any physical force, much less the violent physical force required by *Johnson I*." *Chea*, at *24. And it held that the definition of robbery under the Hobbs Act "sweeps more broadly" than the elements clause under § 924(c) and could not be a categorical match to allow a § 924(c) conviction. *Id.* at *26.

The Government has appealed the decision. *United States v. Chea*, United States Court of Appeals for the Ninth Circuit, Nos. 19-10437 and 19-10438. And in *United States v. Dominguez*, 954 F.3d 1251 (9th Cir. 2020), a panel of the Ninth Circuit (adopting the reasoning in *United States v. Mathis*, 932 F.3d 242, 266 (4th Cir. 2019) rejected a similar argument that attempted Hobbs Act robbery cannot be

"a crime of violence" under the elements clause because it may be committed "'by placing a victim in fear of injury to some intangible economic interest.'" *Dominguez,* at 1261.[7] But the *Dominguez* Panel did not address the meat of the defendant's "intangible economic interest argument" and failed to reckon with the actual words of the statute by stating: "We need not analyze whether the same would be true if the target were 'intangible economic interests,' because Dominguez fails to point to any realistic scenario in which a robber could commit Hobbs Act robbery by placing his victim in fear of injury to an intangible economic interest." *Dominguez*, 954 F.3d at 1260.

This assertion is clearly antiquated and misplaced. Criminal actors do inflict damage on property against victims. *See, e.g., United States v. Ivanov*, 175 F. Supp. 2d 367, 368 (D. Conn. 2001) (Russian hacker extortion case); and 18 U.S.C § 1030 (Fraud and related activity in connection with computers). Walker argued that property damage can be caused by intangible means and that the definition of "property" under Hobbs Act robbery encompasses intangible objects. *See United States v. Arena*, 180 F.3d 380, 392 (2d Cir. 1999) ("The definition of 'property' under the Hobbs Act is admittedly expansive…. 'Property' under the Act 'includes, in a broad sense, any valuable right considered as a source or element of wealth,' including 'a right to solicit business.' *United States v. Tropiano*, 418 F.2d 1069[, 1075-76 (2d Cir. 1969)…]; *see also Northeast Women's Center, Inc. v. McMonagle*,

[7]Dominguez has filed petition for certiorari with this Court at United States v. Dominguez*,* 20-1000.

868 F.2d 1342, 1350 (3d Cir.), ('Rights involving the conduct of business are property rights'), *cert. denied*, [493 U.S. 901] (1989)").

In discussing why *Hill* is wrongly decided, Walker discussed the dissent in *Stokeling* where Justice Sotomayor observed that "physical force" in the ACCA was meant to "encompass[] the degree of force necessary to commit common-law robbery" but the *Stokeling* majority departed from that common-sense understanding, Congressional intent to impose an enhanced penalty on offenders with prior "violent" felonies, and its prior decision in *Johnson I v. United States*, 559 U.S. at 140. *Stokeling,* 139 S. Ct. at 557-59. The Justice noted the Court is required to interpret what exactly Congress meant when it used the words "physical force" to define the kind of "violent felony" that should be captured by ACCA's elements clause. *Stokeling,* 139 S. Ct. at 557 (internal citations omitted). Then she remarked that "[r]ather than parsing 'cherry pick[ed] adjectives,' … it is instructive to look to how *Johnson* actually answered that question." *Id.*, at 557.

The Justice reminded the majority of Justice Scalia's reasoning: "In other words, in the context of a statute delineating 'violent felon[ies],' the phrase 'physical force' signifies a degree of force that is '*violent*,' 'substantial,' and 'strong'–'that is, force capable of causing physical pain or injury to another person.'" *Id.* (emphasis in original). She then chided the majority's "slicing *Johnson* up," which gave undue concentration on the phrase: "capable of causing physical pain or injury" and emphasizing "the dictionary definition of the word 'capable' to suggest that *Johnson* 'does not require any particular degree of likelihood or probability' of 'pain or

injury'–merely, as with any law professor's eggshell-victim hypothetical, 'potentiality.'" *Id.* Respectfully, *Hill* similarly parses when it states:

> Hill's argument rests on a flawed reading of *Johnson I*. In that case, the Court declined to construe 'physical force' for the purposes of § 924(e)(2)(B)(i) in line with the common-law crime of battery, which deemed the element of 'force' to be satisfied 'by even the slightest offensive touching.' [*Johnson I*, 559 U.S. at 133]. But in rejecting this interpretive approach, the Court did not construe § 924(e)(2)(B)(i) to require that a particular quantum of force be employed or threatened to satisfy its physical force requirement.

Hill at 57, 58. So the question is: what does *Johnson I* require? The answer is: violent physical force against a person. By its own language Hobbs Act robbery does not meet this standard since it includes acts against "property". Similarly, the jury instruction was in error because it defined the term robbery as a taking: "by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property". And in relation to Count Three, the charge wrongly instructed that Hobbs Act robbery is a "crime of violence."

II. The failure to include an essential element of 18 U.S.C. § 922(g) deprived the court of jurisdiction or should have resulted in dismissal, and the failure to instruct a jury as to an essential element of an offense is plain error

At Count Four, Walker was convicted of being a felon in possession of ammunition in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2), and 924(e)(1). The Second Circuit left that conviction undisturbed, even in light of this Court's ruling in *Rehaif v. United States*, 139 S. Ct. at 2191 (2019), based on its opinions in *United*

States v. Balde, 943 F.3d 73 (2d Cir. 2019) and *United States v. Miller*, 954 F.3d 551 (2d Cir. 2020).[8] Appendix H.

In the Opinion, the Panel states that an "indictment's failure to allege" *Rehaif*'s knowledge element is "not a jurisdictional defect." Appendix H at 60A, 61A. Respectfully, *Balde* conflicts with Supreme Court and Second Circuit precedent holding that a failure to allege an essential element is fatal to an indictment. *United States v. Resendiz-Ponce*, 549 U.S. 102, 108 (2007); *Hamling v. United States*, 418 U.S. 87, 117 (1974); *Silber v. United States*, 370 U.S. 717, 717-718 (1962); *United States v. Carll*, 105 U. S. 611, 612 (1882); *United States v. Cook*, 84 U.S. 168, 174 (1872); *United States v. Bastian*, 770 F.3d 212, 217 (2014); *United States v. Rigas*, 490 F.3d 208, 228 (2d Cir. 2007); *see United States v. Berlin*, 472 F.2d 1002 (2d Cir. 1973) (dismissing count of indictment that, like Walker's, failed to allege essential scienter element).

With respect to the jury instruction, based on *Miller*, the Panel determined that Walker could not "satisfy the final prong of the plain error standard – requiring him to show that the error seriously affects the fairness, integrity, or public reputation of judicial proceedings – because evidence available to the government for use at trial indicates persuasively that Walker was well aware of his status as a felon." Appendix H at 61A. However, regardless of what Walker knew, the element was not proven to a jury, with the Panel looking outside the record to support his conviction. The Second Circuit's position should be rejected.

---

[8]A petition for certiorari has been filed in *United States v. Mack*, 20-5407, from the decision.

Indeed, its approach conflicts with an opinion of the Court of Appeals for the Fourth Circuit, *United States v. Gary*, 954 F.3d 194 (4th Cir. 2020) (a petition for certiorari is pending in this Court at 20-444)[9] holding that a failure to allege and to inform a pleading defendant about the *Rehaif* knowledge element of the offense was structural error requiring reversal. *See also United States v. Guzmán-Merced*, 984 F.3d 18 (1st Cir. 2020) (Defendant's guilty plea conviction and sentence for violating 18 U.S.C.S. § 922(g)(1) was vacated, and the case was remanded since the district court's failure to advise him of knowledge requirement under the Rehaif decision was clear error).

It also conflicts with the Third Circuit, *en banc*, decision that a § 922(g) trial conviction is void if no evidence was presented at the trial that the defendant knew, when he possessed a gun, that he had previously been convicted of a crime punishable by over a year in prison, holding it constituted "plain error" on direct review. *See United States v. Nasir*, No. 18-2888, 2020 U.S. App. LEXIS 37489, *35-36, 54 (3d Cir. Dec. 1, 2020).

Another petition for certiorari from a trial defendant in the Eleventh Circuit regarding the *Rehaif* knowledge requirement has been filed in *Greer v. United States*, 19-8709 concerning decisions listed at *United States v. Greer,* 753 F. App'x 886 (11th Cir. 2019) and 798 F. App'x 483 (11th Cir. 2020). This evolving circuit split demonstrates that this issue is a substantial question and certiorari should be granted.

---

[9]The Government has asked for a stay of *Mack* pending this Court's decision regarding *Gary*.

III. It was error for the district court to admit into evidence: 1) an in-court identification by Walker's Probation Officer; and 2) an out-of-court identification by the alleged victim

The Panel was unconvinced that Walker's Probation Officer's in-court identification of him as the man committing a robbery in surveillance footage was cumulative and unnecessary, and found that any error was harmless. Appendix H at A64-A67. However, the testimony carried a high risk of unfair prejudice that substantially outweighed any probative value. Fed. R. Evid. 403. Other circuits have "recognized the danger of unfair prejudice that arises when the source of such testimony is a police, probation, or parole officer." *United States v. Pierce*, 136 F.3d 770, 775 (11th Cir. 1998) (citing *United States v. Calhoun*, 544 F.2d 291, 296 (6th Cir. 1976); *United States v. Henderson*, 68 F.2d 323, 327 (9th Cir. 1995); *United States v. Butcher*, 557 F.2d 666, 669 (9th Cir. 1977); *United States v. Farnsworth*, 729 F.2d 1158, 1161 (8th Cir. 1984)). Walker could not vigorously cross-examine his Probation Officer about any bias given the nature of their relationship because it risked portraying him "as a person subject to a certain degree of police scrutiny." *Butcher*, 557 F.2d at 669.

The Government, itself, proved in its own closing argument that the identification was unnecessary to support the video evidence, stating:

> All the still shots are Government's Exhibit 7. I have put two of those here for you. That's pages 50 and 68. Everyone agrees that's the perpetrator of the robbery. Take a good look at that face, and compare it to the defendant. Keeping mind that he's wearing glasses today. You can still look and see that it's clearly the defendant.

> Look at the hairline. Look at the facial features. Look at the nose. No one is saying this is a high definition, you know, 4K video. It's clear enough. It's clear enough on the video alone that it's the defendant. We have more evidence. This is just reason one.

ECF 109 at 29 of 60. So the testimony was simply cumulative, and prejudiced Walker. *Calhoun*, 544 F.2d at 296.

The Panel also found Walker's arguments to preclude Almontaser's out-of-court identification to be unconvincing. However, while the decision addressed Walker's arguments regarding: 1) the photographic array; 2) the passage of time between the robbery and the identification; and 3) the possible taint caused by a "Crime Stoppers" poster; the decision did not address that the identification was duplicative, ECF 69 at 57, 58 of 84, and therefore unnecessary under Fed. R. Evid. 403's balancing test.

IV. It was error to deny Walker's motion, pursuant to Fed. R. Crim. P. 33, for a new trial

With respect to Walker's motion for a new trial, the Panel found his arguments unpersuasive, Appendix H at A71-A73, of which there were three: 1) the failure to state a claim regarding Count Three (the 18 U.S.C. § 924(c) violation based on Hobbs Act robbery), and the erroneous jury instruction as discussed above in Point I; 2) the spoliation of surveillance video evidence; and 3) that an impaired juror deliberated to verdict on Counts One through Three. We respectfully refer the Court to Point I, above, regarding the first issue.

As to the missing video the Panel essentially concluded that Walker's argument was speculative and that he failed to show the Government's "bad faith".

However, the bad faith was the destruction of parts of the video itself. And as to the juror, she obviously had been impacted by a prior experience that caused her nightmares, but still sat on the jury, voting against Walker; thus failing to alert anyone until the end of the trial process rather than at the beginning as obligated.

V. The district court did not error in determining that New York Robbery in the Second Degree is not a "violent felony" for purposes of the Armed Career Criminal Act, 18 U.S.C. § 924(e)

We argued in opposition to the Government's cross-appeal that because second-degree robbery under New York Penal Law § 160.10 is not categorically a "violent felony" within the meaning of the ACCA his sentence to time served should be affirmed. ECF 109 at 32-46 of 60. The Panel rejected that argument because since "Walker's sentencing, we have ruled – and Walker now concedes, as he must – that New York Robbery in any degree is a violent felony, both for purposes of 18 U.S.C. § 924(e)(2)(B)(i) and under an identical clause in the U.S. Sentencing Guidelines, U.S.S.G. § 2L1.2. *United States v. Thrower*, 914 F.3d 770, 774-77 (2d Cir. 2019) (18 U.S.C. § 924(e)(2)(B)(i)), [*cert. denied*, 140 S. Ct. 305 (2019)]; *United States v. Pereira-Gomez*, 903 F.3d 155, 159, 164-66 (2d Cir. 2018) (Guidelines) [*cert. denied* 139 S. Ct. 1600 (2019)]." Appendix H at A74.

Nonetheless, we discussed that in *United States v. Steed*, 879 F.3d 440 (1st Cir. 2018), the First Circuit reviewed a series of New York cases and concluded that attempted second-degree robbery did not qualify as a crime of violence under the force clause of the Career Offender Guideline. *Id.* at 448-51. The First Circuit concluded that New York's definition of forcible stealing, *see* N.Y.P.L. § 160.00,

encompasses a "purse snatching" just sufficient to produce awareness in the victim. *See Steed*, 879 F.3d at 449. Thus, it held that a New York State conviction for attempted second-degree robbery, N.Y.P.L. §§ 110.00/160.10(2)(a), is not a crime of violence under the elements clause of the Career Offender Guideline, § 4B1.2(a)(1). *Steed*, at 450, 451.

The level of force required for New York robbery, *Steed* explained, was insufficient to meet the elements clause. *Steed* concluded, "[A]s we read the relevant New York precedents, there is a realistic probability that Steed's conviction was for attempting to commit an offense for which the least of the acts that may have constituted that offense included 'purse snatching, per se.'" *Steed*, 879 F.3d at 450 (quoting *People v. Santiago*, 62 A.D.2d 572, 579 (2d Dep't 1978), *aff'd*, 48 N.Y.2d 1023 (1980)). Because "such conduct falls outside the scope" of the elements clause, "we cannot say that, under the categorical approach, Steed's conviction was for an offense that the force clause of the career offender guideline's definition of a 'crime of violence' encompasses." *Steed*, 879 F.3d at 450, 451. *Steed* also observed that a court must consider "the state of New York law as it stood at the time that *Steed* was convicted of attempting to commit that crime, which was in 2000." *Id.* at 447.[10]

Thrower and *Pereira-Gomez* stand in opposition to the determination made not only by the district court in this case but also determinations made by multiple judges in other cases in this Circuit. Looking at the least acts of robbery criminalized by New York, as explained by *Steed*, Walker's conviction of New York

[10]Walker was convicted of New York robbery in 1991.

Robbery in the Second Degree does not equate to "violent force" and, thus, should not be counted as a predicate under the ACCA. Appendix E; *see e.g., United States v. Moncrieffe*, 167 F. Supp. 3d 383, 403-05 (E.D.N.Y. 2016) (Weinstein, J.) ("In the colloquial phrase, violence under the federal statute occurs when 'push comes to shove.' A gentle push is enough under the state law, but not under federal law.")

CONCLUSION

For the above-stated reasons, the petitioner Shameke Walker respectfully requests that his petition for a writ of certiorari to the Court of Appeals for the Second Circuit be granted.

Dated: Brooklyn, New York
February 15, 2021

Respectfully submitted,

s/Michael O. Hueston
MICHAEL O. HUESTON, ESQ.
16 Court Street, Ste. 1800
Brooklyn, New York 11241
(718) 246-2900
mhueston@nyc.rr.com
Attorney for Petitioner
Shameke Walker

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA :

- v. - : 15-CR-388 (JBW)
PRE-TRIAL ORDER

SHAMEKE WALKER, :

Defendant. :
----------x

In the case of United States of America vs. Shameke Walker, the Court announced the following rulings orally at a pre-trial conference on June 6, 2016:

1. To minimize the risk of unfair prejudice to the defendant, the trial will be bifurcated. After the parties have presented their cases and the jury has reached a verdict with regards to Counts One, Two, and Three of the second superseding indictment, the parties will present additional evidence, make final arguments, and the jury will deliberate with regards to Count Four.

2. Evidence of the defendant's gang nickname "Bonafide" is inadmissible at trial.

3. Evidence of the defendant's alleged gang membership is inadmissible at trial.

4. Evidence concerning the firearm and ammunition recovered at the residence of the defendant and his common-law wife is inadmissible at trial unless the defendant opens the door.

5. Evidence of the defendant's prior convictions, including their nature or number, is inadmissible, except that in the second phase of the bifurcated trial, the government may introduce evidence that the defendant was convicted of a crime punishable by more than one year, subject to a limiting instruction. However, if the defendant chooses to testify, then the trial would no longer be bifurcated, and the evidence of his prior convictions may be admissible at trial pursuant to Fed. R. Evid. 609.

6. The phrases "convicted felon" or "felony" may not be used at trial in reference to the defendant or any of his previous conduct unless the defendant testifies, in which case the government case use the word "felony" when impeaching the defendant with his prior convictions.

7. Evidence of Mr. Basel Almontaser's out-of-court identification of the defendant from a photo array on July 13, 2015 is admissible at trial.

8. The government may call Senior United States Probation Officer Tanya Parris to testify as to the identity of the robber in surveillance footage. To minimize the risk of undue prejudice, the nature of Officer Parris's role as a Probation Officer is inadmissible at trial, unless the defense chooses to open the issue on cross-examination. Officer Parris will inform the jury on direct examination that she "works for an agency to which Mr. Walker has to report."[1]

9. Evidence of statements about the robbery Mr. Walker claimed to have made to his probation officer are inadmissible at trial unless Mr. Walker testifies, in which case he could be impeached by his prior statements.

SO ORDERED.

Date: 6/9/16

Jack B. Weinstein
Senior District Court Judge

[1] The parties have conferred and agree that this language will obviate any prejudice Mr. Walker would have suffered from the jury discovering that he is currently on federal probation.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

– against –

SHAMEKE WALKER,

Defendant.

ORDER

15-CR-388 (JBW)

JACK B. WEINSTEIN, Senior United States District Judge:

A hearing on defendant's motion for reconsideration (ECF No. 80), and defendant's second motion *in limine* (ECF No. 86), was conducted on July 7, 2016. The prospective witness, Bazel Almontaser, was present in person with his counsel.

The reasons for the decisions below were described orally on the record. *See* Hr'g Tr., July 7, 2016.

Defendant's motion for reconsideration of the order of June 29, 2016 is denied as moot. The witness has indicated his intention to invoke his Constitutional Fifth Amendment right against self-incrimination. No grant of immunity has been made by the government. *See id.*

Defendant's motion to exclude the expert testimony of New York Police Department detective Gerald Rex is denied. *See id.*

Defendant's motion to preclude the government from calling latent print examiner Pasquale Imbimbo as a government witness is granted. *See id.*

SO ORDERED.

Jack B. Weinstein
Senior United States District Judge

Date: July 7, 2016
Brooklyn, New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA – against – SHAMEKE WALKER, Defendant.	**AMENDED MEMORANDUM AND ORDER** 15-CR-388

JACK B. WEINSTEIN, Senior United States District Judge:

The government moves to preclude reference to the criminal history of the complaining witness in this case. *See* Gov't's Mot. In Limine ("Gov't's Mot."), May 31, 2016, ECF No. 48, at 11-13. Defendant Shameke Walker is charged with committing an armed robbery of a bodega in Brooklyn, New York. *See generally*, Superseding Indictment, May 25, 2016, ECF No. 41. It is undisputed that the store clerk, Bazel Almontaser, was in the bodega at the time of the robbery, and that he reported identifying information to the police shortly after the incident and later identified the defendant from a photo array. Walker's counsel seeks to cross-examine Almontaser on two prior assault convictions, as well as an admission to the government that he previously sold synthetic marijuana from the bodega, including to defendant. *See* Def.'s Letter, June 21, 2016, ECF No. 75, at 1; Gov't's Letter, June 20, 2016, ECF No. 71, at 1-2. The issues were discussed at in limine hearings on June 6, 2016 and June 22, 2016. *See* Hr'g Tr., June 6, 2016; Hr'g Tr., June 22, 2016.

In ruling on the government's motion, the court applies Rules 403 and 609 of the Federal Rules of Evidence.

Rule 403 of the Federal Rules of Evidence states as follows:

> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presented cumulative evidence.

Fed. R. Ev. 403.

Rule 609 of the Federal Rules of Evidence reads, in relevant part:

> **(a) In General.** The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:
>
> > **(1)** for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:
> >
> > > **(A)** must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and
> > >
> > > **(B)** must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and
> >
> > **(2)** for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving – or the witness's admitting – a dishonest act or false statement.

Fed. R. Ev. 609.

Using the court's discretion as the evidence rules require, the government's motion is granted to preclude any reference to Almontaser's prior convictions. The motion is denied, with limitations, with regard to Almontaser's admission to the government that he has sold drugs from the bodega.

The witness has two convictions. One is for felony attempted assault of a person over 65 years old on June 15, 2015 (two days after the robbery), and the other is for misdemeanor attempted assault in April 2016. Gov't's Mot. at 11. Both convictions involved domestic

assaults. *Id.* It is dubious whether the convictions are relevant as assault does not shed light on veracity. The defense argues that the fact that the witness denied committing one or both assaults to the police, and later entered guilty pleas for both, shows that his words cannot be trusted. *See* Hr'g Tr., June 22, 2016. Defense counsel is undoubtedly aware, however, that in light of the significant risks and emotional toll of going to trial, many defendants plead guilty to crimes they did not commit. *See, e.g.*, Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REVIEW OF BOOKS (Nov. 20, 2014), http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/ ("How prevalent is the phenomenon of innocent people pleading guilty? The few criminologists who have thus far investigated the phenomenon estimate that the overall rate for convicted felons as a whole is between 2 percent and 8 percent. . . . let us suppose that it is even lower, say, no more than 1 percent. When you recall that, of the 2.2 million Americans in prison, over 2 million are there because of plea bargains, we are then talking about an estimated 20,000 persons, or more, who are in prison for crimes to which they pleaded guilty but did not in fact commit.").

Nonetheless, even assuming defendant's guilty pleas are relevant, their introduction at trial cannot be permitted under Rule 403. Domestic violence is a disturbing issue that would undoubtedly prejudice the jury's view of Almontaser and his testimony at trial. Were the court to allow cross-examination of the witness on these convictions, it would fail to afford protection to a large population of minorities in New York State who have had contact with the criminal justice system. *See, e.g.*, *Utah v. Strieff*, No. 14-1373, 2016 WL 3369419, at *15 (U.S. June 20, 2016) (Sotomayor, J., dissenting) ("[I]t is no secret that people of color are disproportionate victims of [law enforcement] scrutiny." (citing M. Alexander, The New Jim Crow 95-136 (2010))). Members of these communities should not be discouraged from coming forward to

testify about serious threats to public safety in the areas where they live and work. Whether Almontaser's convictions were justified is not for this court to decide. What it can decide, however, is to limit the constant reminder of these past acts. The witness is already burdened by the collateral consequences of a felony conviction and need not be subjected to further scrutiny. *Cf.* Anna Roberts, *Reclaiming the Importance of the Defendant's Testimony: Prior Conviction Impeachment and the Fight against Implicit Stereotyping*, 83 U. Chi. L. Rev. 835 (2016).

The defense may, however, examine the witness on his admission to the government that he sold drugs from the bodega, and that one of his customers was the defendant. The nature of the prior interactions between Almontaser and Walker are relevant to understanding whether the witness recognized defendant as the robber. As the defense argues, it is plausible that Almontaser knew the robber to be a supplier, and not defendant, but described the defendant to the police in an attempt to maintain his role in the drug organization. *See* Hr'g Tr., June 22, 2016. It is equally plausible that because the witness has interacted with Walker on several prior occasions, the government's theory that Almontaser correctly identified defendant as the robber is supported. Because the issue of identification is central to this case, and because the investigation proceeded from the witness's initial description of the robber, he may be examined on the nature of his prior interactions with defendant.

To properly balance the probative value of the information and its prejudicial effect under Rule 403, however, if the witness does not testify about the robber's appearance or submit any other identifying facts, he may not be cross-examined on his admission of selling drugs. For the same reasons described above, witnesses should not be discouraged from coming forward on important matters of public safety. Almontaser has not been offered immunity from the government for the criminal acts he has admitted to committing. The court has ordered the

appointment of counsel to advise the witness of his Fifth Amendment right against self-incrimination. *See* Order, June 23, 2016, ECF No. 77.

SO ORDERED.

Jack B. Weinstein
Senior United States District Judge

Date: August 2, 2016
Brooklyn, New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

– against –

SHAMEKE WALKER,

Defendant.

ORDER
15-CR-388

JACK B. WEINSTEIN, Senior United States District Judge:

Defendant moves for a vacated judgment and new trial on the grounds that: "(1) [the prosecution allowed the] spoliation of surveillance videos necessary to the defense; (2) Mr. Walker's conviction on Count Three should be dismissed; and (3) an impaired juror was permitted to deliberate to verdict." Def. Motion for New Trial, ECF No. 151, May 9, 2018.

This motion is denied. The defendant received a fair trial with overwhelming evidence of his guilt produced by the Government. *United States v. Ferguson*, 246 F.3d 129, 134 (2d Cir. 2001) ("The ultimate test on a Rule 33 motion is whether letting a guilty verdict stand would be a manifest injustice. The trial court must be satisfied that 'competent, satisfactory and sufficient evidence' in the record supports the jury verdict. The district court must examine the entire case, take into account all facts and circumstances, and make an objective evaluation. 'There must be a real concern that an innocent person may have been convicted.' Generally, the trial court has broader discretion to grant a new trial under Rule 33 than to grant a motion for acquittal under

Rule 29, but it nonetheless must exercise the Rule 33 authority 'sparingly' and in 'the most extraordinary circumstances.'") (internal citation omitted).

SO ORDERED.

Jack B. Weinstein
Senior United States District Judge

Dated: May 16, 2018
Brooklyn, New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

– against –

SHAMEKE WALKER,

Defendant.

MEMORANDUM & STATEMENT OF REASONS
15-CR-388

JACK B. WEINSTEIN, Senior United States District Judge:

Parties

The United States of America

Shameke Walker

Appearances

Andrey Spektor
Lindsay Gerdes
United States Attorney's Office
271 Cadman Plaza East
Brooklyn, NY 11201

Michael Hueston
16 Court Street, Suite 3301
Brooklyn, NY 11241

Table of Contents

I. Introduction

A. The Crime

During the robbery of a bodega in Brooklyn, New York, Shameke Walker ("Walker") fired at a store clerk with a revolver. The bullet missed the clerk, but pierced the leg of an uninvolved security guard standing across the street.

Walker was arrested and charged with four counts: (1) Hobbs Act Robbery, 18 U.S.C. § 1951(a); (2) committing physical violence in furtherance of a Hobbs Act Robbery, 18 U.S.C. § 1951(a); (3) possessing, brandishing, and discharging a firearm during a crime of violence, 18 U.S.C. § 924(c); and (4) being a felon in possession of ammunition, 18 U.S.C. § 922(g)(1).

Under federal law, Walker could not be charged with attempted murder or assault, as he could have been under New York State law, for the shooting of the security guard. *Taylor v. United States*, 136 S. Ct. 2074, 2082–83 (2016) (Thomas, J., dissenting) ("The Constitution expressly delegates to Congress authority over only four specific crimes . . . Given these limited grants of federal power, it is 'clea[r] that Congress cannot punish felonies generally.'") (quoting *Cohens v. Virginia*, 6 Wheat. 264, 428 (1821) (Marshall, C. J.)). The Government attempted to avoid this issue by charging Walker twice under the Hobbs Act—once for robbery and once for violence in furtherance of the robbery.

B. Rule 29 Motion

In mid-trial motions, Walker argued that Count One, Hobbs Act Robbery, and Count Two, violence in furtherance of Hobbs Act Robbery, were multiplicitous, violating his Fifth Amendment protection against double jeopardy. Trial Tr. 533:3-9, Jul. 14, 2018 ("Count One and Count 2 both charge Hobbs Act Robbery, 18 U.S.C. 1951. It is not that there are two subsections, it is not Part A and Part B or Clause 1 and Clause 2 . . . both of those charges charge the exact

same statute. When we look at the facts in the case and the language of the statute, they do so in exactly the same way."). The court reserved decision on the motion, letting all four counts go to the jury. Walker was found guilty as charged. *See* ECF No. 115, Jul. 15, 2016; ECF No. 118, Jul. 18, 2016.

Because the elements of proof required for Hobbs Act Robbery are sufficient to prove violence in furtherance of Hobbs Act Robbery, Count Two is dismissed as multiplicitous. *United States v. Ansaldi*, 372 F.3d 118, 124 (2d Cir. 2004) ("An indictment is multiplicitous if it charges the same crime in two counts.").

C. Statutory and Guidelines Sentencing Enhancements

Walker argues that his prior and current offenses do not designate him as an Armed Career Criminal, 18 U.S.C. § 924(e), nor do they qualify for a sentence enhancement under the Career Offender Guidelines, U.S.S.G. § 4B1.1.

Walker has a long history of violent and criminal acts. Under the sentencing Guidelines and federal law, however, he is not subject to a sentence enhancement as a violent predicate offender.

Mandatory minimum statutes constitute the basis for a major category of excessive federal sentences. Whenever it is reasonable to do so based on the language of the applicable statute, we should construe it against mandatory minimum sentences. *United States v. Dossie*, 851 F. Supp. 2d 478, 478 (E.D.N.Y. 2012) ("[Mandatory Minimums] strip criminal defendants of the due process rights we consider fundamental to our justice system.").

The rule of lenity is particularly useful in moderating excessive mandatory minimum sentences. *See Rewis v. United States*, 401 U.S. 808, 812 (1971) ("Ambiguity concerning the

ambit of criminal statutes should be resolved in favor of lenity."). Neither the Armed Career Criminal Act nor the Career Offender Guidelines are applicable to Walker.

D. Sentence

Walker is sentenced to 10 years on Count Three, brandishing a firearm during a crime of violence, 18 U.S.C. § 924(c), to run consecutive to a sentence of time served on Count One, Hobbs Act Robbery, 18 U.S.C. § 1951(a), and Count Four, felon in possession of ammunition, 18 U.S.C. § 922(g)(1).

Walker has been in custody since July 15, 2015. Presentence Report ("PSR") at 1. The sentence of time served on Counts One and Four amounts to approximately 34 months' incarceration. Walker's combined term of imprisonment will be almost 13 years. He is sentenced to five years' supervised release.

II. Facts

A. Event

In the early morning of June 13, 2015, Walker entered a convenience store; he was armed with a handgun. Trial Tr. 11:24-12:4, Jul. 11, 2016. Drawing his gun, he demanded cash from the store clerk, Barry Almontaser. *Id.* at 172:12-14, Jul. 12, 2016. Walker stole two telephones, two cartons of cigarettes, and $700 from the register. *Id.* at 172:15-20. While Walker was pocketing the stolen items, the store clerk, in an attempt to stop him from leaving, cut a rope used to hold the front glass door open. *Id.* at 174:7-25.

As the store clerk was shutting the door from the outside, Walker shot once at him through the glass. *Id.* at 175:16-17.

The bullet shattered the glass door, narrowly missed the store clerk, and traveled across the street hitting a security guard in the leg. Evidence that the bullet hit a security guard was

excluded at trial as unduly prejudicial. *See Old Chief v. United States*, 519 U.S. 172, 180 (1997); Hr'g Tr. at 33:25-34:20, Jun. 22, 2016 ("You are going to have [evidence that] the bullet went through the window after the gun was shot, and from the direction it went across the street. But I am not going to allow in evidence that a civilian was shot. That prejudices the case entirely.").

The store clerk ran from the scene; Walker nonchalantly pedaled away on his bike with the stolen goods. *Id.* at 176:22-25.

B. Walker's Criminal History

The government argues that three of Walker's prior convictions are relevant in considering sentence enhancements under the Armed Career Criminal Act and Career Offender Guidelines. *See* Gov't Sentencing Mem., ECF No. 138.

1. In 1991, Robbery in the Second Degree (Aided by Another), New York Penal Law § 160.10(1). Walker was sentenced to 54 months' incarceration. PSR at ¶ 37.

2. In 1999, Strong Arm Robbery, South Carolina Penal Law § 16-11-330(A). Walker was sentenced to 10 years' incarceration. PSR at ¶ 42.

3. In 2010, Aiding and Abetting Assault with a Dangerous Weapon with Intent to do Bodily Harm, 18 U.S.C. § 113(a)(3). This crime took place while Walker was incarcerated at a federal penitentiary. PSR at ¶ 45. He was sentenced to 18 months in prison. *Id.*

III. Law

A. Motion for a Judgment of Acquittal

Under Federal Rule of Criminal Procedure 29, a defendant may move for a judgment of acquittal on the theory that the Government's evidence is insufficient to sustain a conviction. Where the motion is made before the close of all the evidence, "the court may reserve decision on the motion, proceed with the trial . . . submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty . . . If the court

reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved." Fed. R. Crim. P. 29(b).

i. Hobbs Act Robbery, 18 U.S.C. § 1951

18 U.S.C. § 1951(a) provides:

> 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.

Under this section, "robbery" is defined as:

> 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.

18 U.S.C.§ 1951(b)(1).

ii. Multiplicity

The Fifth Amendment to the United States Constitution provides that no person shall "twice be put in jeopardy of life or limb" for the same offense. An indictment which charges two offenses instead of one for what is the same criminal act, is multiplicitous, and violates the double jeopardy clause. *United States v. Harris*, 79 F.3d 223, 231 (2d Cir. 1996). "The primary problem is that the jury can convict on both counts, resulting in two punishments for the same crime." *United States v. Ansaldi*, 372 F.3d 118, 124 (2d Cir. 2004).

The Supreme Court in *BlockBurger v. United States*, 284 U.S. 299, 304 (1932), laid out the test to determine whether an indictment charges distinct crimes.

> A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction

> under either statute does not exempt the defendant from prosecution and punishment under the other.

Id. (internal quotation omitted).

BlockBurger and its progeny instruct courts to consider whether "each offense contains an element not contained in the other; if not, they are the 'same offence' and double jeopardy bars additional punishment and successive prosecution." *United States v. Dixon*, 509 U.S. 688, 696 (1993); *United States v. Basciano*, 599 F.3d 184, 198 (2d Cir. 2010) ("We explained that the critical double jeopardy inquiry is not factual, *i.e.*, whether the same conduct is at issue in charges brought under different statutes, but legal, *i.e.*, 'whether the 'offense'—in the legal sense, as defined by Congress—complained of in one count is the same as that charged in another.'") (quoting *United States v. Chacko*, 169 F.3d 140, 147 (2d Cir. 1999)). When a single statutory violation is "charged twice, the question is whether the facts underlying each count were intended by Congress to constitute separate 'units' of prosecution." *Ansaldi* 372 F.3d at 124.

Multiple counts based on identical facts, but different elements of law, will not violate the double jeopardy clause. *Gavieres v. United States*, 220 U.S. 338, 342 (1911) ("It is true that the acts and words of the accused set forth in both charges are the same; but in the second case it was charged, as was essential to conviction, that the misbehavior in deed and words was addressed to a public official. In this view we are of opinion that while the transaction charged is the same in each case, the offenses are different."). Proof of additional facts, however, is insufficient on its own to overcome double jeopardy. *Ansaldi* 372 F.3d at 124 ("In this case, it is true that each count undoubtedly required proof of something that the other did not; that is, the counts are not identical. The theory of Count Three required the government to prove that GBL converted to GHB in the body and that Defendants were aware of that. Count Four

required proof that Defendants intended to distribute GBL for human consumption, as well as that GBL met the requirements for being a controlled substance analogue. Nevertheless, none of the facts peculiar to each count is relevant to the 'unit' of prosecution of the count.").

iii. Hobbs Act and Double Jeopardy

In *Scheidler v. Nat'l Org. for Women, Inc*., 547 U.S. 9 (2006), the Supreme Court addressed whether physical violence unrelated to robbery or extortion fell within the scope of the Hobbs Act. The Court examined the text of the statute and determined that *robbery or extortion* was required for a violation of the Hobbs Act.

> Congress did not intend to create a freestanding physical violence offense in the Hobbs Act. *It did intend to forbid acts or threats of physical violence in furtherance of a plan or purpose to engage in what the statute refers to as robbery or extortion* (and related attempts or conspiracies).

Scheidler, 547 U.S. at 23 (emphasis added).

In dicta, the Court discussed other possible factual scenarios that could be covered under the "violence . . . in furtherance" clause, such as:

> a hypothetical mobster who threatens violence and demands payment from a business. Those threats constitute attempted extortion; but the subsequent acts of violence against a noncomplying business by the subordinates of that mobster may not constitute attempted extortion and may not be punishable as a conspiracy to commit extortion if the subordinates were not privy to the mobster's plan. A specific prohibition of physical violence in furtherance of a plan to commit extortion would bring the subordinates' behavior within the statute's coverage.
>
> The United States Government argued that the physical violence clause also:
>
> permits prosecutors to bring multiple charges for the same conduct. For instance, the clause would apply to a defendant who injured bystanders during a robbery, permitting the Government to charge that defendant with the Hobbs Act crime of robbery and the separate Hobbs Act crime of using violence in furtherance of the robbery.

Id. at 22 (internal citation omitted).

The Model Federal Jury Instructions have rejected the latter interpretation offered by the

Government, but endorsed the former application where a defendant committed an act that was in furtherance of, but did not quite rise to the level of extortion or robbery.

The comment to the Hobbs Act jury instructions explains this reasoning:

> The Hobbs Act, 18 U.S.C. § 1951, seems on its face to describe three separate offenses: (1) robbery; (2) extortion; and (3) committing or threatening physical violence in furtherance of a plan or purpose to violate section 1951. However, in *National Organization for Women, Inc. v. Scheidler* (*Scheidler III*), the Supreme Court held that the third putative offense does not "create a freestanding physical violence offense," but rather must be read restrictively to proscribe only the commission or threat of violence in furtherance of a plan to commit robbery or extortion. *Thus, it seems that* [the violence in furtherance clause is] *only applicable when the defendant planned to commit robbery or extortion, but instead committed or threatened some act of violence not amounting to an attempted robbery or extortion, a small subset of cases that will rarely be charged.*

3-50 Sand's Modern Federal Jury Instructions-Criminal P 50.01 (2017) (emphasis added).

This interpretation is consistent with an examination of the elements of the Hobbs Act. The Hobbs Act is a divisible statute. A defendant may be convicted of Hobbs Act Robbery or Hobbs Act extortion.

Hobbs Act Robbery is indivisible; it may be committed through multiple alternative means, robbery or violence in furtherance of a plan to commit robbery, but always as part of a single element. Thus, violence in furtherance of Hobbs Act Robbery necessarily requires proof of the same elements as Hobbs Act Robbery.

The interpretation proffered by the Government, allowing a charge of Hobbs Act Robbery and violence in furtherance of Hobbs Act Robbery, for the same conduct, would violate double jeopardy by punishing the offender twice for what was designed by Congress to be a single unit of prosecution.

Our federal system requires that courts act with great care when determining the breadth of federal criminal law constitutionally delegated to the states.

> It is the sensitive duty of federal courts to review carefully the enforcement of our federal criminal statutes to prevent their injection into unintended areas of state governance. . . Exercising that duty, we find it necessary to nullify this attempted application of the Hobbs Act to circumstances it was never meant to reach. Incremental extensions of federal criminal jurisdiction arguably present a more pernicious hazard for our federal system than would a bold accretion to the body of federal crimes. At a minimum, a clear extension of federal responsibility is likely to be sufficiently visible to provoke inquiries and debate about the propriety and desirability of changing the state-federal balance. Less abrupt, more subtle expansions, however, such as nearly occurred here, are less likely to trigger public debate, and, yet, over time cumulatively may amount to substantial intrusions by federal officials into areas properly left to state enforcement.

United States v. Capo, 817 F.2d 947, 955 (2d Cir. 1987).

B. Sentencing Enhancements Under Federal Law and the Guidelines

The Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), and the Career Offender Guidelines, U.S.S.G. § 4B1.1(a), separately delineate sentencing enhancements based on a defendant's history of violent criminal acts.

i. Armed Career Criminal Act, 18 U.S.C. § 924(e)

The ACCA imposes a mandatory 15 year prison term on any defendant convicted of 18 U.S.C. § 922(g), felon in possession of ammunition or a firearm, who has three prior convictions for a violent felony or a serious drug offense, committed on three different occasions. 18 U.S.C. § 924(e)(1). A 10 year maximum penalty applies without the ACCA sentence enhancement. *See* 18 U.S.C. § 924(a)(2).

The statute defines "violent felony" in section 924(e)(2)(B):

> the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, [or] involves use of explosives . . .

Subsection (i) is described as the "force clause" and subsection (ii) is referred to as the "enumerated clause." The statute previously contained a "residual clause" which included "conduct that presents a serious potential risk of physical injury to another" within the definition of a "violent felony." The Supreme Court, in 2015, ruled the "residual clause" unconstitutionally vague, and no longer a basis for an increased sentence under the ACCA. *Johnson v. U.S.*, 135 S. Ct. 2551, 2563 (2015) ("We hold that imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process.").

1. The Force Clause of the ACCA

The ACCA does not provide a definition for "physical force," therefore we "give the phrase its ordinary meaning." *Johnson v. United States*, 559 U.S. 133, 138 (2010) (citing *Bailey v. United States*, 516 U.S. 137, 138 (1995)).

The Supreme Court, in examining the meaning of the force clause, reminds us to interpret it in the larger context of determining what amounts to a violent felony. *Johnson*, 559 U.S. at 141 ("We think it clear that in the context of a statutory definition of '*violent* felony,' the phrase 'physical force' means *violent* force—that is, force capable of causing physical pain or injury to another person.") (emphasis in original). The Court rejected the Government's argument that this clause is satisfied by "mere-touching" or a "non-violent misdemeanor," and held that the statute requires "violent force," or "force capable of causing physical pain or injury to another person." *Id.* at 140-43 ("It might consist, for example, of only that degree of force necessary to inflict pain—a slap in the face, for example."); *see also United States v. Castleman*, 134 S. Ct. 1405, 1412 (2014) ("Minor uses of force may not constitute 'violence' in the generic sense.").

ii. Career Offender Guidelines, U.S.S.G. § 4B1.1

Under the United States Sentencing Commission Guidelines, a defendant is sentenced as a Career Offender if:

> (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction;
>
> (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and
>
> (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1.1(a).

Section 4B1.2 of the Guidelines defines a "crime of violence" as:

> (a) . . . any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
>
> > (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
> >
> > (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C.§ 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

U.S.S.G. § 4B1.2(a).

Like all Guidelines, the Career Offender section is advisory, not mandatory:

> there is no statutory provision instructing courts to sentence a career offender at or near the statutory maximum. And while the sentencing statute expressly directs the district court to 'consider' the 'sentencing range established for . . . the applicable category of defendant as set forth in the guidelines,' 18 U.S.C. § 3553(a)(4)(A), it does not instruct the court to impose such a sentence.

United States v. Sanchez, 517 F.3d 651, 663 (2d Cir. 2008) (quoting *United States v. LaBonte*, 520 U.S. 751, 761 n.5 (1997)).

iii. Categorical Approach

In *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004), the Supreme Court instructed district courts deciding whether an offense is a crime of violence to apply the "categorical approach" and "look to the elements and nature of the offense of conviction, rather than to the particular facts relating to the petitioner's crime."

Under this approach, the court considers the "offense generically, that is to say, [it] examine[s] it in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion." *United States v. Beardsley*, 691 F.3d 252, 259 (2d Cir. 2012). If the elements are identical to an enumerated offense, then the prior conviction qualifies as a predicate offense; however, if the "statute criminalizes any conduct that would not fall within the scope of either the force clause or the residual clause, a conviction under the . . . statute is not categorically a crime of violence and cannot serve as a predicate offense." *United States v. Jones*, 878 F.3d 10, 16 (2d Cir. 2017) (internal citations omitted); *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016) ("A crime counts as 'burglary' under the [ACCA] if its *elements* are the same as, or narrower than, those of the generic offense. But if the crime of conviction covers any more conduct than the generic offense, then it is not an ACCA 'burglary'—even if the defendant's actual conduct (*i.e.*, the facts of the crime) fits within the generic offense's boundaries.") (emphasis in original).

iv. Modified Categorical Approach

In a narrow set of cases courts apply the "modified categorical approach," where they look beyond the statutory elements to "a limited class of documents (for example, the indictment, jury instructions, plea agreement) to determine what crime, with what elements, a defendant was convicted of." *Mathis*, 136 S. Ct. at 2249. In such cases, the statute underlying the prior

conviction contains multiple alternative elements—creating a "divisible" statute—which prohibits a later sentencing court from discerning, without reviewing something more, which elements underlie the defendant's conviction. *See Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013) (a statute is typically, but not always, divisible if it "sets out one or more elements of the offense in the alternative—for example, stating that burglary involves entry into a building *or* an automobile") (emphasis in original).

The Supreme Court recently discussed the differences between statutory *elements* and *means* required to commit a crime:

> This case concerns a different kind of alternatively phrased law: not one that lists multiple elements disjunctively, but instead one that enumerates various factual means of committing a single element. *See generally Schad v. Arizona*, 501 U.S. 624, 636, 111 S. Ct. 2491 (1991) (plurality opinion) ("[L]egislatures frequently enumerate alternative means of committing a crime without intending to define separate elements or separate crimes").

Mathis, 136 S. Ct. at 2249.

As an example, the court described a statute which:

> requires use of a "deadly weapon" as an element of a crime and further provides that the use of a "knife, gun, bat, or similar weapon" would all qualify. Because that kind of list merely specifies diverse means of satisfying a single element of a single crime—or otherwise said, spells out various factual ways of committing some component of the offense—a jury need not find (or a defendant admit) any particular item: A jury could convict even if some jurors "conclude[d] that the defendant used a knife" while others "conclude[d] he used a gun," so long as all agreed that the defendant used a "deadly weapon." And similarly, to bring the discussion back to burglary, a statute might . . . itemize the various places that crime could occur as disjunctive factual scenarios rather than separate elements, so that a jury need not make any specific findings (or a defendant admissions) on that score.

Id. (internal citations omitted).

Thus, the threshold inquiry is whether the statute underlying the prior conviction lists *elements* of the crime, or alternative *means* of committing the crime. If they are *elements*, and

create separate criminal acts, the court may apply the modified categorical approach at sentencing to "discover which of the enumerative alternative [elements] played a part in the defendant's prior conviction." *Id.* at 2256. If they are *means*, to a singular criminal act, "the court has no call to decide which of the statutory alternative [means] was at issue in the earlier prosecution." *Id.*

IV. Application of Law to Facts

A. Multiplicity

Walker argues that "submitting separate counts to the jury for [Hobbs Act] robbery and violence-in-furtherance [of Hobbs Act Robbery]" violates the double jeopardy clause of the Fifth Amendment. Defendant's Letter, ECF No. 139, Jan. 12, 2018.

The court, in its jury instructions, provided the definitions of "Hobbs Act Robbery" and "Robbery" as written under 18 U.S.C. § 1951(a). The court also spelled out the three elements necessary to prove Count One, Hobbs Act Robbery:

> First, that Mr. Walker knowingly obtained or took the personal property of another, the owner of the store, and that includes money and other tangible and intangible things of value capable of being possessed and transferred from one person to another . . .
>
> Second, Mr. Walker took this property against the other person's will, by actual or threatened force, or violence, or fear of injury . . . A threat may be made verbally or by a physical gesture, depending upon the particular facts.
>
> Third, that the robbery in some way affected interstate or foreign commerce or the movement of goods in commerce . . .

Trial Tr. 716:14-717:1, Jul. 15, 2016.

The court next charged the jury with Count Two, commission of violence in furtherance of Hobbs Act Robbery. *Id.* at 718-719. The court again read the definition of a Hobbs Act Robbery, then listed the following elements necessary to prove Count Two:

> First, that Mr. Walker threatened or committed physical violence against [the owner of the store]. Physical violence requires the use of force, which is force capable of causing physical pain or injury to another person.
>
> Second, that the defendant committed or threatened acts of violence in furtherance of a robbery. I have already told you what "robbery" means.
>
> Third, that as a result of Mr. Walker's actions, interstate commerce, or an item moving in interstate commerce, would be delayed, obstructed, or affected in some way . . .

Id. at 718:14-24.

Charging both counts violated double jeopardy. Hobbs Act Robbery is indivisible. A defendant may be convicted under the statute for robbery or violence in furtherance of robbery, but not both. These are different *means* not separate *elements.* Congress did not intend for a single criminal act to give rise to separate units of prosecution. *United States v. Ansaldi*, 372 F.3d 118, 124 (2d Cir. 2004).

The sole addition in Count Two, as charged to the jury, is the *in furtherance of a robbery* clause. The act of taking property through physical force in Count One encapsulates the use of force in furtherance of a robbery in Count Two. "Because the violence in furtherance clause would not require proof of any elements beyond those in the robbery charge, allowing the jury to separately convict on both would violate the Double Jeopardy Clause . . ." Defendant's Mot., ECF No. 139, Jan. 12, 2018, at 16-17.

The hypothetical uses of the Hobbs Act proposed by the parties in *Scheidler v. Nat'l Org. for Women, Inc*., 547 U.S. 9 (2006), are inapplicable as charged to the jury here. *See Supra* 3-50 Sand's Modern Federal Jury Instructions-Criminal P 50.01 (2017).

B. Armed Career Criminal Act; New York Second Degree Robbery

Walker was convicted of 18 U.S.C. § 922(g), felon in possession of ammunition. Under the ACCA, the court determines whether Walker, in addition to his instant conviction of 18

U.S.C. § 922(g), has committed three prior violent felony offenses and is thus subject to a 15 year mandatory minimum. 18 U.S.C. § 924(e)(1).

The Government argues Walker has three prior violent felony convictions: (1) Robbery in the Second Degree, New York Penal Law 160.10(1); (2) Strong Arm Robbery, South Carolina Penal Law § 16-11-330(A); and (3) Aiding and Abetting Assault with a Dangerous Weapon with Intent to do Bodily Harm, 18 U.S.C. § 113(a)(3).

As described below, New York Robbery in the Second Degree is not a violent felony under the ACCA. Therefore, Walker cannot have committed three prior violent felony offenses, and it is unnecessary to review his other possible predicate convictions.

Robbery is not an enumerated offense in the ACCA, so the court must determine under the "force" clause whether or not it is a violent felony. Although the ACCA does not define "physical force" as used in the statute, the Supreme Court has held that "in the context of a statutory definition of '*violent* felony,' the phrase 'physical force' means *violent* force—that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010) (emphasis in original).

New York Penal Law Section 160 defines robbery as forcible stealing and states:

> A person forcibly steals property when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of:
>
> > 1. Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or
> >
> > 2. Compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny.

NYPL 160.00.

Because second degree robbery is a divisible statute the court must next use the modified categorical approach and examine which of the three types of second-degree robbery Walker was convicted of. *Buie v. United States*, 2017 WL 3995597, at *5 (S.D.N.Y. Sept. 8, 2017).

Walker pled guilty to NYPL 160.10(1). Under this subsection, a person is guilty of robbery in the second degree, when he forcibly steals property and when "[h]e is aided by another person actually present . . ." Being aided by another in commission of a robbery does not turn an otherwise non-violent felony into a violent felony under the ACCA.

In *Johnson*, the Supreme Court held that sentencing courts are bound by a state court's interpretation of the elements of a state-law offense. *Johnson*, 559 U.S. at 138. Reviewing New York courts' interpretations of the elements of NYPL 160.10, this court finds that Walker's conviction cannot qualify as a predicate offense under the ACCA, since second-degree robbery, even when aided by another, may be accomplished without violent force.

> New York courts have explained that the "physical force" threatened or employed can be minimal, including a bump, a brief tug-of-war over property, or even the minimal threatened force exerted in "blocking" someone from pursuit by simply standing in their way. *See, e.g., People v. Lee*, 197 A.D.2d 378, 602 N.Y.S.2d 138, 139 (1st Dep't 1993) (bumping victim); *People v. Bennett*, 219 A.D.2d 570, 631 N.Y.S.2d 834, 834 (1st Dep't 1995) ("human wall" blocking pursuit); *People v. Patton*, 184 A.D.2d 483, 585 N.Y.S.2d 431, 431 (1st Dep't 1992) (blocking pursuit); *People v. Safon*, 166 A.D.2d 892, 560 N.Y.S.2d 552, 552 (4th Dep't 1990) (tug-of-war); *People v. Brown*, 243 A.D.2d 363, 663 N.Y.S.2d 539, 540 (1st Dep't 1997) (attempting to push the victim); *People v. Pena*, 50 N.Y.2d 400, 407 n. 2, 429 N.Y.S.2d 410, 406 N.E.2d 1347 (N.Y. 1980) (defendant who commits robbery while carrying a deadly weapon is guilty of robbery in the first degree; mere possession is sufficient for a conviction); *cf. United States v. Castleman*, —— U.S. ——, 134 S.Ct. 1405, 1412, 188 L.Ed.2d 426 (2014) ("Minor uses of force may not constitute 'violence' in the generic sense. For example, in an opinion that we cited with approval in *Johnson*, the Seventh Circuit noted that it was hard to describe ... as violence a squeeze of the arm [that] causes a bruise.").

United States v. Moncrieffe, 167 F. Supp. 3d 383, 403–04 (E.D.N.Y. 2016).

District courts in this circuit have affirmed this reading of the New York statute in the context of a "violent felony." *Austin v. United States*, 2017 WL 6001162, at *4 (S.D.N.Y. Dec. 4, 2017) ("Merely standing in someone's way, does not involve the use of physical force capable of causing substantial physical pain or injury. And neither pulling away when someone grabs your hand, nor hitting someone with a purse, nor a shove that only causes someone to step backward, amounts to "substantial" or "strong" physical force under *Johnson* . . . These acts are wrong, and they are illegal. But they are not violent . . . ") (internal citations omitted); *Buie v. United States*, No. 05-CR-664 (RCC), 2017 WL 3995597, at *8 (S.D.N.Y. Sept. 8, 2017) ("It is possible to commit first-degree robbery in New York without committing a violent felony as defined by ACCA.").

C. Career Offender Guidelines

Under the Guidelines the court first determines whether an instant offense of conviction is a crime of violence. *See* U.S.S.G. § 4B1.1(a) ("[T]he instant offense of conviction is a felony that is . . . a crime of violence.").

Because none of the instant convictions, described below, are crimes of violence, the Career Offender Guidelines cannot be applied to enhance Walker's sentence.

i. Hobbs Act Robbery

Hobbs Act Robbery envisions a single criminal act, that may be committed through different means. *See* 18 U.S.C. § 1951(b)(1). The categorical approach must be applied. *See United States v. O'Connor*, 874 F.3d 1147, 1151 (10th Cir. 2017) ("We must apply the 'categorical approach' to decide whether Mr. O'Connor's prior conviction for Hobbs Act robbery is a 'crime of violence' under the Guidelines and therefore qualifies him for an enhanced sentence."); *United States v. Gardner*, 823 F.3d 793, 802 (4th Cir. 2016) ("A crime is

not divisible simply because it may be accomplished through alternative means, but only when alternative elements create distinct crimes.").

Hobbs Act Robbery, examined categorically, is not a crime of violence under the Guidelines, because elements of the statute sweep more broadly than common law robbery and the force clause. *See, e.g., O'Connor*, 874 F.3d at 1158 ("Hobbs Act robbery can be accomplished by threats to property. Both generic robbery and Guidelines [robbery] . . . cannot—they are limited to conduct involving physical force or threats of physical *force against a person*. We thus conclude that Hobbs Act robbery under § 1951(b)(1) does not categorically qualify as a crime of violence under the enumerated offense clause of the Guidelines.") (emphasis added). Whereas the Career Offender Guidelines definition of "crime of violence" is satisfied if the offense "has an element the use, attempted use, or threatened use of physical force *against the person* of another," a Hobbs Act robbery can be completed by alternative means, specifically, "commit[ting] or threaten[ing] physical violence to any person *or* property." U.S.S.G. § 4B1.2(a)(1) (emphasis added); 18 U.S.C. § 1951(a) (emphasis added). Stated another way, "Hobbs Act robbery occurs only when one takes another's property against that person's will and by means of actual or threatened force. But it occurs regardless of whether the victim's will is overcome by force directed *to* a person *or* property." *O'Connor*, 874 F.3d at 1154 (emphasis in original) (internal quotation marks omitted).

It is irrelevant whether the instant case actually involved threats or acts of violence against a person. *Id.* at 1158 ("If some conduct that would be a crime under the [Hobbs Act] would not be a 'crime of violence' under § 4B1.2(a), then any conviction under that statute will not qualify as a 'crime of violence' for a sentence enhancement under the Guidelines, regardless of whether the conduct that led to a defendant's . . . conviction was in fact violent."); *see also*

Mathis v. United States, 136 S. Ct. 2243, 2256 (2016) (if, as in the case of the Hobbs Act, the statute lists means to a singular criminal act, "the court has no call to decide which of the statutory alternative [means] was at issue in the earlier prosecution").

ii. Possessing, Brandishing, and Discharging a Firearm During a Crime of Violence, 18 U.S.C. § 924(c)

Under the Career Offender Guidelines, a "violation of 18 U.S.C. § 924(c) . . . [qualifies as] a 'crime of violence' . . . if the offense of conviction established that the underlying offense was a 'crime of violence.'" U.S.S.G. § 4B1.2 cmt. n. 1; *see generally United States v. Robinson*, 447 Fed. Appx. 512, 514-15 (4th Cir. 2011).

In the instant case, the underlying crime of violence supporting Walker's conviction under § 924(c) was a Hobbs Act Robbery. Already determined is that a Hobbs Act Robbery is not a crime of violence within the meaning of the Guidelines. Thus, for purposes of a Career Offender sentence enhancement, Walker's conviction under § 924(c) does not satisfy the requirements of a crime of violence.

United States v. Hill, 832 F.3d 135, 138 (2d Cir. 2016), is not relevant here, because it determined only that Hobbs Act Robbery was a crime of violence sufficient to satisfy 18 U.S.C. § 924(c)(3), possession of a firearm during a crime of violence, which includes a crime of violence against a "person or property."

The Guidelines, like the ACCA, require "physical force *against the person* of another . . ." § 4B1.2. This distinction is crucial, because Hobbs Act Robbery may involve force against only property, meaning the sweep of the statute is broader than the Guidelines. 18 U.S.C. § 1951(b)(1). Hobbs Act Robbery qualifies as a crime of violence under 18 U.S.C. § 924(c)(3), but not under the ACCA or the Guidelines.

iii. Felon in Possession of Ammunition, 18 U.S.C. § 922(g)(1)

Three elements are required to prove 18 U.S.C. § 922(g)(1): (1) knowing possession of the firearm or ammunition; (2) a previous felony conviction; and (3) the possession being in or affecting commerce. *See United States v. Smith*, 160 F.3d 117, 121 n.2 (2d Cir. 1998); *see also United States v. Amante*, 418 F.3d 220, 221 n.1 (2d Cir. 2005).

Walker's conviction under 18 U.S.C. § 922(g)(1) is not a crime of violence within the meaning of the Career Offender Guidelines, because the statute does not have "as an element the use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. § 4B1.2(a)(1). *See United States v. Soto-Rivera*, 811 F.3d 53, 60 (1st Cir. 2016) ("Passive possession of a firearm [under 18 U.S.C. § 922(g)(1)] (even one as potentially dangerous as a machinegun) is not a crime that includes—as an element that must be proved by the government—the use, attempted use, or threatened use of physical force. The lack of such an element means that it does not constitute a crime of violence under U.S.S.G. § 4B1.2(a)(1). Moreover, such possession is clearly not one of those specifically-enumerated crimes listed in U.S.S.G. § 4B1.2(a)(2).").

V. 18 U.S.C. § 3553(a) Considerations and Guidelines Calculation

A. Walker's Background

Walker is a 44 year-old United States citizen. *See* PSR at ¶ 2. Because of his mother's drug addiction, he was removed from her home as a young child and placed in foster care. PSR ¶ 58. He was first incarcerated at age 14. PSR at ¶ 71. Since 1998, he has been out of custody for less than 3 years. PSR at ¶¶ 42-46.

He is in a romantic relationship with M.M. PSR at ¶ 62. They have no children together, but Walker lives with, and helps care for, M.M.'s three children from previous relationships. PSR at ¶ 65.

B. Statutory Sentencing Range and Guidelines Calculation

Counts	Statutory Sentencing Range	Guidelines Offense Level
(1) Hobbs Act Robbery 18 U.S.C. 1951(a)	**20 year maximum.**	20 — 2B3.1(a) +4 — 2B3.1(b)(3)(B), special offense characteristics for discharging weapon, causing serious bodily injury to victim. **Offense Level= 24**
(2) Committing physical violence in furtherance of a robbery 18 U.S.C. 1951(a)	**Dismissed as multiplicitous.**	
(3) Possessing, brandishing, and discharging a firearm during a crime of violence 18 U.S.C. 924(c)	**10 year mandatory minimum.** Count 3 must be imposed consecutively to all other counts.	2K2.4(b) — Guideline sentence is the minimum term of imprisonment required by statute**.** Grouping rules (Chapter 3) do not apply to this count of conviction.
(4) Felon in possession of ammunition 18 U.S.C. 922(g)	**10 year maximum.** Because the court finds he is not subject to the Armed Career Criminal Act enhancement he is not subject to the 15 year mandatory minimum.	24 — 2K1.3(a)(1), committed offense subsequent to sustaining 2+ felony convictions for crimes of violence. **Offense Level = 24**

Guidelines Calculation	
Total (multi-count) Adjusted Offense Level	24
Criminal History Category	V
Guidelines Range	92-115 months + 10 year minimum = 212-235 months

i. Offense Level Calculation

This court adopts the offense level calculations suggested by Probation with respect to Count One and Count Three. *See* PSR at ¶¶ 16-21 (assigning an offense level of 24 for Count One); *see also* PSR at ¶ 22 (stating that Count Three is not subject to the grouping rules, but requires a 10 year mandatory minimum to run consecutively to any other term of sentence).

Probation concluded, for Count Four, that Walker should be designated as an Armed Career Criminal under 18 U.S.C. § 924(e)(1), and assigned an offense level of 34. *See* PSR at ¶¶ 23-28; *see also* U.S.S.G. § 4B1.4(a)-(b). The court does not sentence Walker as an Armed Career Criminal. *See supra* IV.B. Because, however, Walker's convictions for South Carolina Strong Arm Robbery, § 16-11-330(A), and aiding and abetting assault with a dangerous weapon with intent to do bodily harm, 18 U.S.C. §§ 113(a)(3), qualify as violent felonies under the Guidelines, his base offense level for Count Four is 24. *See* U.S.S.G. § 2K2.1(a)(2) ("24, if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense."); *United States v. Walker*, 595 F.3d 441, 447 (2d Cir. 2010) ("[B]ecause South Carolina's common law strong arm robbery offense corresponds substantially to the generic definition of robbery, the offense categorically qualifies as a predicate 'crime of violence' for purposes of applying the Guidelines enhancement."); *Gadsen v. United States*, 229 F. Supp. 3d 427, 430 (D.S.C. 2017) (finding that "South Carolina strong arm robbery is a lesser-included offense of armed robbery" and "is categorically a crime of violence under the force clause"); *United States v. Verwiebe*, 874 F.3d 258, 261 (6th Cir. 2017) (holding that a violation of 18 U.S.C. § 113(a)(3) is a crime of violence under the force clause of U.S.S.G. § 4B1.2(a) "because it proscribes common law assault with a dangerous weapon, not simple common law assault.").

Counts One and Four both yield an offense level of 24, which provides a total adjusted offense level of 24. *See* U.S.S.G. § 3D1.3(a).

ii. Criminal History Calculation

The court adopts Probation's criminal history score of 11. PSR at ¶ 47 (noting a subtotal criminal history score of nine, and a two-point increase for committing the instant offense while on supervised release).

iii. Total Calculation

An offense level of 24 and a criminal history score of 11 establishes a criminal history category of V. *See* U.S.S.G. Ch. 5 Pt. A, Sentencing Table. The court does not adopt Probation's finding that Walker is a Career Offender, which would place him in criminal history category VI. PSR ¶ 47. The court's calculation yields a term of imprisonment of 92-115 months, or 212-235 months if considered with the 10 year minimum for Count 3. *See* U.S.S.G. Ch. 5 Pt. A, Sentencing Table.

iv. Sentence Imposed

Counts	Sentence	Supervised Release
(1) Hobbs Act Robbery 18 U.S.C. 1951(a)—discharging the weapon applies to count 1	Time Served. Approximately 34 months to run concurrent to Count Four.	Five years to run concurrent to all counts.
(2) Committing physical violence in furtherance of a robbery 18 U.S.C. 1951(a)	Dismissed as multiplicitous.	
(3) Possessing, brandishing, and discharging a firearm during a crime of violence 18 U.S.C. 924(c)	10 year mandatory minimum to run consecutive to any other term of sentence.	Five years to run concurrent to all counts.
(4) Felon in possession of ammunition 18 U.S.C. 922(g)	Time Served. Approximately 34 months to run concurrent to Count One.	Five years to run concurrent to all counts.

VI. Conclusion

Count Two is dismissed. Walker is not subject to a sentence enhancement under federal law or the Career Offender Guidelines.

Walker is sentenced to 10 years' incarceration for Count Three, to run consecutive to a concurrent sentence of time served, approximately 34 months, for Counts One and Four. He is sentenced to five years' supervised release. No fine is imposed since he has, and will have, no assets. A $300 special assessment is payable forthwith. No restitution is imposed.

The court considered the enumerated factors under 18 U.S.C. § 3553(a) in imposing a "sufficient, but not greater than necessary" sentence.

SO ORDERED.

/s/ Jack B. Weinstein
Jack B. Weinstein
Senior United States District Judge

Dated: May 17, 2018
Brooklyn, New York

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Eastern District of New York

AMENDED AMENDED AMENDED

UNITED STATES OF AMERICA
v.
SHAMEKE WALKER

JUDGMENT IN A CRIMINAL CASE

Case Number: CR15-388 (JBW)

USM Number: 75079-053

Michael Hueston 16 Court Street, B'klyn 11241
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) AUSA- Andrey Spektor

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☑ was found guilty on count(s) after a plea of not guilty. 1-3 of the second superseding indictment: count 4 of the superseding indictment

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.G. 1951(a)	Hobbs Act Robbery		1ss

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☑ Count(s) remaining ☐ is ☑ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

5/16/2018
Date of Imposition of Judgment

Jack B Weinstein
Signature of Judge

Jack B. Weinstein SR. U.S.D.J
Name and Title of Judge

6/28/18
Date

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.
★ JUN 29 2018 ★
BROOKLYN OFFICE

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 1A

DEFENDANT: SHAMEKE WALKER
CASE NUMBER: CR15-388 (JBW)

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
	Dismissed by the court		2ss
18 USC 924(c)(1)(A)(i) 924(c)(1)(A)(ii) and 924 (c)(1)(A)(iii)	Possessing, brandishing and discharging a firearm during a crime of violence		3ss
18 USC 922(g)(1) and 18 USC 924(a)(2) and (e)(1)	Felon in possession of ammunition/armed career criminal		4s

AO 245B (Rev. 02/18) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: SHAMEKE WALKER
CASE NUMBER: CR15-388 (JBW)

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

TIME SERVED ON COUNTS ONE AND FOUR.

10 YEARS ON COUNT 3 TO RUN CONSECUTIVE.

☑ The court makes the following recommendations to the Bureau of Prisons:

That the defendant be incarcerated at a facility in or as close to New York City as possible.

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: SHAMEKE WALKER
CASE NUMBER: CR15-388 (JBW)

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

5 years on each count to run concurrent.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 3A — Supervised Release

DEFENDANT: SHAMEKE WALKER
CASE NUMBER: CR15-388 (JBW)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: SHAMEKE WALKER
CASE NUMBER: CR15-388 (JBW)

ADDITIONAL SUPERVISED RELEASE TERMS

The defendant shall submit his person, residence, place of business, vehicle or any other premises under his control to a search on the basis that the probation officer has reasonable belief that contraband or evidence of a violation of the conditions of the release may be found; the search must also be conducted in a reasonable manner and at a reasonable time; failure to submit to a search may be grounds for revocation; the defendant shall inform any other residents that the premises may be subject to search pursuant to this condition.

The defendant shall provide the probation department with full financial disclosure whenever requested.

DEFENDANT: SHAMEKE WALKER
CASE NUMBER: CR15-388 (JBW)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 300.00	$	$	$

PAYABLE IMMEDIATELY

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
UNITED STATES OF AMERICA

v

ORDER
CR07-347

SHAMEKE WALKER
----------X

Jack B. Weinstein, Senior United States District Judge

For the reasons stated orally on the record, the violation of supervised release charges pending against the defendant are dismissed.

SO ORDERED

JACK B. WEINSTEIN
SR. UNITED STATES DISTRICT JUDGE

Dated: 6/4/18

18-1933 (L)
United States v. Walker

In the
United States Court of Appeals
For the Second Circuit

August Term, 2019

(Argued: December 6, 2019 Decided: September 11, 2020)

Nos. 18-1933, 18-2085

UNITED STATES OF AMERICA,

Appellee–Cross-Appellant,

–v.–

SHAMEKE WALKER,

Defendant-Appellant–Cross-Appellee.

B e f o r e :

JACOBS, CARNEY, and PARK, *Circuit Judges*.

Following his arrest for a 2015 attempted robbery of a convenience store in Brooklyn, Defendant-Appellant Shameke Walker was charged with (1) one count of Hobbs Act Robbery, in violation of 18 U.S.C. § 1951(a) ("Count One" or the "Hobbs Act robbery count"); (2) one count of Committing Physical Violence in Furtherance of a Hobbs Act Robbery, in violation of 18 U.S.C. § 1951(a) ("Count Two" or the "violence-in-Hobbs Act robbery count"); (3) one count of Possessing, Brandishing, and Discharging a Firearm During a Crime of Violence, in violation of 18 U.S.C. § 924(c) ("Count Three" or the "firearm-in-violent-crime count"); and (4) one count of being a Felon in Possession of

Ammunition, in violation of 18 U.S.C. § 922(g)(1) ("Count Four" or the "felon-in-possession count"). Walker proceeded to trial by jury, which the United States District Court for the Eastern District of New York (Weinstein, *J.*) bifurcated. The first phase was limited to prosecution of Counts One, Two, and Three; the second, to Count Four. The jury convicted Walker on all counts. At sentencing, the District Court dismissed the violence-in-Hobbs Act robbery count as duplicative of the Hobbs Act robbery count and then rejected the government's argument that the Armed Career Criminal Act (the "ACCA"), 18 U.S.C. § 924(e), mandated imposition of a 15-year minimum incarceratory sentence on Walker. The court reasoned that Walker's predicate convictions did not support the proposed mandatory minimum sentence because, in its view, New York Robbery in the Second Degree was not a "violent felony" within the meaning of the ACCA. The court imposed a sentence of time served for Counts One and Four, and the ten-year mandatory minimum for Count Three that applied to a defendant with Walker's criminal history.

Walker timely appealed, challenging his convictions on Counts Three and Four, attacking several evidentiary rulings made by the District Court, and contesting the District Court's denial of his motion for a new trial. The government cross-appealed, arguing that binding Second Circuit precedent compels the conclusion that New York Robbery in the Second Degree is a "violent felony" within the meaning of the ACCA and that the District Court's sentence was therefore based on an erroneous legal conclusion. On review, we identify no basis to disturb Walker's convictions on Counts Three or Four. We similarly discern no abuse of discretion in the District Court's evidentiary rulings or in its denial of Walker's motion for a new trial. We conclude, however, that the District Court erred in determining that New York Robbery in the Second Degree is not a "violent felony" for purposes of the ACCA. Accordingly, we **AFFIRM** Walker's judgment of conviction and **REMAND** for **RESENTENCING**.

AFFIRMED AND REMANDED FOR RESENTENCING.

MICHAEL O. HUESTON, ESQ., Brooklyn, N.Y., *for Defendant-Appellant–Cross-Appellee*.

ANDREY SPEKTOR, Assistant United States Attorney for the Eastern District of New York (Samuel P. Nitze & Lindsay K. Gerdes, Assistant United States Attorney,

on the brief), *for* Seth D. DuCharme, Acting United States Attorney for the Eastern District of New York, Brooklyn, N.Y., *for Appellee–Cross-Appellant*.

CARNEY, *Circuit Judge*:

In 2016, Defendant-Appellant Shameke Walker was convicted by a jury of (1) Hobbs Act Robbery, in violation of 18 U.S.C. § 1951(a) ("Count One" or the "Hobbs Act robbery count"); (2) Committing Physical Violence in Furtherance of a Hobbs Act Robbery, in violation of 18 U.S.C. § 1951(a) ("Count Two" or the "violence-in-Hobbs Act robbery count," which is not challenged on appeal); (3) Possessing, Brandishing, and Discharging a Firearm During a Crime of Violence, in violation of 18 U.S.C. § 924(c) ("Count Three" or the "firearm-in-crime-of-violence count"); and (4) Being a Felon in Possession of Ammunition, in violation of 18 U.S.C. § 922(g)(1) ("Count Four" or the "felon-in-possession count"), all in connection with his 2015 robbery of a convenience store in Brooklyn, New York. After dismissing the violence-in-Hobbs Act robbery count as duplicative of the Hobbs Act robbery count, the United States District Court for the Eastern District of New York (Weinstein, *J.*) sentenced Walker to ten years of incarceration—the mandatory minimum sentence associated with the firearm-in-crime-of-violence count—to run consecutive to a sentence of time served on Counts One and Four. We now resolve Walker's appeal and the government's cross-appeal.

Walker attacks his three remaining convictions on several grounds. He first argues that the firearm-in-crime-of-violence count should have been dismissed because (he submits) Hobbs Act robbery is not a "violent crime" within the meaning of 18 U.S.C. § 924(c). On the same rationale, he maintains that the District Court's jury instructions regarding the firearm-in-crime-of-violence count were erroneous, warranting vacatur.

Walker also urges that the Supreme Court's decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), compels reversal of his conviction on the felon-in-possession count because the District Court lacked jurisdiction over his prosecution, the government adduced insufficient evidence to prove that count, and the related jury instructions were erroneous. Walker further contends that the District Court made numerous erroneous evidentiary rulings, necessitating a new trial. Finally, Walker assails the District Court's denial of his motion for a new trial under Federal Rule of Criminal Procedure 33, charging several different errors that in his view require retrial.

On its cross-appeal, the government points to several recent decisions by our Court that, in its view, establish that New York Robbery in the Second Degree is a "violent felony" under the ACCA, 18 U.S.C. § 924(e). *See, e.g.*, *United States v. Moore*, 916 F.3d 231 (2d Cir. 2019); *United States v. Thrower*, 914 F.3d 770 (2d Cir. 2019); *United States v. Pereira-Gomez*, 903 F.3d 155 (2d Cir. 2018). These decisions necessitate a remand to the District Court for resentencing, in the government's view.

For the reasons that follow, we reject each of Walker's lines of attack. His arguments with respect to Count Three, the firearm-in-crime-of-violence count, are foreclosed by our opinion in *United States v. Hill*, 890 F.3d 51, 60 (2d Cir. 2018), in which we held that Hobbs Act robbery qualifies, categorically, as a crime of violence under the elements clause of 18 U.S.C. § 924(c). His jurisdictional challenge to his conviction on Count Four, the felon-in-possession count, is similarly foreclosed by our opinion in *United States v. Balde*, 943 F.3d 73, 92 (2d Cir. 2019), and he cannot establish that the asserted evidentiary and other failures on the part of the government and the District Court amount to plain error requiring vacatur or reversal. As discussed in detail below, the District Court acted well within the permissible bounds of its discretion in its

various evidentiary rulings and in denying Walker's motion for a new trial. As to the government's cross-appeal, however, we agree that our recent precedents confirm that New York Robbery in the Second Degree falls within the ACCA's definition of "violent felony" and that, accordingly, resentencing is required.

We therefore AFFIRM Walker's judgment of conviction and REMAND for RESENTENCING.

BACKGROUND[1]

This appeal stems from Walker's conviction for the June 13, 2015 robbery of a Brooklyn convenience store. During that robbery, Walker—who was then on supervised release following his conviction for unlawfully possessing a firearm but, nevertheless, had come to the scene equipped with a firearm—attempted to shoot the store's clerk, Bazel Almontaser. Walker missed. His shot instead struck an uninvolved security guard standing across the street.

Based on the events of that day, a grand jury returned an indictment charging Walker with Hobbs Act robbery and a related offense (Counts One and Two), as well as crimes relating to his unlawful possession and use of a firearm and ammunition (Counts Three and Four).[2] Walker decided to proceed to trial on these charges.

---

[1] Because Walker appeals his conviction by a jury, "our statement of the facts views the evidence in the light most favorable to the government, crediting any inferences that the jury might have drawn in its favor." *United States v. Rosemond*, 841 F.3d 95, 99-100 (2d Cir. 2016). Unless otherwise noted, when quoting cases in this Opinion, all alterations, brackets, citations, and internal quotation marks have been omitted.

[2] With respect to Count Four, the government charged Walker with possession of ammunition as opposed to a firearm because no gun was recovered from the crime scene; only a shell casing was found.

I. Pretrial Proceedings

Before Walker's trial began, the District Court made several rulings that are relevant to this appeal and that we therefore discuss in some detail.

First, in April 2016, the court denied Walker's motion to dismiss Count Three (the firearm-in-crime-of-violence count) for failure to state a claim. It reasoned that the question whether Hobbs Act robbery, as charged in Count One, was a crime of violence with the meaning of 18 U.S.C. § 924(c)—a question that was being litigated when Walker sought Count Three's dismissal—was not dispositive of the motion because committing physical violence in furtherance of a Hobbs Act robbery, as charged in Count Two, *was* such a crime.

Second, the District Court denied Walker's motion to preclude admission of fingerprint evidence collected from a cigarette carton that, as captured on video by surveillance cameras, Walker had attempted to steal from the convenience store during the robbery. In the period leading up to trial, the government produced to Walker, among other discovery, a report prepared by New York City Police Department ("NYPD") Detective Patricia Lezcano discussing those fingerprints (the "Fingerprint Report"). The Fingerprint Report advised that the carton contained three latent prints, each of which was matched to Almontaser.

At the time, the parties appear to have understood the Fingerprint Report to mean that the carton contained no other usable prints. This understanding was dispelled, however, when—just days before trial was scheduled to begin—the government met with Lezcano in a witness preparation session and she clarified that the carton contained a fourth print that was in fact usable; she simply had not identified its source. The government then directed Lezcano to perform a comparative analysis

between the unidentified fourth print and Walker's prints and, after doing so, Lezcano determined that the previously unidentified print was Walker's.

When the government disclosed this new information, Walker responded that the government had violated its Rule 16 obligation to timely comply with discovery requests and asked the District Court "to preclude this fingerprint evidence." App'x 178. Finding the new evidence too "important" to exclude, the court refused to do so, but signaled that it was willing to provide Walker a lengthy continuance, including to prepare for a *Daubert* hearing as to whether the report was "unreliable as a class of evidence." App'x 178-79. Walker instead determined to challenge the fingerprint evidence through the testimony of one Dr. Itiel Dror, an expert in cognitive bias. The District Court allowed Walker to proceed as he proposed, and additionally, accommodated his request for a trial date in July, the month following all of this motions practice.

Third, the court permitted Officer Tanya Parris of the U.S. Probation and Pretrial Services Office ("Probation") to make an in-court identification of Walker. Parris had supervised Walker, in connection with a prior conviction, for a year before the robbery. Because of her familiarity with Walker—including with his general appearance at the time of the robbery—the government sought to adduce her testimony that Walker was the very person captured on the convenience store surveillance video in the middle of committing the robbery in question. The District Court agreed that such an identification would be probative, but it also recognized that it would be prejudicial to Walker should the jury learn that Parris knew him only in her capacity as his probation officer. It therefore precluded any testimony relating to the precise circumstances under which Walker and Parris had become acquainted, ordering Parris that she should

"inform the jury on direct examination" only "that she 'works for an agency to which Mr. Walker has to report.'" App'x 174.

Fourth, the court found unpersuasive Walker's motion to preclude Almontaser's pretrial identification of Walker from a photographic array, in which Walker argued primarily that the fillers (photographs of non-suspects) did not bear sufficient resemblance to him. After examining the array itself, the District Court concluded that the array was "good," rather than being unduly "suggestive." App'x 118.

Fifth, and finally, the court precluded the defense's proposed inquiry into Almontaser's two prior domestic violence convictions, reasoning that they did not have "anything to do . . . with credibility under Rule 403" of the Federal Rules of Evidence. App'x 191. The District Court did, however, allow Walker to cross-examine Almontaser about his role in selling K2, an illegal strain of synthetic marijuana, from the convenience store, consistent with the defense's theory that what occurred on July 15, 2018, was not a robbery, but rather a drug deal gone wrong.

II. Phase I of the Trial

Trial began on Monday, July 11, 2016. On Walker's motion, the District Court had agreed to bifurcate the trial, as described above, separating prosecution of Counts One through Three (the robbery and related firearm charges) from that of Count Four (the felon-in-possession count) so that the jury would learn about Walker's criminal history only after it had reached a verdict on the robbery-related offenses.

To prove its case with respect to the first three charges, the government relied primarily on testimony from the following witnesses: (1) NYPD Detective *Yuan Newton*, the lead investigator on the robbery case, who testified about his observations of the crime scene, his conversations with Almontaser regarding the robbery, the video

surveillance system used at the store and the footage it captured of many of the events leading up to the robbery and large portions of the robbery itself, the various steps he took to identify a suspect (including the process of generating a photo array), and Walker's eventual arrest; (2) store clerk *Almontaser*, who testified about his role as a clerk at the convenience store, the sale of K2 at the store, and his recollection of the events that had occurred on the day of the robbery; (3) NYPD Officer *Robert Youngs*, who testified about photographing and collecting evidence from the crime scene, including the shell casings that were the basis of the ammunition charge and the cigarette carton bearing Walker's fingerprint; (4) NYPD Detective *Gerald Rex* and NYPD Detective *Lezcano*, both of whom testified about the fingerprint evidence; and finally, (5) Probation Officer *Parris*, who identified Walker in the surveillance video as the person robbing the store.

For his part, Walker mounted his defense primarily through rigorous cross-examinations intended to demonstrate that he was not the robber (a case of mistaken identity) and that Almontaser was not credible (because, as counsel argued, he was "a lying drug dealer"). App'x 918. Indeed, Walker relied heavily on the fact that portions of the surveillance video were inexplicably missing, implying that the police had destroyed footage that lent credence to his alternative theory, including video of Almontaser dealing drugs from the store. To further bolster that theory of the case, Walker attacked the fingerprint evidence through testimony provided by his witness Dr. Dror about the manner in which cognitive and other biases can lead fingerprint examiners to reach inaccurate conclusions.

Following the first phase of the bifurcated trial, which concluded on Friday, July 15, the jury convicted Walker of Counts One, Two, and Three.

III. Phase II of the Trial

During the second phase of the trial—which took place beginning the afternoon of July 15, immediately after the verdicts were rendered on the first three counts—the government read into the record two stipulations: One established the fact of Walker's prior felony conviction and the other that a cartridge casing recovered from the robbery scene constituted "ammunition" for purposes of the firearm-in-crime-of-violence count. The jury was charged that afternoon, but did not reach a verdict as to Count Four by the end of the day on Friday, so the District Court adjourned the jury's deliberations until Monday, July 18.

On Monday morning, one of the jurors wrote a note to the court explaining that she had a nightmare over the weekend about potential retribution for her jury service and describing how the trial was causing her fear and anxiety. This emotional reaction was tied to a robbery that happened some time ago, she said. The resulting fear was significant enough that she sought to be excused from the jury.

The court determined to dismiss the juror. Walker then sought to have the jury's verdict from the first phase of the trial set aside in light of the excused juror's participation. The District Court denied the motion, noting that the juror had the nightmare over the weekend, *after* the jury delivered its verdict on the first three counts. Later on Monday afternoon, the remaining eleven members of the jury convicted Walker on Count Four.

IV. Sentencing

When Walker was sentenced almost two years after his conviction, two motions were pending before the District Court. One was a Rule 33 motion for a new trial asserting that law enforcement destroyed exculpatory portions of the surveillance

video, assailing the District Court's instruction to the jury that Hobbs Act Robbery is a crime of violence, and making arguments about the excused fearful juror. The second was a Rule 29 motion for a judgment of acquittal on Count Two (the violence-in-Hobbs Act robbery count), arguing that it was duplicative of Count One (the Hobbs Act robbery count). The District Court denied the first motion but granted the second, reasoning that Counts One and Two were duplicative because "violence in furtherance of Hobbs Act Robbery necessarily requires proof of the same elements as Hobbs Act Robbery." App'x 1183.

Turning at last to the sentence itself, the court sentenced Walker to time served on each count except Count Three (the firearm-in-crime-of-violence count), which carried a ten-year mandatory minimum sentence. In imposing that ten-year sentence, the District Court determined that the ACCA's enhanced penalty provision—which sets a fifteen-year mandatory minimum sentence if, at the time a defendant violates 18 U.S.C. § 922(g), he has three or more prior convictions for violent felonies, *see* 18 U.S.C. § 924(e)(1)—did not apply. Walker's prior convictions include a 1991 conviction for Robbery in the Second Degree under New York law; a 1999 conviction for Strong Arm Robbery under South Carolina law; and a 2011 conviction for Aiding and Abetting Assault under federal law. The court concluded that New York Robbery in the Second Degree did not constitute a violent felony under the ACCA, leaving Walker without the minimum three violent felony convictions that would have triggered the fifteen-year mandatory minimum sentence. The court explained that it did not "review [Walker's] other possible predicate convictions" because it did not think that it needed to do so. App'x 1191.

Walker and the government timely noticed their appeals.

DISCUSSION

On appeal, Walker reiterates the arguments that he made to the District Court and that we described above. We address each of his challenges in turn before considering the government's claim that the District Court twice erred in its sentencing determination.

I. Conviction on Count Three, the Firearm-in-Crime-of-Violence Count[3]

Walker first suggests that the District Court erred by denying his motion to dismiss Count Three. Walker premised his motion on the theory that Hobbs Act robbery "categorically fails to constitute a crime of violence" under 18 U.S.C. § 924(c). Appellant's Br. at 32-37; *see also* Appellant's Reply Br. at 6-16. He advances this argument notwithstanding his concession, *see* Appellant's Br. at 32-34, that our Circuit has now ruled that Hobbs Act robbery qualifies, categorically, as a crime of violence under the elements clause of 18 U.S.C. § 924(c). *See Hill*, 890 F.3d at 53, 60 ("[W]e agree with all of the circuits to have addressed the issue, and hold that Hobbs Act robbery has as an element the use, attempted use, or threatened use of physical force against the person or property of another."); *see also United States v. Barrett*, 937 F.3d 126, 128 (2d Cir. 2019) (stating that Hobbs Act Robbery "can be identified as a crime of violence

---

[3] We review *de novo* the District Court's denial of Walker's motion to dismiss Count Three. *United States v. Greenberg*, 835 F.3d 295, 305 (2d Cir. 2016). As to Walker's challenge to the jury instructions given in connection with that count, the parties disagree on the applicable standard of review: The government points out that Walker did not object to the jury instructions below, *see* Gov't Br. at 30 n.8, and argues that this Court should therefore review this issue for plain error, *see United States v. Vilar*, 729 F.3d 62, 70 (2d Cir. 2013). Walker maintains, however, that the Court should review the jury instructions *de novo*, urging that "the government was on notice regarding the issue because Walker moved to dismiss the 924(c) count." Appellant's Br. 38. We need not decide this question, however, because Walker's claim fails under either standard.

under § 924(c)(3)(A) applying the traditional, elements only, categorical approach"). Because "prior opinions of a panel of this court are binding upon us in the absence of a change in the law by higher authority or our own in banc proceeding (or its equivalent)," *United States v. Moore*, 949 F.2d 68, 71 (2d Cir. 1991), *Hill* controls this case. The District Court correctly recognized that *Hill* was controlling and denied Walker's motion to dismiss Count Three on this ground.

Walker's challenge to the District Court's jury instructions on Count Three rests on the same mistaken argument: that Hobbs Act robbery is not a crime of violence under 18 U.S.C. § 924(c). Thus, we identify no error in the District Court's jury instructions.[4]

II. Conviction on Count Four, the Felon-in-Possession Count

Several weeks before the scheduled oral argument on this appeal, we granted Walker's motion for leave to file supplemental briefing on the question whether the Supreme Court's decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), compels

[4] In suggesting that the District Court "charged that the jury could find Walker conspired to commit or committed the Hobbs Act robberies," Appellant's Br. at 38, Walker misstates the record. Although the District Court read aloud from the indictment the text of the statutory provision charged, which criminalizes conspiracy, the court explicitly instructed the jury that it could convict Walker only if it found the government had proved beyond a reasonable doubt "that Mr. Walker knowingly obtained or took the personal property of another, the owner of the store, and that includes money and other tangible and intangible things of value capable of being possessed and transferred from one person to another which would include cigarettes or things of that nature." App'x 1042.

reversal of his conviction on Count Four. We directed both parties to make submissions addressing the issue.[5] *See* Dkt No. 120.

In his supplemental submission, Walker urges that *Rehaif* has several important effects. In his view, it means (1) that the District Court lacked jurisdiction over his prosecution on Count Four because the indictment does not allege that he knew he belonged to the relevant category of persons barred from possessing ammunition (*i.e.*, that he knew he had been convicted of a "crime punishable by imprisonment for a term exceeding one year," 18 U.S.C. § 922(g)(1)). Therefore, he contends, the indictment does not allege all the statutory elements of a § 922(g) offense. Further, he says, *Rehaif* means (2) that his conviction violated his due process rights because the government did not prove that he knew he was a felon. Finally, he urges that *Rehaif* requires us to find (3) that the District Court erred by failing to instruct the jury that it was required to find that Walker had knowledge of his status.

The parties agree that plain error review applies. On plain error review, we consider whether "(1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant's substantial rights; and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *United States v. Miller*, 954 F.3d 551, 557-58 (2d Cir. 2020).

Walker's jurisdictional argument is foreclosed by our decision in *United States v. Balde*, 943 F.3d 73, 92 (2d Cir. 2019), in which we held that an "indictment's failure to allege that [a defendant] knew that he was [in a prohibited category, *e.g.*, a felon] . . .

---

[5] The Supreme Court issued its decision in *Rehaif* on June 21, 2019—nearly three months before Walker filed his reply brief on September 19, 2019. We nevertheless granted his motion, filed on November 18, 2019, to submit additional briefing discussing *Rehaif*.

was not a jurisdictional defect." With respect to his two remaining arguments, we have little difficulty in concluding that he cannot satisfy the final prong of the plain error standard—requiring him to show that the error seriously affects the fairness, integrity, or public reputation of judicial proceedings—because evidence available to the government for use at trial indicates persuasively that Walker was well aware of his status as a felon. That evidence includes Walker's conviction of at least five prior felonies, including, most notably, an earlier conviction for being a felon in possession of a firearm, and his prior sentences, four of which resulted in terms of imprisonment exceeding one year. [6] Under circumstances such as these, "we do not think that rejecting [Walker's] argument will seriously affect the fairness, integrity, or public reputation of judicial proceedings. To the contrary, we think accepting it would have that effect." *Miller*, 954 F.3d at 559.

We therefore conclude that the District Court had jurisdiction over Count Four, that Walker's conviction on this count did not violate his due process rights, and that the erroneous related jury instructions did not amount to plain error requiring reversal. *See generally id.* at 557-60.

---

[6] As we have explained, "[m]ost defendants charged with violations of § 922(g)(1) avail themselves of" the Supreme Court's decision in *Old Chief v. United States*, 519 U.S. 172 (1997), "in order to keep the nature and details of their prior felony convictions from the jury." *Miller*, 954 F.3d at 559 n.23. They stipulate to their qualifying status, as Walker did in his case, the result being that "the trial record . . . contain[s] limited evidence regarding the defendant's knowledge of his felon status." *Id.* at 559 & n.23. Accordingly, "in the limited context of our fourth-prong [of the plain error test] analysis, we will consider reliable evidence in the record on appeal that was not part of the trial record," including presentence investigation reports. *Id.* at 560.

III. Evidentiary Rulings

Walker argues that the District Court abused its discretion by: (1) permitting the government to introduce certain fingerprint evidence; (2) allowing Probation Officer Parris to identify, in court, Walker as appearing on video surveillance footage of the robbery; (3) admitting into evidence the robbery victim's testimony to his out-of-court identification of Walker; and (4) precluding Walker from cross-examining Almontaser about Almontaser's prior domestic violence convictions. On this basis, Walker urges that his convictions must be vacated.

We review a district court's evidentiary rulings for abuse of discretion. *United States v. Boles*, 914 F.3d 95, 109 (2d Cir. 2019). A district court abuses its discretion when it acts "arbitrarily or irrationally," *United States v. Nektalov*, 461 F.3d 309, 318 (2d Cir. 2006), or premises its decision on an error of law, *United States v. Figueroa*, 548 F.3d 222, 226 (2d Cir. 2008). Further, "even when an evidentiary ruling is manifestly erroneous, the defendant will not receive a new trial if admission of the evidence was harmless." *United States v. Siddiqui*, 699 F.3d 690, 702 (2d Cir. 2012).

A. Fingerprint Evidence

Walker contests the admission of certain fingerprint evidence because, he argues, the government was negligent in fulfilling its discovery obligations and that negligence led to an inexcusably late disclosure to him of the fingerprint evidence. The reader will recall that the evidence concerned the presence of a fourth fingerprint on a carton of cigarettes and Detective Lezcano's identification of the print as belonging to Walker.

As a general rule, "[a] district court's decision not to exclude evidence that was the subject of a Rule 16(a) [of the Federal Rules of Criminal Procedure] violation is not

grounds for reversal unless the violation caused the defendant substantial prejudice."[7] *United States v. Lee*, 834 F.3d 145, 158 (2d Cir. 2016). To prove substantial prejudice, "the defendant must demonstrate that the untimely disclosure of the [evidence] adversely affected some aspect of his trial strategy." *Id.* Walker maintains that his trial counsel had "assembled a defense for trial that was predicated on a misidentification theory," and that "[t]he sudden introduction of new fingerprint evidence significantly[,] and, unfairly, undermined" that strategy. Appellant's Br. at 41. We are not persuaded.

That the admitted fingerprint evidence damaged Walker's defense does not mean its admission resulted in substantial unfair prejudice to him under *Lee*; he must also show that its admission affected his trial strategy. *United States v. Miller*, 116 F.3d 641, 681 (2d Cir. 1997). This he cannot do. The record establishes that Walker "was not prevented from pursuing his strategy of claiming" misidentification, *id.*; to the contrary, misidentification was the defense he presented to the jury, *see* App'x 279-85 (arguing that, while Walker "was at home, somebody else was going into that store"); *see also* App'x 923-58. Moreover, the government's case against Walker was strong even without the fingerprint: The robbery was captured on video, and multiple witnesses identified Walker as the robber. *Cf. Lee*, 834 F.3d at 158-61 (explaining that late admission of defendant's post-arrest statement did not "substantially prejudice the defense so as to require reversal" where the government generally put on a strong case and so the conviction did not hinge on the challenged post-arrest statement).

[7] Although Walker's claim is premised on the notion that the government violated Federal Rule of Criminal Procedure 16, regarding required government disclosures, the District Court did not establish a discovery schedule in this case that the government could have violated.

Further, when the government violates Rule 16, the "district court has broad discretion in fashioning a remedy," *id.* at 158, including by granting the defense a continuance, *see* Fed. R. Crim. P. 16(d)(2)(B). That was the course adopted by the District Court here: After discovery of the fingerprint evidence, it offered Walker a lengthy continuance as well as a *Daubert* hearing to allow the defense to seek exclusion of the fingerprint evidence on reliability grounds. Walker declined both invitations. He insists that a continuance was an insufficient remedy because it would have interfered with his liberty interest and right to speedy trial. But when previously given the opportunity to proceed quickly to trial, Walker declined, and he willingly waived his right to speedy trial and requested adjournments many times during the trial preparation process. These decisions seriously undermine his claim that a continuance was inadequate to address any harm.

Finally, we note that the District Court went to great lengths to mitigate any prejudice to Walker arising from the late disclosure and admission of the fingerprint evidence: It precluded the government from calling the fingerprint expert whom Walker had hired to conduct a separate analysis of the fingerprint and who had reached the same conclusion as the government's expert (*i.e.*, that the fourth fingerprint was a match for Walker's), and it allowed Walker to attack the reliability of the fingerprint evidence through the testimony of a separate, additional expert. In sum, Walker was not substantially prejudiced by the fingerprint evidence and the court did not abuse its discretion in admitting it.

B. In-Court Identification

Next, Walker contends that his probation officer should not have been permitted to testify that Walker was the man whose image appeared in surveillance video footage

of the robbery, both because that testimony was cumulative of other identification testimony and because the jury was capable of making the identification itself. Neither argument is convincing.

Rule 701 of the Federal Rules of Evidence permits lay opinion testimony that is: "(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." *See also United States v. Yannotti*, 541 F.3d 112, 125 (2d Cir. 2008) (explaining that "[a] rational perception is one involving first-hand knowledge or observation"). Where the jury is "in as good a position as the witness to draw the inference" to which the opinion relates, the opinion is not helpful and should not be admitted. *United States v. Rea*, 958 F.2d 1206, 1216 (2d Cir. 1992). On the other hand, where an opinion is the result of factors not otherwise possessed by or communicated to the jury, lay opinion testimony is likely to be helpful. *See id.*

According to Walker, "[t]he robber did not disguise his appearance and was clearly visible on the surveillance video," which "showed clear and complete views of the offender's full face, head, hands and gait." Appellant's Br. at 44-45. Walker further represents that, at the time of the trial, his own "appearance had not substantially changed since the robbery." Appellant's Br. at 45. His assertions are belied, however, by the trial testimony, and were accordingly rejected by the District Court: the court found that the robber wore a black hooded sweatshirt, with the hood up much of the time, *see* App'x 333-60; the robber was not wearing glasses in the video, whereas Walker wore glasses throughout trial, *see* App'x 313; as Walker's own trial counsel also observed, the man who committed the robbery was "at least fifty pounds heavier than Mr. Walker,"

App'x 279; and "the video is not as crystal clear as [Walker] suggest[s]," including because "[e]verybody is hurried and harried," App'x 167. Walker's probation officer, on the other hand, who provided testimony on the identification, had spent many hours with Walker leading up to the time of the robbery and had the opportunity to observe physical traits such as his gait, which were on display in the surveillance video but not at trial. Given these circumstances, the District Court did not abuse its discretion in admitting the testimony on the ground that the probation officer's opinion was likely to be helpful to the jury.

Walker also maintains that his probation officer's testimony "carried a high risk of unfair prejudice that substantially outweighed its limited probative value," and so should have been excluded under Rule 403 of the Federal Rules of Evidence. Appellant's Br. at 46-47. We have not had occasion to consider this somewhat thorny question in a published opinion, but, as other circuits have recognized:

> Identification testimony from law enforcement or corrections personnel may increase the possibility of prejudice to the defendant either by highlighting the defendant's prior contact with the criminal justice system, if the witness's occupation is revealed to the jury, or by effectively constraining defense counsel's ability to undermine the basis for the witness's identification on cross-examination, if the witness's occupation is to remain concealed.

United States v. Pierce, 136 F.3d 770, 776 (11th Cir. 1998); *accord United States v. Pace*, 10 F.3d 1106, 1114-16 (5th Cir. 1993). Critically, however, courts have not found that admission of such testimony was an abuse of discretion where the district court "directed the government not to delve into the circumstances of the parole officers' relationships with the defendant," leaving to the defendant the decision whether to reveal his criminal history as the basis for the relationship. *United States v. Farnsworth*,

729 F.2d 1158, 1161 (8th Cir. 1984); *accord United States v. Contreras*, 536 F.3d 1167, 1171-72 (10th Cir. 2008); *United States v. Beck*, 418 F.3d 1008, 1013-15 (9th Cir. 2005); *United States v. Garrison*, 849 F.2d 103, 107 (4th Cir. 1988).

We think our sister Circuits that we have cited saw the risk of such testimony, but we also think it within a district court's discretion to manage that risk. Thus, we place great weight on the District Court's instruction to counsel here that Walker's probation officer not be identified as a probation officer (*i.e.*, her profession was not to be mentioned), and the fact that the government complied with this instruction. Nor did the government elicit any testimony about Walker's criminal history in connection with the probation officer's testimony. Walker was free to cross-examine his probation officer about the nature of their relationship (to attempt to show, for example, that she was biased against him, or for any other reason), but chose not to do so. *Cf. Farnsworth*, 729 F.2d at 1162 ("The defendant himself chose to avoid an extensive cross-examination as a matter of strategy.").

Because of the practical constraints on a defendant's cross-examination in these circumstances, courts must carefully consider whether to allow lay opinion identification by probation officers. *See generally United States v. Calhoun*, 544 F.2d 291, 296 (6th Cir. 1976) ("The knowledge that [a defendant] was on parole at the time of the alleged offense could also arouse an emotional reaction among the jurors, especially those who harbor strong feelings about recidivism and the premature release of those in prison for crimes."). But where, as here, the probation officer's identification testimony was highly probative, and the record does not appear to contain other adequate identification testimony, a district court does not abuse its discretion in allowing the probation officer to testify and imposing related limitations to mitigate associated risks.

C. Out-of-Court Identification

Walker contends that the admission of Almontaser's out-of-court identification of Walker in a photographic array was unduly prejudicial because: even non-suggestive photo arrays such as those at issue here have "long been known to be hazardous"; the identification occurred one month after the robbery, which is "a considerable amount of time"; and the NYPD displayed "Crime Stoppers" posters with a photograph of Walker that had been taken independently of the robbery, a circumstance that could have tainted Almontaser's recollection if he saw the posters. Appellant's Br. at 48-49. We do not find his arguments persuasive.

We have long allowed admission of photo-array identifications. *See United States v. Anglin*, 169 F.3d 154, 161 (2d Cir. 1999) ("An unbroken line of our decisions . . . permits use of a non-suggestive photo array for identification purposes and trial testimony based upon that identification."). Like other courts, ours has criticized the single-photograph procedure, *see Mysholowsky v. New York*, 535 F.2d 194, 197 (2d Cir. 1976); *see also Simmons v. United States*, 390 U.S. 377, 383-84 (1968), but here, the victim was shown an array of six similar-looking people and was told that the perpetrator of the robbery might not be included in the array, *see* App'x 361-63, 448-49.

Further, we have never suggested that the passage of a month's time between a crime and a subsequent photo identification is too lengthy to permit its use at trial. We see no reason to suggest such a rule here, where the record provides no basis to conclude the victim's memory had faded: To the contrary, Almontaser testified that he had seen, and interacted with, Walker several times before the robbery; he described the robber to the police, including noting that the robber had gold teeth; and, in the photo array identification, he selected an individual whose characteristics matched the

description he gave to the officer (a male whose teeth included some that were gold). *See* App'x 408, 445, 497. This proved to be Walker.

The same rationale applies to Walker's complaint about possible taint arising from the Crime Stoppers fliers: Almontaser described the robber to law enforcement on the day of the robbery; he then identified Walker consistent with that initial description. Walker had the opportunity to cross-examine Almontaser to highlight the weaknesses he now asserts, but he chose not to do so. *Cf. Simmons*, 390 U.S. at 384 (explaining that cross-examination is a tool that may be used to determine whether identification is reliable). In any event, any error in admitting this testimony does not provide grounds for a new trial in light of the video evidence and in-court identification of Walker as the robber. *See United States v. Cadet*, 664 F.3d 27, 32 (2d Cir. 2011) (explaining that "erroneous evidentiary rulings entitle a defendant to a new trial, unless the error was harmless").

D. Domestic Violence Convictions

Finally, Walker asserts that the District Court erred by precluding him from cross-examining Almontaser about Almontaser's two prior convictions for domestic violence—one for felony attempted assault and one for misdemeanor attempted assault. *See* Fed. R. Evid. 609(a) (prior felony convictions "must be admitted, subject to Rule 403, . . . in a criminal case in which the witness is not a defendant" and prior misdemeanor convictions "must be admitted if the court can readily determine that . . . the crime required . . . a dishonest act or false statement").

District courts have broad discretion to impose reasonable limits on cross-examination based on, *inter alia*, unfair prejudice or marginal relevance. *See* Fed. R. Evid. 403; *Figueroa*, 548 F.3d at 227. Explaining its decision to preclude this evidence,

the District Court commented that "[i]t is dubious whether the convictions are relevant as assault does not shed light on veracity." App'x 224. The court further concluded that mention of the convictions would be unduly prejudicial because "[d]omestic violence is a disturbing issue." App'x 224-25. This rationale is consistent with our precedent establishing that violent crimes, however abhorrent, often are not crimes of dishonesty, and may not meaningfully reflect on a witness's truthfulness. *See United States v. Estrada*, 430 F.3d 606, 617-19 (2d Cir. 2005) (discussing "rule of thumb" that "convictions which rest on dishonest conduct relate to credibility whereas those of violent or assaultive crimes generally do not").

Walker does not present any arguments that the domestic violence convictions were relevant to Almontaser's truthfulness or that their admission would not be unduly prejudicial. Instead, he observes that the Federal Rules of Evidence distinguish between prior convictions of defendants and those of witnesses. True enough. The District Court, too, recognized that distinction and then appropriately performed a Rule 403 balancing test. On the facts presented here, we find no merit in Walker's claim that the District Court abused its discretion in limiting cross-examination as it did. And in any event, any potential error was harmless considering the District Court allowed Walker to impeach Almontaser by asserting that he was a drug-dealer, in support of Walker's alternative narrative that the encounter between Walker and Almontaser was not a robbery but a drug deal gone bad. *See United States v. Flaharty*, 295 F.3d 182, 191 (2d Cir. 2002).

IV. Rule 33 Motion

With respect to his motion for a new trial, Walker reasserts on appeal the arguments he made in the District Court.[8] We find those arguments no more persuasive than did that court.

Rule 33(a) of the Federal Rules of Criminal Procedure provides that, on "the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." In determining whether to grant a Rule 33 motion, "[t]he ultimate test is whether letting a guilty verdict stand would be a manifest injustice." *United States v. Canova*, 412 F.3d 331, 349 (2d Cir. 2005). A court must have "a real concern that an innocent person may have been convicted" in light of the evidence presented and the credibility of the witnesses. *Id.* District courts have notably broad leeway in ruling on such motions and we review a district court's denial of a motion under Rule 33 for abuse of discretion. *United States v. Vinas*, 910 F.3d 52, 58 (2d Cir. 2018).

A. Spoliation

The thrust of Walker's spoliation argument derives from the serious accusation that either Almontaser or the police "destroyed parts of the [surveillance] video" that "could have provided a key to understanding what actually transpired between [Almontaser] and his assailant, including the nature of their relationship, and if this was

[8] Walker again argues that the indictment did not charge any "crimes of violence" and therefore Count Three (the firearm-in-crime-of-violence count) should have been dismissed and his conviction on that count overturned for failure to state a claim. This attack does no more than repackage his arguments that Hobbs Act Robbery is not a crime of violence. As discussed, those arguments have no merit.

a robbery at all." Appellant's Br. at 53-54. Walker specifically references "28 seconds from an outside surveillance video that begins to show what transpired immediately between the perpetrator and [the victim] after the 'robbery,'" but that was unavailable for unknown reasons. Appellant's Reply Br. at 21.

This Court has defined spoliation to be "the destruction or significant alteration of evidence, or failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *United States v. Odeh (In re Terrorist Bombings of U.S. Embassies in E. Africa)*, 552 F.3d 93, 148 (2d Cir. 2008). Even when the government is under an obligation to preserve relevant recordings, which it may well have been here, where a defendant "has pointed to no evidence that the tapes were intentionally destroyed," their destruction "could not have amounted to spoliation." *Id.* Similarly, in the context of a motion to dismiss an indictment for spoliation, we have held that a criminal defendant must show: (1) "that the evidence possessed exculpatory value that was apparent before it was destroyed"; (2) that the evidence "was of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means"; and (3) "bad faith on the part of the [g]overnment." *Greenberg*, 835 F.3d at 303. The "[f]ailure to satisfy any of these requirements, including a failure to show the Government's bad faith, is fatal to a defendant's spoliation motion." *Id.*

Walker does not assert that he knows what the missing video footage contained, let alone that the missing footage was exculpatory other than insofar as it portrayed a further brief interaction between the robber and the victim. Indeed, the footage Walker references pertains to the moments *after* the robbery was completed, and Walker does not explain what kind of events recorded then could possibly exculpate him. Nor does the record support a finding or even a suspicion that the missing footage was

unavailable as a result of any bad faith, or an unintentional or even negligent act of destruction on the part of the government. Accordingly, we have no basis for concluding that the District Court abused its discretion in denying Walker's motion for a new trial based on his speculations about spoliation.

B. Impaired Juror

Walker also contends that the District Court abused its discretion when—rather than declaring a mistrial—it decided to dismiss a juror who advised the court that she had a nightmare after the close of the first phase of the trial, before the first set of verdicts was reached. He asserts that the episode reflects bias on the part of the excused juror, and therefore indelible taint in the proceedings leading up to her dismissal.

Rule 23(b)(3) of the Federal Rules of Criminal Procedure authorizes the court to "permit a jury of 11 persons to return a verdict, even without a stipulation by the parties, if the court finds good cause to excuse a juror." We review for abuse of discretion a district court's handling of juror dismissal, just as we do its denial of a Rule 33 motion. *United States v. Farhane*, 634 F.3d 127, 168 (2d Cir. 2011).

The District Court acted well within its discretion in denying Walker's motion for a new trial on the basis of the excused juror's hypothetical bias. The court reasonably considered the possibility of bias and found none, concluding that Walker was not, and had not been, harmed by the excused juror's participation to that point. The juror stated under oath that she had been reminded of a long-ago robbery only after deliberations for the first phase of the trial had concluded and the verdict was announced; she had reported her concerns at the earliest possible opportunity; and she averred that she had not mentioned her dream to any of the other jurors. As the Supreme Court has explained, "the Constitution does not require a new trial every time a juror has been

placed in a potentially compromising situation." *Rushen v. Spain*, 464 U.S. 114, 118 (1983). We see no basis to conclude that the District Court abused its discretion in its handling of this juror.

V. Sentence

We turn finally to the government's cross-appeal of the District Court's determination that the ACCA's enhanced penalty provision does not apply to Walker. This Court "review[s] de novo all questions of law relating to the district court's application of a federal sentence enhancement." *United States v. Beardsley*, 691 F.3d 252, 257 (2d Cir. 2012).

Since Walker's sentencing, we have ruled—and Walker now concedes, as he must—that New York Robbery in any degree is a violent felony, both for purposes of 18 U.S.C. § 924(e)(2)(B)(i) and under an identical clause in the U.S. Sentencing Guidelines, U.S.S.G. § 2L1.2. *United States v. Thrower*, 914 F.3d 770, 774-77 (2d Cir. 2019) (18 U.S.C. § 924(e)(2)(B)(i)); *United States v. Pereira-Gomez*, 903 F.3d 155, 159, 164-66 (2d Cir. 2018) (Guidelines). We therefore remand to the District Court so that it may decide whether Walker's two other convictions qualify as violent felonies under the ACCA and for resentencing.

CONCLUSION

Accordingly, the judgment of conviction entered by the District Court hereby is **AFFIRMED** and the cause is **REMANDED** for further proceedings consistent with this Opinion.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 19th day of November, two thousand twenty.

United States of America,

Plaintiff - Appellee-Cross-Appellant,

v.

Shameke Walker,

Defendant - Appellant-Cross-Appellee.

ORDER

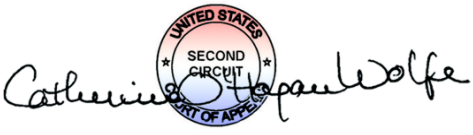
Docket Nos: 18-1933, 18-2085

Appellant-Cross-Appellee, Shameke Walker, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk



18 U.S.C. § 922(g)

§ 922(g) Unlawful acts

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien—

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)

(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 924(a) and (c)

§ 924. Penalties

(a)

(1) Except as otherwise provided in this subsection, subsection (b), (c), (f), or (p) of this section, or in section 929 [18 USCS § 929], whoever—

> **(A)** knowingly makes any false statement or representation with respect to the information required by this chapter [18 USCS §§ 921et seq.] to be kept in the records of a person licensed under this chapter [18 USCS §§ 921 et seq.] or in applying for any license or exemption or relief from disability under the provisions of this chapter [18 USCS §§ 921 et seq.];
>
> **(B)** knowingly violates subsection (a)(4), (f), (k), or (q) of section 922 [18 USCS § 922];
>
> **(C)** knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(l) [18 USCS § 922(1)]; or
>
> **(D)** willfully violates any other provision of this chapter [18 USCS §§ 921 et seq.], shall be fined under this title, imprisoned not more than five years, or both.

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 [18 USCS § 922] shall be fined as provided in this title, imprisoned not more than 10 years, or both.

(3) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly—

> **(A)** makes any false statement or representation with respect to the information required by the provisions of this chapter [18 USCS §§ 921 et seq.] to be kept in the records of a person licensed under this chapter [18 USCS §§ 921 et seq.], or

(B) violates subsection (m) of section 922 [18 USCS § 922], shall be fined under this title, imprisoned not more than one year, or both.

(4) Whoever violates section 922(q) [18 USCS § 922(q)] shall be fined under this title, imprisoned for not more than 5 years, or both. Notwithstanding any other provision of law, the term of imprisonment imposed under this paragraph shall not run concurrently with any other term of imprisonment imposed under any other provision of law. Except for the authorization of a term of imprisonment of not more than 5 years made in this paragraph, for the purpose of any other law a violation of section 922(q) [18 USCS § 922(q)] shall be deemed to be a misdemeanor.

(5) Whoever knowingly violates subsection (s) or (t) of section 922 [18 USCS § 922] shall be fined not more than $1,000, imprisoned for not more than 1 year, or both.

(6)

(A)

(i) A juvenile who violates section 922(x) [18 USCS § 922(x)] shall be fined under this title, imprisoned not more than 1 year, or both, except that a juvenile described in clause (ii) shall be sentenced to probation on appropriate conditions and shall not be incarcerated unless the juvenile fails to comply with a condition of probation.

(ii) A juvenile is described in this clause if—

(I) the offense of which the juvenile is charged is possession of a handgun or ammunition in violation of section 922(x)(2); and

(II) the juvenile has not been convicted in any court of an offense (including an offense under section 922(x) [18 USCS § 922(x)] or a similar State law, but not including any other offense

consisting of conduct that if engaged in by an adult would not constitute an offense) or adjudicated as a juvenile delinquent for conduct that if engaged in by an adult would constitute an offense.

(B) A person other than a juvenile who knowingly violates section 922(x) [18 USCS § 922(x)]—

(i) shall be fined under this title, imprisoned not more than 1 year, or both; and

(ii) if the person sold, delivered, or otherwise transferred a handgun or ammunition to a juvenile knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence, shall be fined under this title, imprisoned not more than 10 years, or both.

(7) Whoever knowingly violates section 931 [18 USCS § 931] shall be fined under this title, imprisoned not more than 3 years, or both.

* * *

(c)

(1)

(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a violation of this subsection that occurs after a prior conviction under this subsection has become final, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term

of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 [46 USCS §§ 70501 et seq.].

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section—

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition—

(i) if the killing is murder (as defined in section 1111 [18 USCS § 1111]), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112 [18 USCS § 1112]), be punished as provided in section 1112 [18 USCS § 1112].

18 U.S.C. § 1951

§ 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.

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

New York State Robbery, P. L. § 160.00

§ 160.00. Robbery; defined

Robbery is forcible stealing. A person forcibly steals property and commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of:

1. Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or

2. Compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny.

New York State Robbery in the second degree, P. L. § 160.10

§ 160.10. Robbery in the second degree

A person is guilty of robbery in the second degree when he forcibly steals property and when:

1. He is aided by another person actually present; or

2. In the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime:

(a) Causes physical injury to any person who is not a participant in the crime; or

(b) Displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm; or

3. The property consists of a motor vehicle, as defined in section one hundred twenty-five of the vehicle and traffic law.
Robbery in the second degree is a class C felony.