No.

In the
SUPREME COURT of the UNITED STATES
October Term, 2021

JERMAINE JACKSON,

***Petitioner*,**

against

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

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QUESTION PRESENTED FOR REVIEW

Whether 18 U.S.C. 924(c)(3)(A)'s definition of "crime of violence" excludes attempted Hobbs Act robbery, in violation of 18 U.S.C. 1951(a).

PARTIES TO THE PROCEEDING

The are no parties other than those named in the caption of this petition who were parties to the proceeding before the court whose judgment is sought to be reviewed.

DIRECTLY RELATED CASES

1. United States District Court for the Eastern District of New York
United States v. Jermaine Jackson, 17-CR -140 (SJF), Judgment entered January 9, 2019.

2. United States Court of Appeals for the Second Circuit
United States v. Jermaine Jackson, 19-Cr-13, Summary Order entered May 12, 2021, Petition for Rehearing *en banc*, denied July 13, 2021.

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Petitioner Jermaine Jackson respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on July 13, 2021.

OPINIONS BELOW

The opinion of the Second Circuit dated May 12, 2021, attached hereto as Appendix A, is reported at *United States v. Jermaine Jackson* 854 Fed. Appx. 403 (2d Cir. 2021). The order of the Court of Appeals of July 13, 2021, denying rehearing and rehearing *en banc*, attached hereto as Appendix C, is unreported.

JURISDICTION

This petition for certiorari is being filed within 150 calendar days[1] of the order denying rehearing and rehearing *en banc*. This Court's jurisdiction is invoked under Title 28, United States Code, section 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 924(c) and (j), and 1111.

Title 18, United States Code, section 924(c)(1)(A) provides, in pertinent

[1] In light of the ongoing health concerns related to COVID-19, the United States Supreme Court extended the deadline to file any petition for a writ of certiorari to 150 days by order dated March 19, 2020.

part:

> 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.

Section 924(c)(3) provides, "For purposes of this subsection the term "crime of violence" means an offense that is a felony and –

> has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> 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.

Section 924(j) provides, in pertinent part, "A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall –

> if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and
>
> …

Title 18, United States Code, section 1111(a) states,

> Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery; or perpetrated as part of a pattern or practice of assault or torture against a child or children; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

Any other murder is murder in the second degree.

STATEMENT OF THE CASE

A. The District Court Proceedings - Conviction and Sentence

This petition relates to the sole offense to which Petitioner entered a guilty plea, which was Count Seven of the indictment. That count founded on 18

U.S.C. § 924(j)), however, requires reference to two other counts in the indictment.

Count Seven charged that he, in the course of violating Count Six [discharging a firearm during a crime of violence, a violation of 18 U.S.C. § 924(c)] caused a murder with a firearm and with malice aforethought, by killing a person by the name of Edwin Lopez "(i) willfully, deliberately, maliciously and with premeditation; and (ii) *during the perpetration*[2] *and attempted perpetration of a robbery*." (emphasis added) Count Six, in turn, requires that the discharge of the firearm occur during, in relation to, and in furtherance of a "crime of violence," alleged therein (as pertinent) to be the offense contained in Count Five [Hobbs Act robbery, a violation of 18 U.S.C. § 1951(a)]. As discussed below, the plea allocution and facts admitted by the government established that Petitioner had not committed a completed robbery, but only an attempted robbery.

Count Five describes the alleged offense conduct as:

> the robbery of United States currency from the AL Mini Market store located at 91 Ocean Avenue, Valley Stream, New York, from one or more AL Mini Market employees, through the use of actual

[2] The "perpetration" relates to the conduct described in Count Four whereas the "attempted perpetration" relates to the Count Five conduct that is the subject of the present appeal.

> and threatened force, physical violence and fear of injury to such employees and to others present.

Petitioner pled guilty pursuant to a plea agreement. In advance of the change of plea hearing, the magistrate judge directed that the parties execute a form regarding the plea. As a part of that form, the government was required to provide a list of the elements of the offense to which the guilty plea would be entered:

> a) On or about December 16, 2016, the defendant used and carried a firearm;
> b) during a crime of violence (*i.e., a robbery*);
> c) of Al Mini Market in Valley Stream that affects interstate commerce;
> d) *and during that robbery* the defendant
> e) knowingly and intentionally caused the death of Edwin Lopez, one of the store's employees, by discharging a firearm.

(emphasis added) Petitioner indicated he was aware of this.

As a part of the plea hearing, the court repeated the elements that the government would have to prove:

> that on December 16, 2016 you used and carried a firearm during the commission of a crime of violence, *that is a robbery*, at the A1 Mini Market in Valley Stream which market affects interstate commerce, and that *during the course of that robbery* you knowingly and intentionally caused the death of Edwin Lopez, one of the store employees, by discharging your firearm, or that firearm.

(emphasis added) Petitioner again said he understood.

Finally, the court asked Petitioner to state what happened. He averred that "[d]uring the course of a *robbery* in Valley Stream, I shot a person resulting in death." (emphasis added) The government responded to a question from the court by acknowledging that petitioner and another individual entered armed with firearms "and *attempted* to rob the employees and the other patrons in the A1 Mini Market." (emphasis added)[3]

The magistrate judge recommended to the district court that the plea be accepted. The district court accepted the plea and subsequently entered its judgment of conviction and sentence.

B. The Appeal and Petition for Rehearing in the Second Circuit

Petitioner appealed to the Second Circuit and argued that the change of plea hearing contained multiple errors, and that as a result, the conviction should be vacated. Specifically, Jackson urged that there was no factual basis for a Hobbs Act robbery conviction, that attempt to commit Hobbs Act robbery is not a "crime of violence," that Petitioner's allocution failed to afford him an understanding of the charges against him, and that these errors were plain error warranting relief.

[3] The government went on to state that the victim resisted, was shot once, but pursued Petitioner who then fired multiple shots, including the fatal one(s).

The Second Circuit denied and dismissed Jackson's appeal, holding that "Jackson pleaded guilty to a violation of 18 U.S.C. § 924(j)(1), not to Hobbs Act robbery," and that the Second Circuit has held that a district court satisfies Rule 11(b)(1)(G) by "describing the elements of the offense in the court's own words." *United States v. Maher*, 108 F.3d 1513, 1521 (2d Cir. 1997). In addition, the Court held that the transcript of the plea hearing demonstrate[d] that the magistrate judge informed Jackson of each element of his § 924(j)(1) charge and ensured that Jackson understood the court's explanations, thus satisfying her obligation under Rule 14 11(b)(1)(G).

Moreover, the Circuit Court explained that when Jackson pleaded guilty, settled circuit precedent provided that Hobbs Act robbery conspiracy qualified as a "crime of violence" under § 924(c). *See United States v. Barrett* (*Barrett I*), 903 F.3d 166, 175 (2d Cir. 2018). Even though Hobbs Act robbery conspiracy no longer qualifies as a "crime of violence," *Barrett II*, 937 F.3d at 129-30, we have held that attempted Hobbs Act robbery does. *See United States v. McCoy*, No. 17-3515, 2021 WL 1567745, at *20 (2d Cir. Apr. 22, 2021)

Petitioner sought rehearing and rehearing *en banc* as to this issue, but his application was denied. (Appendix C.)

REASONS FOR GRANTING THE PETITION

The Second Circuit's Decision Is In Conflict With The Law Of Other Circuits And The Issue Is Currently Before This Court

In the court below, we urged that there was no factual basis for a Hobbs Act robbery conviction, and that attempt to commit Hobbs Act robbery is not a "crime of violence." We ask this Court to revisit the ruling of the Second Circuit that relied on an incorrect foundation as described below. Alternatively, we ask for consideration by this Court because the decision below conflicts with established precedent.

A. The Issue Is Currently Before This Court in *United States v. Taylor*, No. 20-1459

As a threshold matter, we note that, subsequent to briefing in this case, the Second Circuit decided *United States v. McCoy,* 995 F.3d 32 (2d Cir. 2021), in which it held that attempted Hobbs Act robbery *is* a crime of violence.

Whether attempted Hobbs Act robbery is a crime of violence is an issue relevant to defendants in every federal court nationwide. It is also an issue on which there is a split among the circuits. *Compare, United States v. Walker*, 990 F.3d 316 (3d Cir. 2021) (finding attempted Hobbs Act robbery to be a crime of violence under Section 924(c)); *United States v. Dominguez*, 954 F.3d 1251 (9th Cir. 2020) (*same*); *United States v. Ingram*, 947 F.3d 1021 (7th Cir. 2020) (*same*);

United States v. St. Hubert, 909 F.3d 335 (11th Cir. 2018) (*same*); with *United States v. Taylor,* 979 F.3d 203 *(*4th Cir. 2021*), cert. granted,* 141 S. Ct. 2882 (U.S. July 2, 2021) (No. 20-1459*)* (holding to the contrary).

Therefore, reviewing this issue will allow the Court to decide an issue that has a significant impact on convictions imposed on a large number of people, and about which there is a split among the circuits.

We also note that the question of whether attempted Hobbs Act robbery is or is not a crime of violence is presently before this Court, and was argued before the Supreme Court on December 7, 2021, in No. 20-1459, *United States v. Taylor*. The legal issue in *Taylor* is exactly the same as here; it is presented here in a slightly different factual context, but one with no legal consequence.

Therefore, we respectfully request that Petitioner's petition for *certiorari* be held in abeyance pending decision in *Taylor*.

B. The Conflict Between These Decisions Is Substantial And Fundamental

The divergent decisions present an intolerable conflict on the same issue of law and not simply a discrepancy in dicta or the application of general principles. This discrepancy is so substantial that if Petitioner's matter was presented in the Fourth Circuit, to the "*Taylor* court," that court would decide it differently if presented with identical facts.

C. Attempted Hobbs Act Robbery is Not a Crime of Violence.

Even if Count Five had properly charged Petitioner with committing an attempted Hobbs Act robbery, there would not be a sufficient factual basis to find Petitioner had caused death during a crime of violence, as attempted Hobbs Act robbery is not a crime of violence.

While the Second Circuit has recently decided this issue, the issue of whether attempted Hobbs Act robbery is a predicate crime of violence for section 924(c) purposes is split among the many Circuits. In *United States v. Barrett*, *supra*, the Court found that conspiracy to commit Hobbs Act robbery is not such a crime of violence. Attempt to commit Hobbs Act robbery is, like conspiracy to commit it, an inchoate crime. We submit that the reasoning underlying *Barrett*, and *United States v. Davis*, _ U.S. _, 139 S.Ct. 23199 (2019), which *Barrett* relied upon, compels the conclusion that attempted Hobbs Act robbery is not a crime of violence.

Although decisions by three Circuit Courts of Appeals – *United States v. Dominguez*, 954 F.3d 1251 (9th Cir. 2020); *United States v. Ingram*, 947 F.3d 1021 (7th Cir. 2020); and *United States v. St. Hubert*, 909 F.3d 335 (11th Cir. 2018) – have reached a contrary conclusion, prior to its decision in *McCoy*, at least six district courts within the Second Circuit held that attempted Hobbs Act robbery was not a § 924(c)(3)(A) crime of violence. *See*, *United States v. Culbert*, No. 19-

cr-614 (BMC), 2020 WL 1849692 (E.D.N.Y. April 13, 2020); *United States v. Cheese*, No. 18-CR-33-2 (NGG), 2020 WL 705217 (E.D.N.Y. Feb. 12, 2020)[4]; *Lofton v. United States,* No. 6:16-cv-06324-MAT, 6:04-cr-06063-MAT-MWP, 2020 WL 362348 (W.D.N.Y. Jan. 22, 2020); and *United States v. Tucker*, No. 18 CR 0119 (SJ), 2020 WL 93951 (E.D.N.Y. Jan. 8, 2020).

The Fourth Circuit, in *United States v. Taylor*, became the first court of appeals to hold that attempted Hobbs Act robbery is not a crime of violence under 18 U.S.C. § 924(c)(3)(A)'s elements clause.

The court in *Taylor* granted a successive 28 U.S.C. § 2255 motion and vacated the movant's § 924(c) conviction, which had been predicated on both conspiracy to commit Hobbs Act robbery (not a crime of violence under Fourth Circuit precedent, nor under the Second Circuit's decision in *United States v. Barrett*, 937 F.3d 126 (2d Cir. 2019)), and attempted Hobbs Act robbery.

The *Taylor* Court reasoned that one may attempt Hobbs Act robbery by (i) intending to commit a robbery through a threat of force, and (ii) taking a nonviolent substantial step toward that objective, such as planning the robbery or reconnoitering the target. "Where a defendant takes a nonviolent substantial step toward threatening to use physical force—conduct that undoubtedly satisfies the

[4] The government has filed an appeal of the decision in *Cheese*. *See United States v. Hytmiah (Cheese)*, 2d Cir., March 13, 2020, No. 20-923.

elements of attempted Hobbs Act robbery—the defendant has not used, attempted to use, or threatened to use physical force. Rather, the defendant has merely attempted to threaten to use physical force. The plain text of § 924(c)(3)(A) does not cover such conduct." *Taylor*, 979 F.3d at 208.

Courts use a "categorical approach" to decide whether an offense constitutes a "crime of violence" for purposes of section 924(c)(3). *Taylor v. United States*, 495 U.S. 575, 600 (1990); *Descamps v. United States*, 133 S.Ct. 2276, 2281 (2013); *United States v. Acosta*, 470 F.3d 132, 135 (2d Cir. 2006) (per curiam); *United States v. Hill*, 890 F.3d 51, 55 (2d Cir. 2018). As described in *Hill,* under the categorical approach, courts

> identify "the minimum criminal conduct necessary for conviction under a particular statute." *Acosta*, 470 F.3d at 135. In doing so, courts "'look only to the statutory definitions' – *i.e.*, the elements – of [the] … offense[], … and *not* 'to the particular [underlying] facts.'" *Descamps*, 133 S.Ct. at 2283 (quoting *Taylor*, 495 U.S. at 600); *see also Acosta*, 470 F.3d at 135 ("[We] focus on the intrinsic nature of the offense rather than on the circumstances of the particular crime."). The reviewing court "cannot go behind the offense at it was charged to reach [its] own determination as to whether the underlying facts" qualify the offense as, in this case, a crime of violence. *Ming Lam Sui v. INS*, 250 F.3d 105, 117-18 (2d Cir. 2001) (quoting *Lewis v. Ins*, 194 F.3d 539, 543 (4th Cir. 1999)).

890 F.3d at 55-56. Once the minimum conduct necessary to commit an offense is determined, the question is "whether such conduct amounts to a crime of

violence." *Id.* at 56.

To attempt a crime, "a defendant must (a) have the intent to commit the object crime and (b) engage in conduct amounting to a substantial step toward its commission." *Cheese*, 2020 WL 705217 at *2 (citing *United States v. Yousef*, 327 F.3d 56, 134 (2d Cir. 2003)). A "'substantial step' must be something more than mere preparation, yet may be less than the last act necessary before the actual commission of the substantive crime.'" *Id* (*citing United States v. Farhane*, 634 F.3d 127, 147 (2d Cir. 2011) (*quoting United States v. Manley*, 632 F.2d 978, 987 (2d Cir. 1980) (internal quotation marks omitted))).

In each of the recent cases from district courts within the Second Circuit circuit finding attempted Hobbs Act robbery is not a crime of violence (prior to *McCoy*), the courts rejected the central argument of those decisions finding to the contrary: that attempted Hobbs Act robbery is a crime of violence because it requires proof of intent to commit all the elements of Hobbs Act robbery, a crime of violence. As Judge Garaufis put it in *Cheese*, the "argument collapses the distinction between acts constituting an underlying offense and acts constituting an attempt of the underlying offense," contrary to the Supreme Court's reasoning in *United States v. Davis*, 139 S.Ct. 2319 (2019), which requires "examination of the 'minimal criminal conduct necessary for conviction under a particular statute." *Id* at *3 (quoting *United States v. Hendricks*, 921 F.3d 320, 327 (2d Cir. 2019)).

The court noted that a defendant could take a "substantial step" toward committing Hobbs Act robbery without using, attempting to use, or threatening to use physical force. For example, the court noted, in *United States v. Gonzalez*, 441 Fed.Appx. 31, 36 (2d Cir. 2011) (summary order), the Court found the evidence sufficient to establish attempted Hobbs Act robbery where the defendants' casing of a store they intended to rob while possessing "'paraphernalia which, under the circumstances, could serve no lawful purpose (including a real firearm, a starter pistol, and ski masks) constitute[d] a substantial step, and amply corroborate[d] their criminal purpose.' (citing *United States v. Jackson*, 560 F.2d 112, 120-21 (2d Cir. 1977); *United States v. Wrobel*, 841 F.3d 450, 453-55 (7th Cir. 2016) (upholding attempted Hobbs Act robbery conviction where defendants planned robbery, traveled across state lines for purpose of robbing a diamond merchant, but were stopped by law enforcement before the robbery was committed with hooded sweatshirts, a black hat, three pairs of gloves, and a pry bar).'" *Cheese*, 2020 WL 705217 at *3. The court concluded, "Because a defendant who takes a substantial step in furtherance of Hobbs Act robbery can do so without the use, threatened use, or attempted use of force, attempted Hobbs Act robbery cannot be a crime of violence under the categorical analysis." *Id* (citing *United States v. Tucker, supra,* 2020 WL 93951 at *18-19 [*sic* – should be *6).

In *Tucker*, Judge Johnson "concur[red] with Judge Pryor and two other

[dissenting] judges of the 11th Circuit that, 'it is incorrect to say that a person necessarily attempts to use physical force within the meaning of 924(c)'s elements clause just because he attempts a crime that, if completed would be violent." 2020 WL 93951 at *6 (citing *United States v. St. Hubert*, 918 F.3d 1174, 1212 (11th Cir. 2019) (Jill Pryor, J., joined by Wilson and Martin, JJ., dissenting from the denial of rehearing en banc).

Judge Johnson also agreed with the defense that "surveillance" of a target is the "'minimum criminal conduct'" necessary to constitute attempted Hobbs Act robbery. As to "whether a person conducting surveillance of a target with the intent to commit robbery necessarily uses, attempts to use, or threatens the use of force," he again found Judge Pryor "persuasive," when she wrote:

> We can easily imagine that a person may engage in an overt act – in the case of robbery, for example, overt acts might include renting a getaway van, parking the van a block away from the bank, and approaching the bank's door before being thwarted – without having used, attempted to use, or threatened to use force. Would this would-be robber have *intended* to use force? Sure. Would he necessarily have attempted to use force? No.

Id (citing *St. Hubert*, 918 F.3d 1174, 1212 (Pryor, dissenting from the denial of rehearing en banc) (emphasis in original). "Accordingly," Judge Johnson found, "this court finds that given the broad spectrum of attempt liability, 'the elements of attempt to commit robbery could clearly be met without any use, attempted use, or threatened use of violence.'" *Id* (quoting *United States v. Alfonso*, Criminal No.

3:17CR128 (JBA), 2019 WL 1916199 (D. Conn. Apr. 30, 2019) at *3).

We respectfully submit the Court should adopt the reasoning in *Taylor, Culbert*, *Cheese*, *Lofton* and *Tucker*, and find that attempted Hobbs Act robbery is categorically not a crime of violence under section 924(c).

Since the facts adduced at Petitioner's plea hearing established attempted Hobbs Act robbery, but not the completed crime, and neither attempted Hobbs Act robbery nor conspiracy to commit Hobbs Act robbery are predicate crimes of violence, the facts were not sufficient to establish Petitioner caused death during a crime of violence, as charged.

D. There Was No Factual Basis For A Hobbs Act Robbery Conviction

There is no question that this case turns on whether attempted Hobbs Act robbery constitutes a crime of violence, as the parties agreed that Petitioner had committed an attempted, rather than completed, Hobbs Act robbery; the government argued that this fact did not undermine the sufficiency of the plea allocution because attempted robbery is a lesser-included offense of robbery.

As there was no robbery under 18 U.S.C. 1951(a), so too there could be no use of a firearm in relation to such a robbery under 18 U.S.C. § 924(c), and there likewise could be no murder under § 924(j) through the use of a firearm that was not used in relation to a robbery.

The court did not advise Petitioner that he was charged with attempted robbery. Neither did the indictment, the plea agreement, the form the magistrate judge required the parties to complete in advance of taking the plea, or any other facility purporting to provide Petitioner with an understanding of the nature of the charge to which he was pleading. No reasonable reading of the information conveyed by the court to Petitioner would lead one to think that an attempt to rob was not part and parcel of a robbery.

Of course, that is an incorrect understanding of the offense to which he pled guilty, yet his allocution (quoted at page 6, *supra*) makes it abundantly clear (and reasonable) that he thought he was pleading to guilty to using a firearm to commit murder in relation to a "robbery" based on his conduct "[d]uring the course of a robbery in Valley Stream, I shot a person resulting in death." The law, however, is clear that his conduct did not satisfy the definition of a robbery and thus could not possibly have supported his conviction. The applicable definition is found in 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.

"Taking" is an essential element of the offense of robbery, *United States v. Hill*, 890 F.3d 51, 60 (2d Cir. 2018), and the use of a firearm in conjunction with such a robbery is (under subsection (c)) an essential element of subsection (j), the only offense to which Petitioner pled guilty.

In summary, this Court should conclude that attempted Hobbs Act robbery is not a crime of violence for 924(c) purposes, the record does not support Petitioner's guilt under Count 7, and grant a petition for certiorari.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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December 10, 2021

Appendix A

19-13
United States v. Jackson

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to a summary order filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this court's Local Rule 32.1.1. When citing a summary order in a document filed with this court, a party must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A party citing a summary order must serve a copy of it on any party not represented by counsel.

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 12th day of May, two thousand twenty-one.

PRESENT: Guido Calabresi,
Steven J. Menashi,
Circuit Judges
John G. Koeltl,*
District Judge.

UNITED STATES OF AMERICA,

Appellee

v.

No. 19-13

JERMAINE JACKSON,

Defendant-Appellant.

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* Judge John G. Koeltl of the United States District Court for the Southern District of New York, sitting by designation.

For Appellee:	CHRISTOPHER C. CAFFARONE, (Susan Corkery, *on the brief*), Assistant United States Attorneys, *for* Mark J. Lesko, Acting United States Attorney for the Eastern District of New York, Brooklyn, New York.
For Defendant-Appellant:	JESSE M. SIEGEL, New York, New York.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Feuerstein, J.).

Upon due consideration, it is hereby **ORDERED**, **ADJUDGED**, and **DECREED** that this appeal is **DISMISSED.**

Jermaine Jackson appeals his conviction, pursuant to a 2017 plea agreement, for murder in violation of 18 U.S.C. § 924(j)(1). We assume the parties' familiarity with the underlying facts, procedural history, and arguments on appeal. For the reasons set forth below, we dismiss this appeal.

I

Jackson attempted two armed robberies with an accomplice. The first attempt—on December 9, 2016—succeeded, with the pair obtaining over $2,000 in cash. During the second attempt—on December 16, 2016—a store employee, Edwin Lopez, tried to prevent the robbery. Jackson shot Lopez and fled before he

and his accomplice could retrieve any money or other goods from the store. When Lopez attempted to chase the two would-be robbers, Jackson shot Lopez repeatedly, causing his death.

A grand jury returned a seven-count indictment against Jackson. As relevant here, for his role in the December 16 attempted robbery and killing, the indictment charged Jackson with conspiracy to commit Hobbs Act robbery and Hobbs Act robbery, both in violation of 18 U.S.C. § 1951(a) (Counts Four and Five), discharging a firearm in connection with those "crimes of violence" in violation of 18 U.S.C. § 924(c)(1)(A)(iii) (Count Six), and the murder of Lopez in the course of committing the firearm offense charged in Count Six in violation of 18 U.S.C. § 924(j)(1) (Count Seven).

On December 6, 2017, Jackson pleaded guilty to the § 924(j)(1) firearm-related murder charge only. The plea agreement included an appeal waiver that bound Jackson as long as the district court imposed a sentence with a term of imprisonment that did not exceed 365 months. Pursuant to the agreement's terms, the district court dismissed the remaining counts in the indictment in response to the government's motion. The district court imposed a sentence of 365 months' imprisonment followed by five years of supervised release. Jackson appealed.

II

The appeal waiver in Jackson's plea agreement requires us to dismiss this appeal. An appeal waiver is "presumptively enforceable." *United States v. Riggi*, 649 F.3d 143, 147 (2d Cir. 2011). Jackson, however, "retains the right to contend that there were errors in the proceedings that led to the acceptance of his plea of guilty." *United States v. Adams*, 448 F.3d 492, 497 (2d Cir. 2006). Such errors may demonstrate that the waiver was not "knowingly, voluntarily, and competently provided by the defendant," and for that reason should not be enforced. *Riggi*, 649 F.3d at 147. Because Jackson did not raise the alleged errors before the district court, we review for plain error. *United States v. Pattee*, 820 F.3d 496, 505 (2d Cir. 2016).

Jackson argues that the magistrate judge who took his plea made two errors. First, he argues, the magistrate judge did not inform him that Hobbs Act robbery has as one of its elements the unlawful taking or obtaining of personal property, *see* 18 U.S.C. § 1951(b)(1), and thereby failed to discharge her obligation to "inform the defendant of, and determine that the defendant understands, ... the nature of each charge to which the defendant is pleading," Fed. R. Crim. P. 11(b)(1)(G). Second, because neither Jackson nor his accomplice took any property during the

December 16 attempted robbery, Jackson argues that the magistrate judge could not have established "a factual basis" for the crime charged—namely, completed Hobbs Act robbery. Fed. R. Crim. P. 11(b)(3). And because conspiracy to commit Hobbs Act robbery no longer constitutes a qualifying crime of violence to support a conviction for a § 924 firearms offense, *United States v. Barrett* (*Barrett II*), 937 F.3d 126, 129-30 (2d Cir. 2019), Jackson contends the magistrate judge erred in accepting his plea.

Jackson's arguments are without merit. Jackson pleaded guilty to a violation of 18 U.S.C. § 924(j)(1), not to Hobbs Act robbery. We have held that a court satisfies Rule 11(b)(1)(G) by "describing the elements of the offense in the court's own words." *United States v. Maher*, 108 F.3d 1513, 1521 (2d Cir. 1997). The transcript of the plea hearing demonstrates that the magistrate judge informed Jackson of each element of his § 924(j)(1) charge and ensured that Jackson understood the court's explanations, thus satisfying her obligation under Rule 11(b)(1)(G). *See* J. App'x 40, 45-47.

But even assuming that Rule 11 requires a magistrate judge to explain every material fact that the government would need to prove to secure a conviction on the count to which a defendant pleads, the government plainly would not have

had to prove that Jackson obtained property to convict him for a § 924(j)(1) firearm-related murder. When Jackson pleaded guilty, settled circuit precedent provided that Hobbs Act robbery conspiracy qualified as a "crime of violence" under § 924(c). *See United States v. Barrett* (*Barrett I*), 903 F.3d 166, 175 (2d Cir. 2018). Even though Hobbs Act robbery conspiracy no longer qualifies as a "crime of violence," *Barrett II*, 937 F.3d at 129-30, we have held that attempted Hobbs Act robbery does. *See United States v. McCoy*, No. 17-3515, 2021 WL 1567745, at *20 (2d Cir. Apr. 22, 2021). Therefore, the government would not have needed to prove that Jackson obtained property in order to obtain a conviction under § 924(j)(1). Jackson does not contest that the facts adduced at the plea hearing established that he attempted a robbery. The magistrate judge thus did not err either in accepting the plea or in finding a factual basis for the plea.

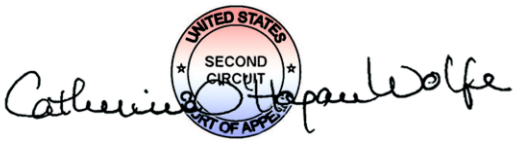
Moreover, Jackson cannot make the requisite showing under plain error review "that there is 'a reasonable probability that, but for the error, he would not have entered the plea.'" *Pattee*, 820 F.3d at 505 (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004)). Jackson does not point to any evidence indicating that he would not have entered this plea had he been informed of the obtaining-property element of Hobbs Act robbery. *See United States v. Lloyd*, 901 F.3d 111, 122

(2d Cir. 2018). Knowledge of this element would not have significantly altered Jackson's plea calculus. By pleading guilty, Jackson avoided a recommended life sentence under the Guidelines if a jury convicted him on the § 924(j)(1) charge—a distinct possibility, given the government's plan to display surveillance footage at trial showing Jackson repeatedly shooting Lopez. And the jury would not have needed to find that Jackson obtained property in order to convict him. Instead, the plea agreement provided that the highest end of his Guidelines range would be 365 months (just over 30 years). Jackson therefore has not shown "a reasonable probability that ... he would not have entered the plea" if the magistrate judge had informed him of Hobbs Act robbery's obtaining-property element. *Pattee*, 820 F.3d at 505. And, furthermore, the magistrate judge's failure to do so did not "seriously affect[] the fairness, integrity or public reputation of [the] judicial proceedings" leading to Jackson's sentence. *Id.*

* * *

For the foregoing reasons, we **DISMISS** this appeal.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



Appendix B

AO 245B (Rev. 11/16) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Eastern District of New York

UNITED STATES OF AMERICA
v.
JERMAINE JACKSON

JUDGMENT IN A CRIMINAL CASE

Case Number: CR-17-00140-001

USM Number: 89961-053

GARNETT H. SULLIVAN, ESQ.
Defendant's Attorney

THE DEFENDANT:

☑ pleaded guilty to count(s) COUNT SEVEN (7) OF THE INDICTMENT

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

☐ was found guilty on count(s) after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18USC924(j)(1)	FIREARM-RELATED MURDER OF EDWIN LOPEZ	12/16/2016	SEVEN(7)

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) ONE (1)THROUGH SIX (6) ☐ 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.

12/17/2018
Date of Imposition of Judgment

s/ Sandra J. Feuerstein
Signature of Judge

SANDRA J. FEUERSTEIN, U.S.D.J.
Name and Title of Judge

1/9/2019
Date

DEFENDANT: JERMAINE JACKSON
CASE NUMBER: CR-17-00140-001

IMPRISONMENT

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

THREE HUNDRED AND SIXTY FIVE (365) MONTHS

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

☑ 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 _____

a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: JERMAINE JACKSON
CASE NUMBER: CR-17-00140-001

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: FIVE (5) YEARS

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 cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
5. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *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)*
6. ☐ 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.

DEFENDANT: JERMAINE JACKSON
CASE NUMBER: CR-17-00140-001

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: JERMAINE JACKSON
CASE NUMBER: CR-17-00140-001

SPECIAL CONDITIONS OF SUPERVISION

For a period of 3 months, the defendant must be confined to his residence, commencing on a date approved by the U.S. Probation Department. The defendant must be required to be at his residence at all times except for approved absences for gainful employment, community service, religious services, medical care, educational or training programs, and at other such times as may be specifically authorized, in advance, by the U.S. Probation Department. The defendant must wear an electronic monitoring device and follow all location monitoring procedures. The defendant must permit the Probation Officer access to the residence at all times and may be required to maintain a telephone without any custom services at the residence. During this period, the defendant may be placed on a curfew if the U.S. Probation Office determines that this less restrictive form of location monitoring is appropriate. The defendant must pay all the costs associated with the location monitoring services and must disclose all financial information and documents to the Probation Department to assess his ability to pay.

☐

The defendant shall submit to an evaluation for an outpatient drug treatment program, approved by the U.S. Probation Department, to determine whether substance abuse treatment is necessary. If recommended to attend treatment, the defendant shall contribute to the costs of such treatment not to exceed an amount determined reasonable by the Probation Department's Sliding Scale for Substance Abuse Treatment Services, and shall cooperate in securing any applicable third party payment, such as insurance or Medicaid. The defendant shall disclose all financial information and documents to the Probation Department to assess his or her ability to pay. The defendant shall submit to testing during and after treatment to ensure abstinence from drugs and alcohol.

☐

The defendant shall obtain a graduate equivalency degree and/or shall participate in an educational or vocational training program as approved by the Probation Department.

☐

A search condition

DEFENDANT: JERMAINE JACKSON
CASE NUMBER: CR-17-00140-001

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	$ 100.00	$	$ 0.00	$ 0.00

☐ 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	$ _____	$ _____

☐ 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.

DEFENDANT: JERMAINE JACKSON
CASE NUMBER: CR-17-00140-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than _____ , or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

Appendix C

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 13th day of July, two thousand twenty-one.

United States of America,

Appellee,

v.

Jermaine Jackson,

Defendant - Appellant.

ORDER

Docket No: 19-13

Appellant, Jermaine Jackson, 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