

No.

IN THE
Supreme Court of the United States

LATIFF THOMPSON,

Petitioner,

v.

UNITED STATES, *et al.*,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 924(c)(3)(A) of Title 18 defines a “crime of violence” as a felony “that has an element the use, attempted use, or threatened use of physical force against the person or property of another.” Mr. Thompson argued in the Court of Appeals that, because a Hobbs Act robbery can be completed by threatening to harm oneself as a member of the family of the target of the robbery, as opposed to threatening the person or property “of another,” or by threatening a fear of intangible economic or financial injury, even a completed Hobbs Act robbery is not, under the categorical approach, a “crime of violence” for purposes of § 924(c)(3)(A). The Court of Appeals held that it was bound by the panel decision in *United States v. McCoy*, 58 F.4th 72 (2d Cir. 2023), holding that a completed Hobbs Act robbery constituted a crime of violence for purposes of 18 U.S.C. 924(c)(3)(A) even though the defendant in that case did not make the argument Mr. Thompson made in this one. The question presented to this Court is whether the Second Circuit Court of Appeals’s rule (joined by other Courts of Appeals) that a subsequent panel must follow the precedent of a prior panel’s decision on the same issue, *even when the arguments made before the second panel are different*, violates the defendant’s constitutional rights to due process and to the effective assistance of counsel, and the right to appellate review of his claim of error.

LIST OF PARTIES

Latiff Thompson, AKA LaBanga, Appellant

Matthew Elias, AKA Heddis, Respondent

United States of America, Appellee

LIST OF RELATED CASES:

United States v. Elias (Thompson), No. 18-cr-33, U.S. District Court for the Eastern District of New York. Judgment entered June, 5, 2023

United States v. Elias (Thompson), No. 23-6626(L), U.S. Court of Appeals for the Second Circuit. Judgment entered October 8, 2025

United States v. Elias (Thompson), No. 23-6627(Con), U.S. Court of Appeals for the Second Circuit. Judgment entered October 8, 2025

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OPINIONS BELOW

The Court of Appeals decision affirming the District Court’s denial of Mr. Thompson’s Rule 20 motion is reported at *United States v. Elias*, 154 F.4th 56 (2d Cir 2025) (summary order) (1a). The Court of Appeals decision denying Mr. Thompson’s petition for rehearing en banc is unreported (42a). The District Court decision affirming the conviction is reported at *United States v. Elias (Thompson)*, 619 F. Supp. 296 (E.D.N.Y. 2022) (23a). The District Court decision denying reconsideration of Mr. Thompson’s Rule 29 motion is unreported (22a).

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254 to review the Order of the United States Court of Appeals on the question whether a completed Hobbs Act robbery is a crime of violence for purposes of 924(c)(3)(A).

The Court of Appeals affirmed the District Court’s denial of Mr. Thompson’s Rule 29 motion for a judgment of acquittal on October 8, 2025, and denied rehearing en banc on May 6, 2026.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. “No person shall . . . be deprived of life, liberty, or property, without due process of law.” U.S. Const., Amend. V

2. “In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence.” U.S. Const., Amend. VI

3. “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const., Amend. XIV

4. Section 1951(a) of Title 18 (Hobbs Act robbery) prohibits the obstruction or delay of interstate commerce by “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.”

5. Section 924(c)(3(A) of Title 28 defines a “crime of violence” as a felony “that has as an element the use, attempted use, or threatened use of physical force against the person or property of another.”

STATEMENT OF THE CASE

Mr. Thompson’s claim on appeal involves a decision by a United States Court of Appeals on an important question of federal law that has not been, but should be, settled by this Court: that the panel that decided Mr. Thompson’s claim on appeal was bound by the contrary decision of a panel on the same claim in a prior case, even though the defendant in the prior case failed to make the argument that was made by appellant in this case. F.R.A.P. 40(b)(2) (A), (D).

The prior case, *United States v. McCoy*, 58 F.4th 72 (2d Cir. 2023), held that a completed Hobbs Act robbery constituted a crime of violence for purposes of 18 U.S.C.

924(c)(3)(A) because the defendants had “presented no hypothetical case in which a Hobbs Act robbery could be committed without the use, attempted use, or threatened use of force against another person or his property.” *McCoy*, 58 F.4th at 74. Mr. Thompson, however, argues something the *McCoy* defendants failed to argue: namely, that a Hobbs Act robbery can be completed by threatening to harm oneself as a member of the family of the target of the robbery, as opposed to threatening the person or property “of another,” or by threatening a fear of intangible economic or financial injury, even a completed Hobbs Act robbery is not, under the categorical approach, a “crime of violence” for purposes of § 924(c)(3)(A).

The panel in this case held that it was bound by the Second Circuit’s rule that panels in subsequent cases must follow the decision of the first panel to answer the question presented. Mr. Thompson therefore resorted to an en banc motion in order to litigate his claim that he was improperly sentenced because a Hobbs Act robbery is not a crime of violence for purposes of 18 U.S.C. § 924(c)(3)(A). The motion for rehearing en banc was denied.

The question presented is whether, since en banc review is a discretionary remedy, the Second Circuit’s policy deprived Mr. Thompson of his constitutional rights to due process, equal protection, and to the effective assistance of counsel, and of the right to appellate review of his claim of error. U.S. Const., Amends. V, VI, XIV; 28 U.S.C. § 1291.

STATEMENT OF FACTS

The Indictment

Mr. Thompson, together with codefendants Matthew Elias, Tyquan Henderson, and Lawrence Woods, was charged in Count 3 of the superceding indictment with the Hobbs Act robbery of an illegal narcotics trafficking business (18 U.S.C. § 1951(a)), and in Count 4 of that indictment with unlawful use of a firearm during that robbery (18 U.S.C. §§ 924(c)(1)(A)(i) and (ii)). Numerous other codefendants were charged in the same indictment with other counts including racketeering, Hobbs Act robberies, and other crimes relating to the criminal enterprise of which Mr. Thompson and his three codefendants were alleged to be a part.

The Crime

SHYMIK HYTMIAH, a member of the Mac Balla Brim set of the Bloods street gang, had a 13-year history of burglaries and robberies by home invasion, various weapons offenses, bank fraud, and identity theft, before he was arrested on December 17, 2017 in this case. He pleaded guilty to multiple counts of Hobbs Act robbery, discharging a weapon, racketeering, bank fraud, and identity theft, and faced 20 years to life in prison. He testified under a plea agreement through which he hoped to receive a “USSG § 5K1” letter from the government permitting a sentence below the mandatory minimum 20-year sentence he faced.

Hytmiah identified Latiff Thompson, Matthew Elias, Tyquan Henderson, and Lawrence Woods, in photographs as four of the men he recruited to commit a robbery of a narcotics stash house above a church at 191-11 Jamaica Avenue in Queens. Two other men, Brandon Darby and Dion Atkinson, also participated in that robbery, which was planned after another man, Shamel Simpkins, identified the location as a target. Simpkins suggested Mr. Thompson as a potential participant, and Mr. Thompson recruited Elias, Henderson, and Woods. Hytmiah identified all eight participants in the 191-11 Jamaica robbery in photographs.

According to Hytmiah, Mr. Thompson and his crew met Hytmiah, Darby and Atkinson at Hytmiah's Aunt's home at 184-23 Galway. Hytmiah told Mr. Thompson that they could expect to find \$400,000 and "a whole bunch of marijuana" at the stash house. After about 5 minutes of planning, during which Henderson and Woods displayed guns they would bring to the robbery, Mr. Thompson, Elias, Henderson, Woods, Hytmiah, and Darby drove in two cars to the 191-194 Jamaica stash house, while Atkinson remained behind to monitor police precinct radio traffic.

After they arrived, Darby left Hytmiah's car and went to the back of the stash house where he, Henderson and Woods climbed onto the roof of the first floor so as to access the second floor through a window (181-82). Meanwhile, Mr. Thompson, carrying a gym bag, waited in front of the stash house to be let inside. In his car, Hytmiah was on the phone alternately with Mr. Thompson, Darby and Atkinson. When he was on the phone with Darby, Hytmiah could hear him entering the second

floor and beating up a man inside who had been sleeping on the couch. After the man inside had been restrained, they let Mr. Thompson in. He went up to the second floor and was on the phone with Hytmiah when they found the marijuana. Mr. Thompson and Darby brought a safe that they found to Hytmiah's car. Hytmiah could see that Darby had blood all over him. The man in the stash house told them there was no money because they had just bought more marijuana.

Mr. Thompson went back to the car where Elias was waiting but Henderson and Woods, who apparently had the marijuana, were not there. Hytmiah drove Darby back to 184-23 Galway, opened the safe, and found approximately \$20,000 and a gun. Elias drove Mr. Thompson to 184-23 Galway where they met up with Darby and Hytmiah, who was angry because he thought Henderson and Woods were "playing games" with the marijuana. Eventually, they learned that Henderson and Woods were at Woods's baby-mother Keda's house. Hytmiah, who had the gun from the safe, and Atkinson drove to Keda's house at 116th Road and Sutphin Blvd. in Queens. Mr. Thompson, Elias, Henderson and Woods were all there with approximately 40 packages of marijuana. Hytmiah put the marijuana in a garbage bag and took it to his car. Hytmiah and Atkinson headed back to 184-23 Galway, followed by Mr. Thomson, Elias, Henderson and Woods in the other car (209, 212). Those four never arrived back at 184-23 Galway. Simpkins later told Hytmiah that they had been arrested and locked up.

Appellant Latiff Thompson's Testimony

LATIFF THOMPSON was a member of a gang that was a rival of the Mac Ballas gang of which Hytmiah was a member. He was introduced to Hytmiah by a fellow gang member, Terrance Payne, who was later killed in a botched Mac Ballas robbery. Hytmiah called Mr. Thompson on September 6, 2017, looking for Mr. Thompson's brother, Littles. Because Mr. Thompson was still angry about Payne's death, and did not like his brother being in the Mac Ballas gang, he decided to visit Hytmiah himself to see what he wanted. He brought Henderson and Woods with him, and flagged down Elias for a ride.

They arrived at the Galway address where Mr. Thompson found that Hytmiah had been planning a bigger operation than he expected. He felt he had gotten into something over his head. When Hytmiah started talking about robbing a stash house, Mr. Thompson said that he would not participate. Henderson and Woods decided to stay so Mr. Thompson left by himself and asked Elias to take him to his second-floor apartment so he could pick up video games and then to his girlfriend's apartment a few blocks from 192-11 Jamaica Avenue. A photograph of the inside of Elias's rental car on the night Mr. Thompson was arrested showed video games on the front passenger seat.

Later, Mr. Thompson got a call from Hytmiah asking where his men were, but Mr. Thompson told him he did not know. Hytmiah came to Mr. Thompson's girlfriend's apartment with four other men, pulled a gun on him, and again demanded

to know where his men were. Hytmiah drove him to 192-11 Jamaica Avenue. On the way, they grabbed his phone and made calls to Henderson, Woods, and Elias. After they arrived, Mr. Thompson saw Hytmiah bring a safe from the building to Hytmiah's car. Hytmiah continued to accuse Mr. Thompson of knowing where the other three men were but eventually brought him to Galway.

Finally, Woods called Mr. Thompson and told him they had "everything" at Woods's house. So Hytmiah, who knew where Woods lived, and the others all went there. Hytmiah went down to the basement, leaving Mr. Thompson outside in the car at gunpoint. Mr. Thompson knew, however, that Hytmiah and Woods were arguing, and that Woods was telling him "that's all I got." Hytmiah then came outside and told Mr. Thompson that he was "good," and let him leave. Mr. Thompson saw Elias again, flagged him down, and asked Elias to take him home. Just as they were about to leave, Woods and Henderson jumped in the car as well, and they drove away, only to be pulled over by the police a block down the road and arrested.

The Rule 29 Motions for a Judgment of Acquittal

At the close of evidence, both defense counsel argued that the Government had failed to elicit sufficient proof of their guilt on the weapon count. The prosecutor argued that the Government had produced sufficient proof of the charged crimes without addressing the interstate commerce claim. The District Court denied the motions without explanation.

Counsel for Mr. Thompson later filed a written Rule 29 motion arguing that there was insufficient proof that force was used during the robbery, that Mr. Thompson was connected to a gun during it, or that he was an accomplice to either crime. Setting forth in detail the evidence at trial, the Government opposed the motion. The District Court found sufficient proof on both counts of conviction and denied the motion.

Counsel for Mr. Thompson sought reconsideration of his acquittal motion on the ground that a newly-decided Supreme Court case, *United States v. Taylor*, 142 S.Ct. 2015 (2022), rendered 18 U.S.C. § 924(c)(1)(A) inapplicable to Hobbs Act robbery, requiring dismissal of Count 4 of the indictment. Counsel argued that under *Taylor*, 142 S.Ct. at 2025, which had jettisoned the “realistic probability” test of *United States v. Hill*, 890 F.3d 51(2d Cir. 2016), whether a crime constitutes a crime of violence for purposes of § 924(c) is determined by a straight comparison of the elements of the underlying crime to the definition of a crime of violence. See *United States v. Chappelle*, 41 F.4th 102, 108 (2d Cir. 2022). Counsel alleged that a comparison of the elements of Hobbs Act robbery demonstrated that it was not a crime of violence.

The Government countered by arguing that nothing in *Taylor* or *Chappelle* led to the conclusion that a completed Hobbs Act robbery, as opposed to an attempted one, or a conspiracy to commit one, was not a crime of violence. The Government

argued that the holding of *Hill*, that a completed Hobbs Act robbery constituted a crime of violence under the categorical approach, remained good law.

The District Court, relying on the Second Circuit Court of Appeals's decision in *United States v. McCoy*, 58 F4th 72 (2d Cir. 2023), which was decided while Mr. Thompson's reconsideration motion was pending, denied the motion. The Court of Appeals had held in *McCoy* that because "[d]efendants here have presented no hypothetical case in which a Hobbs Act robbery could be committed without the use, attempted use, or threatened use of force against another person or his property," their § 924(c) convictions with respect to completed Hobbs Act robberies were affirmed. *Id.* at 75.

The Appeal to the Second Circuit Court of Appeals

Mr. Thompson appealed, making the same argument he had made before the district court, namely that *United States v. Taylor*, 142 S.Ct. 2015 (2022), rendered 18 U.S.C. § 924(c)(1)(A) inapplicable to Hobbs Act robbery. He argued that, under the categorical approach, § 924(c) is not a crime of violence because it could be committed by threatening harm to oneself, or by putting a victim in fear of economic injury to an intangible asset without threatening the use of force. In the first hypothetical, the defendant would not be threatening the use of force against "another," and in the second, he would not be threatening the use of force at all.

The Court of Appeals, relying on *McCoy*, affirmed his conviction on October 8, 2025. After the Mandate issued, appellate counsel moved to recall the Mandate.

The Court granted the motion recalling the mandate and permitted Mr. Thompson file a motion for rehearing. The Court denied Mr. Thompson's motion for rehearing en banc on May 6, 2026 (Appendix C).

REASONS CERTIORARI SHOULD BE GRANTED

Following his conviction of both a completed Hobbs Act robbery, and of committing a crime of violence under 18 U.S.C. § 924(c), Mr. Thompson argued in the district court that, under *United States v. Taylor*, 596 U.S. 845 (2022), which had jettisoned the “realistic probability” test of *United States v. Hill*, 890 F.3d 51(2d Cir. 2016), whether a crime constitutes a crime of violence for purposes of § 924(c) is determined by a straight comparison of the elements of the underlying crime to the definition of crime of violence set forth in § 924(c). See *United States v. Chappelle*, 41 F.4th 102, 108 (2d Cir. 2022). Counsel argued that, under *Taylor*'s categorical approach, a comparison of the elements of Hobbs Act robbery demonstrated that it was not a crime of violence (A 1974).

While Mr. Thompson's motion for reconsideration of his Rule 29 acquittal motion was pending, this Second Circuit Court of appeals decided, in *United States v. McCoy*, 58 F.4th 72 (2d Cir. 2023), that a completed Hobbs Act robbery constituted a crime of violence for purposes of 18 U.S.C. 924(c)(3)(A). In doing so, however, the Court stated that “unlike in *Taylor*, Defendants here have presented no hypothetical case in which a Hobbs Act robbery could be committed without the use, attempted use, or threatened use of force against another person or his property.” *McCoy*, 58

F.4th at 74. Mr. Thompson, however, identified two such hypothetical scenarios in which a Hobbs Act robbery would not be not a crime of violence as defined in § 924(c)(3)(A).

A Hobbs Act robbery involves committing a robbery through force, violence, or fear of injury against a person, his property, or anyone in his company including family members. Section 924(c)(3)(A) of Title 18 defines a "crime of violence" as a felony "that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." Mr. Thompson argued in the district court, and then again in the Court of Appeals, that, because a Hobbs Act robbery can be completed by threatening to harm oneself, as opposed to threatening the person or property "of another," or by inducing a fear of intangible economic or financial injury without threatening violence, even a completed Hobbs Act robbery is not, under the categorical approach, a "crime of violence" for purposes of § 924(c)(3)(A).

This Court has cautioned that showing how an underlying conviction is not a crime of violence "requires more than the application of legal imagination to [the] . . . statute's language"; rather there must be "a realistic probability, not a theoretical possibility," that the statute could encompass conduct that is not a crime of violence. *Gonzalez v. Duanas-Alvarez*, 549 U.S. 183, 193 (2007); See *Hill*, 890 F.3d at 56. While the Court stated in *Gonzalez* that to show how a posited hypothetical case is realistic a defendant "must at least point to his own case or other cases in which the

. . . courts did, in fact apply the statute in the . . . manner for which he argues,” Mr. Thompson argued that pointing to a case is not the only way to show that the hypothetical case is realistic.

Here, with respect to his “threat of suicide” scenario, Mr. Thompson pointed to the language of the underlying Hobbs Act robbery statute itself to show that robbery by threat of suicide is a realistic hypothetical case that would take it out of the ambit of § 924(c)(3)(A)’s “crime of violence” definition. A Hobbs Act robbery can be committed not just by threatening or using violence against the person or property of another, but also against “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.” (emphasis supplied). While § 924(c)(3)(A)’s definition “against the person or property of another” could reasonably apply to relatives, family members, or others in the robbery target’s company, it cannot reasonably apply to the robber himself. The robber himself simply cannot be “another.”

With respect to his “economic harm” scenario, defense counsel relied on Leonard B. Sand et al., *Modern Federal Jury Instructions*, Instruction 50-5, to posit that a Hobbs Act robbery can be committed by causing “fear of injury” of an economic or financial intangible asset without the use of force (A 1988). In *United States v. Torres-Miguel*, 701 F.3d 165, 168-69 (4th Cir. 2012), *overruled on other grounds by United States v. Castleman*, 572 U.S. 157 (2014), the court distinguished between a crime of violence statute defined in terms of the harm caused, e.g. “physical harm to

another,” from one defined by the action taken, e.g. “the use or threatened use of force.” While the latter necessarily involves violent conduct, the former does not, since harm can result in the absence of violent conduct. *Id.* By including “fear of harm” among the ways a Hobbs Act robbery can be committed, § 1951(a) encompassed conduct that does not involve violence and, therefore, is not categorically a “crime of violence” statute for purposes of § 924(c)(3)(A).

The problem for Mr. Thompson, and for all similarly situated defendants, is that his appeal with respect to his § 924(c) claim was over before it began. In *United States v. Peguero*, 34 F.4th 143, 158 (2d Cir. 2022), the Second Circuit Court of Appeals recognized that there was “a longstanding rule that a panel of our [c]ourt is bound by the decisions of prior panels until such times as they are overruled either by an en banc panel of our [c]ourt or by the Supreme Court.” Under that rule, once *McCoy* was decided, there is no argument Mr. Thompson could have made that would result in a panel determination that a completed Hobbs Act robbery was not a crime of violence. This was borne out by the decision in *United States v. Barrett*, 102 F.4th 60, 82 (2d Cir. 2024) *rev’d on other grounds by Barrett v. United States*, 607 U.S. 128 (2026), in which the panel deferred to *McCoy*, even though the defendant had raised the same two hypothetical reasons Mr. Thompson argued that a completed Hobbs Act robbery was not a crime of violence, and that were not argued in *McCoy*. The *Barrett* panel expressly found itself constrained by *McCoy* because of the rule recognized in *Peguero*. *Barrett* 102 F.4th at 82, (citing *United States v. Baker*, 49

F.4th 1348, 1358 (10th Cir. 2022) (rejecting argument that Hobbs Act robbery is not a crime of violence based on new arguments not considered by prior panel because “that holding is the law of this Circuit regardless of what might have happened had other arguments been made to the panel that decided the issue first” (emphasis in original) (internal quotation marks omitted)). As the Court stated in *Peguero*, “[i]t is ‘neither appropriate nor possible’ for us to reject our prior decisions.” 34 F.4th at 158; see *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004) (same).

Despite it being a longstanding one, the rule against departing from prior panel precedent has important constitutional implications. The decisions in *Peguero* and *Wilkerson* expressly offer en banc review as a solution to the rule against a subsequent panel reaching a holding contrary to one previously decided. *Peguero*, 34 F.4th at 148; *Wilkerson*, 361 F.3d at 732. But there is a vast difference between the right to appeal a district court judgement to a Court of Appeals, and the right to seek discretionary review of the claim en banc or by petition for a writ of certiorari to the this Court. Indeed, the Federal Rules of Appellate Procedure expressly discourage en banc review, stating that such petitions are “not favored” (F.R.A.P 40(a)). Thus, the rule against departing from prior precedent deprives a defendant of the right to direct appellate review of his claim of error. The possibility of discretionary review is simply not an adequate substitute, especially when the claim raised is of constitutional dimension.

The goal of the rule requiring deference to a prior panel's decision is to ensure consistency of circuit law. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003). But Circuit consistency cannot be permitted to trump the constitutional rights of criminal defendants. And, while many Circuits have signed off on the rule, those decisions only mean that many more similarly-situated criminal defendants are being deprived of their constitutional and appellate rights than just those in the Second Circuit. *See, e.g., Stein v. Gill*, 2023-1265, 2023 U.S. App. LEXIS 14383 *8 (Fed. Cir. 2023); *United States v. Files*, 63 F.4th 920, 921 (11th Cir. 2023); *Baker*, 49 F.4th at 1358 (10th Circuit); *United States v. Mouscardy*, 722 F.3d 68, 77 (1st Cir. 2013); *Mader v. United States*, 654 F.3d 794, 800 (8th Cir. 2011). *Miller*, 335 F.3d at 900 (9th Circuit).

Having been granted the right to appeal, criminal defendants must be given access to the means for meaningful appeal proceedings. *Griffin v. Illinois*, 351 U.S. 12, 18-19 (1956). The Court in *Griffin* found that a state must afford an indigent defendant transcripts of the trial from which he is appealing. Refusal to do so offended both due process and equal protection. *Griffin*, 351 U.S. at 18-19. Mr. Thompson has been deprived of due process and equal protection by a policy rule that permits only the first defendant who raises a claim of error to do so on direct appeal. All subsequent, but similarly-situated, defendants are precluded from raising the same claim even if the arguments they want to make are different from those made by the first defendant. The subsequent defendants, like Mr. Thompson in this case, are deprived of appellate review of his claim of error as of right, and the possibility of

discretionary review does not provide either due process or equal protection to defendants in Mr. Thompson's shoes.

The rule also deprives the defendant of his Sixth Amendment right to the effective assistance of counsel because no amount of skill by appellate counsel can result in an outcome different from the one a prior panel reached, even on arguments different from those raised in the prior case. *Herring v. New York*, 422 U.S. 853, 860 (1975) (“The constitutional right of a defendant to be heard through counsel necessarily includes his right to have his counsel make a proper argument on the evidence and the applicable law in his favor, however simple, clear, unimpeached, and conclusive the evidence may seem”) (quoting *Yopps v. State*, 228 MD. 204, 178 A.2d 879(1962)); see *Wallberg v. Israel*, 766 F.2d 1071, 1076 (7th Cir. 1985) (hostility of trial judge to defense counsel prevented counsel from effectively representing defendant).

In sum, the rule that has been adopted by most, if not all, Circuit Courts of Appeals, in furtherance of in-Circuit consistency, prevents criminal defendants from raising arguments on an issue already decided by a Circuit panel in a previous case, even when the later challenge relies on different arguments. Because that rule appears to violate the constitutional rights of criminal defendants to due process, equal protection, and effective assistance of counsel, and their right to direct appellate review, this case involves a decision by a United States Court of Appeals on

an important question of federal law that has not been, but should be, settled by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: Garden City, New York
June 12, 2026

Respectfully submitted,

/s/ Paul Skip Laisure
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APPENDIX

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23-6626(L)
United States v. Elias

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 TO 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 8th day of October, two thousand twenty-five.

PRESENT:

GERARD E. LYNCH,
BETH ROBINSON,
ALISON J. NATHAN,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v.

Nos. 23-6626(L),
23-6627(CON)

MATTHEW ELIAS, AKA HEDDIS, LATIFF
THOMPSON, AKA LABANGA,

Defendants-Appellants,

SHAMIEK HYTMIAH, AKA SHA-BALLA,
CONSTANTIN CHEESE, AKA CONS, DESMOND
MURCHISON, AKA DEZ, ANDRE BARNABY, AKA
GOONIE DRE, BRANDON DARBY, AKA BARRACK,
ANTONIO DAVIS, AKA BIG BLOOD, TYQUAN
HENDERSON, AKA GUN PLAY, MICHAEL MILES,
AKA MENACE, AVERY MITCHELL, AKA SLAV,
NAHJUAN PERRY, AKA NAS, PIERRE RAYMOND,
AKA LEEKY, JAMES ROBERSON, AKA LITTLES,
SHAWN SILVERA, AKA DUM OUT, SHAMEL
SIMPKINS, AKA SHA BANG, RASHAWN SMITH,
AKA SHAWN, KIMBERLY THOMPSON, AKA
KIMMY, LAWRENCE WOODS, AKA LAZO, KAHMEL
GRANT, AKA ORNELLY,

*Defendants.**

FOR APPELLEE:

DANA REHNQUIST, Assistant United
States Attorney (Anthony Bagnuola,
Assistant United States Attorney, *on the
brief*), for Breon Peace, United States
Attorney for the Eastern District of New
York, Brooklyn, NY.

FOR DEFENDANT-APPELLANT ELIAS:

JEREMY GUTMAN, New York, NY.

FOR DEFENDANT-APPELLANT
THOMPSON:

PAUL SKIP LAISURE, Garden City, NY.

Appeal from a judgment of the United States District Court for the Eastern
District of New York (Garaufis, *Judge*).

* The Clerk's office is respectfully directed to amend the caption as reflected above.

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that, for the reasons set forth in this order and in the opinion filed simultaneously with it, the judgments against Matthew Elias and Latiff Thompson entered on June 7, 2023, are **AFFIRMED IN PART AND VACATED IN PART**, and the case is **REMANDED** to the district court.

A jury convicted Defendants-Appellants Matthew Elias and Latiff Thompson of Hobbs Act robbery, 18 U.S.C. §§ 1951(a), 2, and the unlawful use of a firearm, *id.* §§ 924(c), 2. Their charges and convictions were the result of their involvement in robbing a marijuana stash house in September 2017. Seven people participated in the robbery; Elias drove one of two getaway cars, and Thompson was one of four people involved in entering the stash house and taking marijuana, cash, and a gun from inside.

In this summary order, we resolve both Defendants' challenges to their convictions and sentences, with the exception of Elias's challenge to his order of forfeiture, which we resolve in a published opinion also issued today. We refer the parties to the factual overview in that opinion, which we supplement only as necessary to explain our decision in this summary order. We otherwise assume

the parties' familiarity with the underlying facts, procedural history, and arguments on appeal.

I. Hobbs Act Robbery and 18 U.S.C. § 924(c)

Thompson and Elias both challenge the district court's denial of their respective motions for judgment of acquittal on the § 924(c) charges pursuant to Federal Rule of Criminal Procedure 29 ("Rule 29") because they contend that the predicate offense, Hobbs Act robbery, is not a crime of violence under § 924(c).¹ They rely on *United States v. Taylor*, in which the Supreme Court held that *attempted* Hobbs Act robbery is not a proper predicate for a § 924(c)(1)(A) conviction because proof of attempted Hobbs Act robbery does not necessarily require proof that the defendant "used, attempted to use, or threatened to use force." 596 U.S. 845, 852 (2022). Defendants contend the same is true of substantive Hobbs Act robbery because a person who threatens *self*-harm at gunpoint to extort a friend or relative would violate the Hobbs Act without threatening force against "another." Thompson Br. 36 (quoting 18 U.S.C. § 924(c)(3)(A)).

We review the denial of a Rule 29 motion for judgment of acquittal without deference to the district court's reasoning. *See United States v. Persico*, 645 F.3d 85,

¹ Elias joined all of Thompson's arguments to the extent they apply to both cases.

104 (2d Cir. 2011). Our cases squarely foreclose Defendants’ argument. As relevant here, § 924(c) prohibits using or carrying a firearm “during and in relation to any crime of violence,” 18 U.S.C. § 924(c)(1)(A), which is in turn defined as a felony that “has as an element the use, attempted use, or threatened use of physical force against the person or property of another,” *id.* § 924(c)(3)(A).

We have held, *after* the Supreme Court’s decision in *Taylor*, that “nothing in *Taylor*[] . . . undermines this Court’s settled understanding that completed Hobbs Act robberies are categorically crimes of violence pursuant to section 924(c)(3)(A).” *United States v. McCoy*, 58 F.4th 72, 74 (2d Cir. 2023).² We reaffirmed that holding in *United States v. Barrett* in the face of the very argument defendants make here. 102 F.4th 60, 81 (2024) (“[The defendant] hypothesizes a defendant convicted of Hobbs Act robbery for taking or obtaining property by threatening harm to himself.”). We concluded we were bound by our decision in *McCoy*. *Id.* at 82–83. We conclude the same here.

² In quotations from caselaw and the parties’ briefing, this summary order omits all internal quotation marks, footnotes, and citations, and accepts all alterations, unless otherwise noted.

II. Sufficiency of Evidence as to Elias's § 924(c) Conviction

Elias contends the district court erred in denying his Rule 29 motion with respect to his § 924(c) conviction because the evidence was insufficient to show that he had “*advance knowledge*” that a confederate would use or carry a gun in the stash house robbery, as necessary to sustain his conviction under an aiding and abetting theory of liability. Elias Br. at 17 (quoting *Rosemond v. United States*, 572 U.S. 65, 81–82 (2014)) (emphasis added).

We review the district court's determination as to the sufficiency of the evidence without deference to the district court. *United States v. Laurent*, 33 F.4th 63, 75 (2d Cir. 2022). And “we view the evidence in the light most favorable to the government” and will uphold the conviction “if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Id.*

There is sufficient evidence here that Elias knew that a confederate would be carrying a gun at the robbery. A confederate, Shamiel Hytmiah, testified that Elias was present at a planning meeting where two other participants lifted up their shirts to show the group that they were carrying guns. That evidence would allow a rational factfinder to conclude beyond a reasonable doubt that Elias had “advance knowledge that a confederate would use or carry a gun” during the

robbery. *Rosemond*, 572 U.S. at 67. It makes no difference that Elias testified differently or that Hytmiah was not certain whether Elias was watching when the others showed their guns. Hytmiah testified that nothing loud or distracting was happening at the time. The jury could therefore conclude from Hytmiah's testimony that Elias saw that two confederates were carrying guns before he drove them to the scene of the robbery. *See Laurent*, 33 F.4th at 75 (noting that we defer to the jury's assessment of witness credibility and the weight of competing evidence).

III. Evidentiary Rulings

We review a district court's evidentiary rulings for abuse of discretion and will disturb an evidentiary ruling only where the decision to admit or exclude evidence was "manifestly erroneous." *United States v. McPartland*, 81 F.4th 101, 114 (2d Cir. 2023). This is especially true for rulings under Federal Rule of Evidence 403, when a district court must weigh the "relevancy and unfair prejudice of proffered evidence," because the district court "sees the witnesses, the parties, the jurors, and the attorneys, and is thus in a superior position to evaluate the likely impact of the evidence." *Id.*

“Even if an evidentiary ruling is manifestly erroneous, we will affirm—and the defendant is not entitled to a new trial—if the error was harmless.” *United States v. Kelly*, 128 F.4th 387, 424 (2d Cir. 2025); *see also* Fed. R. Crim. P. 52(a). “The strength of the government’s case is the most critical factor in assessing whether error was harmless.” *United States v. McCallum*, 584 F.3d 471, 478 (2d Cir. 2009). We also consider “the prosecutor’s conduct with respect to the improperly admitted evidence; [] the importance of the wrongly admitted evidence; and [] whether such evidence was cumulative of other properly admitted evidence.” *Id.*

A. Social Media Posts Suggesting Elias’s Gang Affiliation

Elias challenges the district court’s decision to admit social media images of Elias holding up hand signs purportedly associated with gang membership, arguing that the district court abused its discretion when it failed to recognize that the unfair prejudicial effect of that evidence outweighed any probative value. Despite a pretrial ruling that the prejudicial effect of these images would substantially outweigh any probative value relative to the robbery and firearms charges, the district court allowed the government to cross-examine Elias using the social media images after Elias testified on direct that he did not know

Hytemiah (an admitted member of the same gang in question) until the night of the robbery.

Even if we concluded that admitting the gang-affiliation evidence was an abuse of discretion, it would be harmless error. The government's case was generally strong,³ and the district court instructed the jury to consider gang-affiliation evidence only for the permissible purpose of establishing relationships among the people in the case. We presume the jury was able "to understand, make sense of, and follow" this instruction. *Samia v. United States*, 599 U.S. 635, 646 (2023).

B. Blood-Covered Gloves in Thompson's Pocket

Thompson challenges the district court's decision to let the government cross-examine him about a pair of apparently bloody gloves that police recovered from his back pocket when he was arrested the night of the robbery, and to let the government show the jury police paperwork about the gloves. In a pretrial ruling, the district court suppressed all evidence of the gloves because the government

³ The evidence at trial included testimony from the robbery's organizer (Hytemiah) about Elias's role in the robbery's execution, *see generally* Gov't App'x 1–128, and phone records showing Elias's frequent contact with other perpetrators, *see, e.g.*, App'x 1769–70. Elias also discussed the robbery with others in recorded calls while he was detained before trial. *See* Gov't Ex. 513.

failed to timely disclose them. *See United States v. Elias*, No. 18-CR-33, 2022 WL 805334, at *5-6 (E.D.N.Y. Mar. 16, 2022). But Thompson took the stand and explained that he was not involved in the robbery in any way, and that he met up with Elias and the other perpetrators only after the robbery was over. The government then sought to impeach his credibility on cross by asking whether, at the time of his arrest, police took from him a pair of bloody gloves. When Thompson said no, the government offered documentation contradicting his denial.

“A trial court is accorded broad discretion in controlling the scope and extent of cross-examination.” *United States v. Gatto*, 986 F.3d 104, 121 (2d Cir. 2023). “Once a defendant has put certain activity in issue by offering innocent explanations for or denying wrongdoing, the government is entitled to rebut by showing that the defendant has lied.” *United States v. Beverly*, 5 F.3d 633, 639 (2d Cir. 1993); *cf. United States v. Havens*, 446 U.S. 620, 627–28 (1980) (“[A] defendant’s statements made in response to proper cross-examination reasonably suggested by the defendant’s direct examination are subject to otherwise proper impeachment by the government, albeit by evidence that has been illegally

obtained and that is inadmissible on the government's direct case, or otherwise, as substantive evidence of guilt.").

Thompson testified during his direct examination that he met with the perpetrators of the robbery after the robbery was completed, but before he and others were arrested during the traffic stop of Elias's car. The government's questions and evidence about the bloody gloves in Thompson's pocket fairly impeached his credibility by undermining his testimony that he joined the others *after* they completed the robbery. *See Beverly*, 5 F.3d at 640. By testifying as he did, Thompson opened the door to impeaching evidence.

Thompson's argument that admitting the gloves was unduly prejudicial because he was not able to test the gloves to determine whether they were, in fact, bloody, does not persuade us otherwise. He was able to argue to the jury that there was no evidence that the substance on the gloves was blood because the government hadn't tested it. It was for the jury to decide what weight, if any, to give to his possession of the gloves.

C. The Security Camera

Elias and Thompson challenge the district court's decision to permit the government to offer in its rebuttal case testimony and a photograph showing that

a security camera mounted at the stash house *at the time of the trial* was the same brand as a security camera that police recovered from Elias's car the night of the robbery. They contend that evidence about the camera at the stash house in 2022 was irrelevant, lacked any foundation, and was unfairly prejudicial. The government responds that the evidence was relevant to rebut Elias's testimony denying knowledge that a camera had been seized from his car.

Any arguable error in admitting the evidence was harmless. As Thompson argues, especially absent any evidence that a camera was stolen from the stash house in the course of the robbery, evidence that the brand of the camera recovered from Elias's car immediately after the robbery was the same as the brand of the camera mounted in the stash house *years after the robbery* had little to no probative value. In the face of the government's strong case against both defendants, we "can conclude with fair assurance that the [security camera] evidence did not substantially influence the jury."⁴ *McCallum*, 584 F.3d at 478.

⁴ In addition to the evidence concerning Elias cited in note 3, Hytmiah's testimony and the phone records likewise detailed Thompson's involvement in the robbery's execution. Furthermore, the trial evidence included the transcript of a confession Thompson made to federal agents after his arrest. See App'x 1822–37.

D. Detective Adam Georg's Summary Evidence

Elias and Thompson challenge the district court's decision to permit Detective Adam Georg to testify about the contents of a chart summarizing evidence pertaining to cell phone records and location data, arguing that Georg's testimony amounted to an unfair and premature closing statement.

We disagree. Federal rules permit district courts to “use a summary, chart, or calculation to prove the content of voluminous writings . . . that cannot be conveniently examined in court.” Fed. R. Evid. 1006 (2022).⁵ We have regularly affirmed trial courts' admission of charts to summarize voluminous records of phone calls and other communications. *See, e.g., United States v. Ho*, 984 F.3d 191, 209–10 (2d Cir. 2020); *United States v. Miller*, 954 F.3d 551, 565 (2d Cir. 2020).

The phone records in this case were voluminous and contained intricate data that might have been difficult for jurors to review on their own. *See, e.g., App'x 480–756*. Elias and Thompson do not dispute that Georg's testimony accurately synthesized the phone records consistent with Rule 1006. We disagree with Elias and Thompson that the testimony was improperly cumulative of the underlying evidence; the district court was within its discretion in concluding that

⁵ We cite to the text of Rule 1006 in effect at the time of trial, before the rule was substantially amended in 2024. *See* Fed. R. Evid. 1006 advisory committee's note to 2024 amendment.

the summary testimony was necessary to help the jury understand the hundreds of pages of dense phone records.

IV. Elias’s Special Conditions of Supervised Release

Elias challenges several special conditions of supervised release that appear in his written judgment but that the district judge did not pronounce at sentencing. We owe no deference to the district court’s conclusions when we review “whether the spoken and written terms of a defendant’s sentence differ impermissibly.” *United States v. Washington*, 904 F.3d 204, 207 (2d Cir. 2018).⁶ “[I]n the event of variation between an oral pronouncement of sentence and a subsequent written judgment, the oral pronouncement controls, and any burdensome punishments or restrictions added in the written judgment must be removed.” *United States v. Rosado*, 109 F.4th 120, 124 (2d Cir. 2024).

In this case, the district court sentenced Elias to five years’ supervised release without pronouncing any standard or special conditions, even by

⁶ The government urges plain error review here because the defendant never objected to his conditions of supervised release at sentencing. See Gov’t Br. 69. But we have explained that where, as here, “the defendant lacked prior notice in the district court that the term would be imposed, we will review the issue [without deference] even if the defendant failed to raise an objection in the district court.” *United States v. Rosado*, 109 F.4th 120, 124 (2d Cir. 2024).

reference. But the written judgment included four special conditions. We address in turn whether each was properly imposed.

The first special condition of supervised release that Elias challenges states that he “shall not possess a firearm, ammunition[,], or destructive device.” Elias App’x 118. However, that special condition of supervised release is nearly identical to—but overall less restrictive than—a standard condition of supervised release that Elias has not challenged on appeal. That condition says in relevant part: “You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon[.]” *Id.* at 117. So even if this special condition was insufficiently pronounced, it “does not affect substantial rights” and “must be disregarded.” Fed. R. Crim. P. 52(a).

The second special condition of supervised release that Elias challenges states that Elias:

[s]hall not associate in person, through mail, electronic mail[,], or telephone with any individual with an affiliation to any organized crime groups, gangs[,], or any criminal enterprise; nor shall the defendant frequent any establishment, or other locale where these groups may meet pursuant, but not limited to, a prohibition list provided by the probation department[.]

Elias App'x 118. The government responds that the special condition was the same as a standard condition of supervised release, which need not be orally pronounced because it is listed in United States Sentencing Guideline § 5D1.3(c)(8).⁷

But there are material differences between the special condition the court imposed and the condition recommended by the Guidelines in § 5D1.3(c)(8). The special condition in Elias's judgment imposes restrictions on Elias's association with a broad class of people who have "an affiliation" with "any" criminal groups and organizations, regardless of whether Elias knows of that affiliation. Elias App'x 118. It also restricts Elias' interactions with "gangs," regardless of whether they are engaged in criminal activity at all. *Id.* And it restricts the locations Elias may "frequent," even on his own. *Id.* The condition recommended in U.S.S.G. § 5D1.3(c)(8) is meaningfully narrower; it limits Elias's interactions only with people whom Elias "knows [are] engaged in criminal activity" and prohibits "knowing[]" communications with people convicted of a felony. It has no

⁷ Section 5D1.3(c)(8) of the Guidelines recommends imposing the following condition of supervised release: "The defendant shall not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant shall not knowingly communicate or interact with that person without first getting the permission of the probation officer."

restrictions at all on where Elias may go. *See* U.S.S.G. § 5D1.3(c)(8). This special condition is not coextensive with a standard condition. Because it was not pronounced at sentencing, the condition should be stricken from the judgment. *See Rosado*, 109 F.4th at 125–26.

The third special condition of supervised release that Elias challenges states that Elias:

shall not have contact with any of the victims or any of their family members. This means that [he] shall not attempt to meet in person, or communicate by letter, telephone, email, the internet, or through a third party, without the knowledge and permission of the U.S. Probation Department.

Elias App'x 118. The government acknowledges that this special condition “should have been, but was not, announced at sentencing,” but nonetheless argues that its omission was not plain error because Elias consented to this condition by way of a letter from counsel filed several days after sentencing. Gov't Br. 72; *see also* Elias App'x 131 (counsel's letter). However, the letter from counsel consents only to Elias “refrain[ing] from contacting the victim of the offense” as a condition of supervised release. Elias App'x 131. The letter consents to a narrower condition of release than the condition the district court imposed, which extends to the family members of the victim. Elias's counsel either did not know or did not

consent to the full scope of the contemplated condition of supervised release. So we will not deem it a sufficiently “intentional relinquishment or abandonment of a known right” to challenge the condition to its full extent. *United States v. Brown*, 352 F.3d 654, 663 (2003). As the government concedes it was not otherwise pronounced in Elias’s presence, to the extent the condition imposes limitations beyond the requirement that Elias not contact the victim, it must be stricken. *See Rosado*, 109 F.4th at 125–26.

Finally, the fourth special condition of supervised release that Elias challenges states that Elias “shall comply with the attached order of forfeiture.” Elias App’x 118. We need not evaluate this special condition on its own terms. Instead, because we vacate Elias’s forfeiture order in a published opinion issued contemporaneously with this summary order, we also vacate this condition.

V. Thompson’s Sentence

Thompson argues that his sentence was unreasonable because the district court did not reduce his term of imprisonment to reflect credit for nine months and twenty-four days he spent in state custody pending state firearms charges that resulted from the same arrest that ultimately led to this case. Thompson’s argument is styled as a *substantive* reasonableness challenge, but it appears to be

at least in part a *procedural* reasonableness challenge because he contends that the district court failed to properly calculate Thompson’s sentencing range under the United States Sentencing Guidelines. We review both the procedural and substantive aspects of Thompson’s sentence and see no error.

“We review a sentence for procedural and substantive reasonableness under a deferential abuse-of-discretion standard.” *United States v. Thavaraja*, 740 F.3d 253, 258 (2d Cir. 2014). “A district court commits procedural error where it fails to calculate the Guidelines range” or “makes a mistake in its Guidelines calculation.” *United States v. Cavera*, 550 F.3d 180, 190 (2d Cir. 2008) (en banc). Procedural error also occurs if a sentence rests “on a clearly erroneous finding of fact.” *Id.* Thompson invokes Sentencing Guideline § 5G1.3(b), which directs a court to “adjust” a sentence of imprisonment “for any period of imprisonment already served on [an] undischarged term of imprisonment” resulting from an offense that arose from “relevant conduct” to the offense of conviction as that term is defined by the Guidelines. *See also* U.S.S.G. §§ 1B1.3(a)(1)–(3) (defining relevant conduct). Thompson also invokes Sentencing Guideline § 5K2.23, which permits (but does not require) a downward departure if the defendant has “completed” a

term of imprisonment and would have qualified for a sentence adjustment under § 5G1.3(b) had that term of imprisonment been “undischarged.”

Thompson’s time in New York custody was the result of firearms charges that were ultimately dismissed, and we have held that pretrial detention on dismissed state charges, if they do not result in being “sentenced to prison,” are not a “term of imprisonment” sufficient to meet the requirements of § 5G1.3(b)(1). *United States v. Young*, 910 F.3d 665, 674 (2d Cir. 2018). Moreover, the district court did not find that Thompson’s gun charges in state court involved “related conduct” to the charges here. U.S.S.G. §§ 1B1.3(a)–(3). And because Thompson cannot satisfy these requirements of § 5G1.3(b), he is not eligible for an adjustment under § 5K2.23. So the district court’s Guidelines calculation was not in error.

As for substantive reasonableness, a district court commits substantive error if it imposes a sentence “so shockingly high, shockingly low, or otherwise unsupportable as a matter of law that allowing [it] to stand would damage the administration of justice.” *Thavaraja*, 740 F.3d at 259. The district court imposed consecutive terms of imprisonment, as required by statute, that total 130 months’ imprisonment. That sentence is neither shockingly high nor shockingly low for Thompson’s role in a dangerous home-invasion robbery that had seven

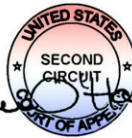
perpetrators working in concert, involved firearms, and resulted in injury and physical restraint to the home's occupant.

* * *

The district court's judgment is **VACATED** with respect to Defendant-Appellant Elias's second, third, and fourth special conditions of supervised release, and the case is **REMANDED** with instructions to the district court to strike or revise the conditions as set forth above. Moreover, as directed in the opinion filed simultaneously with this order, the judgment of forfeiture against Elias is **VACATED**. The district court's judgment is otherwise **AFFIRMED**.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

ORDER: The court DENIES Thompson's [760](#) motion for reconsideration, which Elias joined in his 764 letter. There is no basis for reconsideration of the court's August 5, 2022 Memorandum & Order. Defendants' 18 U.S.C. § 924(c) convictions were predicated on convictions for Hobbs Act robbery under 18 U.S.C. § 1951(a). *See* Aug. 5, 2022 M&O (Dkt. 697.) The Second Circuit held in *United States v. Hill* that completed Hobbs Act robbery is a predicate crime of violence under § 924(c). 890 F.3d 51, 60 (2d Cir. 2018). Just last week, the Circuit declined to reverse this holding in light of *United States v. Taylor*, 142 S. Ct. 2015 (2022) and *United States v. Chappelle*, 41 F.4th 102 (2d Cir. 2022). *See United States v. McCoy*, ___ F.4th ___, 2023 WL 350566, at *1-2 (2d Cir. Jan. 23, 2023). Thompson and Elias make functionally the same argument here: that completed Hobbs Act robbery is not a crime of violence under § 924(c) in light of *Taylor* and *Chappelle*. For the reasons the Second Circuit articulated in *McCoy*, this argument is wrong as a matter of law. Completed Hobbs Act robbery was a predicate crime of violence under § 924(c) at the time of Thompson and Elias's convictions and remains so today. There has been no intervening change in law. The Defendants' § 924(c) convictions are therefore not subject to vacatur on this basis. The parties are DIRECTED to confer and reach out to the court's Deputy at Joseph_Reccoppa@nyed.uscourts.gov to reschedule sentencings for Defendants Thompson and Elias. So Ordered by Judge Nicholas G. Garaufis on 2/2/2023. (Kirschner, Isaac). (Entered: 02/02/2023)

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

-against-

MATTHEW ELIAS and LATIFF THOMPSON,
Defendants.

MEMORANDUM & ORDER
18-CR-33 (S-2) (NGG)

NICHOLAS G. GARAUFIS, United States District Judge.

On March 25, 2022, Latiff Thompson and Matthew Elias were convicted by a jury of committing Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (Count Three of the superseding indictment), and the unlawful use or carrying of a firearm during and in relation to that robbery, in violation of 18 U.S.C. § 924(c) (Count Four). Each defendant now moves pursuant to Federal Rule of Criminal Procedure 29 for a judgment of acquittal. Elias also moves for a new trial under Rule 33.

For the reasons set forth below, the motions are all DENIED.

I. BACKGROUND

Thompson's and Elias's convictions stem from their participation in a September 7, 2017, robbery of a drug dealer's stash house in Jamaica, Queens. The leader of a set of the Makk Balla Brims gang, Shamiel Hytmiah, received a tip that nearly a half million dollars of cash and drugs was inside the stash house, so he recruited a team, which ultimately included Thompson and Elias, to steal it. During the robbery, the team tied up and assaulted the stash house's occupant and stole marijuana and a safe from inside, but ultimately found far less loot than originally expected. Several members of the robbery team carried guns. Thompson went inside. Elias was the driver.

The Government's evidence at trial consisted primarily of witness testimony, including from cooperating witness Hytmiah; a post-arrest interview Thompson gave to the FBI; cell site location records and other cellphone data; and audio from jail calls Thompson and Elias made after their arrests. Thompson's defense was that although he knew there would be a robbery, he stayed outside and never knew guns would be used. Elias claimed he was a dollar cab driver unaware he had driven his friends to a robbery.

A. Legal Standards

1. Rule 29

Rule 29 provides that a court “must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction.” Fed. R. Crim. P. 29(a); *see also* Fed. R. Crim. P. 29(c)(2) (“If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal.”). The standard that guides the court's analysis of a Rule 29 motion is whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,” *United States v. Cassese*, 428 F.3d 92, 98 (2d Cir. 2005), “not whether *this court* believes that the evidence at trial established guilt beyond a reasonable doubt.” *United States v. Brown*, 937 F.2d 32, 35 (2d Cir. 1991) (emphasis added).¹ In challenging the sufficiency of the evidence, defendants face “an uphill battle,” and bear “a very heavy burden” because the court must evaluate the evidence “in the light most favorable to the Government, with all reasonable inferences drawn in favor of the verdict.” *United States v. Crowley*, 318 F.3d 401, 407 (2d Cir. 2003). Nevertheless, “[i]f the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt

¹ When quoting cases, and unless otherwise noted, all citations and quotation marks are omitted, and all alterations are adopted.

and a theory of innocence, then a reasonable jury must necessarily entertain a reasonable doubt.” *United States v. Landesman*, 17 F.4th 298, 320 (2d Cir. 2021).

Furthermore, in deciding a Rule 29 motion, the court must resolve all issues of credibility in favor of the Government and the jury’s verdict. See *United States v. Canady*, 126 F.3d 352, 356 (2d Cir. 1997) (Government); *United States v. Desena*, 260 F.3d 150, 154 (2d Cir. 2001) (jury’s verdict). Thus, “[m]atters of the choice between competing inferences, the credibility of witnesses, and the weight of the evidence are within the province of the jury,” and the court is “not entitled to second-guess the jury’s assessments.” *United States v. Rea*, 958 F.2d 1206, 1221-22 (2d Cir. 1992). Rule 29 does not provide the court “with an opportunity to substitute its own determination of . . . the weight of the evidence and the reasonable inferences to be drawn for that of the jury.” *United States v. Temple*, 447 F.3d 130, 136 (2d Cir. 2006). The court “must affirm the conviction so long as, from the inferences reasonably drawn, the fact finder might fairly have found guilt beyond a reasonable doubt.” *Canady*, 126 F.3d at 356.

2. Rule 33

Rule 33 provides that “[u]pon the defendant’s motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires.” Fed. R. Crim. P. 33(a). Although the court generally has “broader discretion,” *United States v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992), “to grant a new trial under Rule 33 than to grant a motion for acquittal under Rule 29, courts must nonetheless exercise Rule 33 authority ‘sparingly’ and in ‘the most extraordinary circumstances.’” *United States v. Coté*, 544 F.3d 88, 101 (2d Cir. 2008) (quoting *Sanchez*, 969 F.2d at 1414). That is, while “[i]n the exercise of its discretion, the court may weigh the evidence and credibility of witnesses,” *Coté*, 544 F.3d at 101, “courts generally must defer to the jury’s resolution of conflicting evidence and the assessment of witness credibility,”

United States v. Ferguson, 246 F.3d 129, 133 (2d Cir. 1997), and “may not wholly usurp the jury’s role.” *United States v. Autuori*, 212 F.3d 105, 120 (2d Cir. 2000). Additionally, the court must make a “comprehensive assessment of the evidence” by “consider[ing] any reliable trial evidence as a whole, rather than on a piecemeal basis.” *United States v. Archer*, 977 F.3d 181, 189, 196-97 (2d Cir. 2020). Thus, “it is only where exceptional circumstances can be demonstrated that the trial judge may intrude upon the jury function of credibility assessment.” *Ferguson*, 246 F.3d at 133-34. Although the Second Circuit has “not defined exactly what constitutes an ‘extraordinary circumstance’ sufficient to warrant Rule 33 relief,” examples include “situation[s] in which . . . the evidence was patently incredible or defied physical realities, . . . where an evidentiary or instructional error compromised the reliability of the verdict . . . , or where the government’s case depends upon strained inferences drawn from uncorroborated testimony.” *Landesman*, 17 F.4th at 330-31.

At bottom, “[t]he ultimate test on a Rule 33 motion is whether letting a guilty verdict stand would be a manifest injustice.” *Ferguson*, 246 F.3d at 134. A manifest injustice arises when the court has “a real concern that an innocent person may have been convicted” because the court is not “satisfied that competent, satisfactory, and sufficient evidence in th[e] record supports the jury’s finding . . . [of] guilt[] beyond a reasonable doubt.” *Sanchez*, 969 F.2d at 1414; *see also Archer*, 977 F.3d at 188 (“[A] district court may not grant a Rule 33 motion based on the weight of the evidence alone unless the evidence preponderates heavily against the verdict to such an extent that it would be manifest injustice to let the verdict stand.”).

II. DISCUSSION

A. Thompson's Motion

1. Count Three

Thompson contends that the evidence was insufficient to sustain his Count Three Hobbs Act robbery conviction because the Government presented no “direct, eyewitness testimony,” and instead relied on Hytmiah’s testimony and circumstantial evidence, including a bloody sweatshirt. (Thompson Mot. for J. of Acquittal (“Thompson Mot.”) (Dkt. 659) at 2-3.) Because, Thompson argues, the Government did not present “direct, eyewitness testimony,” it therefore failed to establish the essential Hobbs Act robbery element of actual or threatened force, violence, or fear of injury against the victim of the robbery. (*Id.* at 2.)

The Government argues in response that it in fact presented ample evidence proving the force or violence element. (Gov’t. Opp’n. (Dkt. 665) at 20.) Specifically, the Government points to three pieces of evidence adduced at trial. First, it adduced Hytmiah’s testimony describing a “scuffling” between Brandon Darby—a member of the robbery team—and the victim, which led to the victim being restrained. Second, Hytmiah testified that Darby was “soaked” in blood. And third, the jury saw the bloody sweatshirt that another robbery team member, Tyquan Henderson, was wearing just an hour after the robbery. Collectively, the Government argues, this circumstantial evidence renders Thompson’s “contention that the victim’s testimony was necessary in order to establish the use or threat of force . . . utterly meritless.” (*Id.*) The court agrees.

As a threshold matter, the court finds Thompson’s argument unavailing that circumstantial evidence is insufficient and only direct evidence suffices. The law makes no distinction between

direct and circumstantial evidence. *See, e.g., United States v. MacPherson*, 424 F.3d 183, 190 (2d Cir. 2005) (“[T]he law draws no distinction between direct and circumstantial evidence in requiring the government to carry its burden of proof.”); *id.* (“The possibility that inferences consistent with innocence as well as with guilt might be drawn from circumstantial evidence is of no matter to sufficiency analysis because it is the task of the jury, not the court, to choose among competing inferences.”); *United States v. Martinez*, 54 F.3d 1040, 1043 (2d Cir. 1995) (“[T]he jury’s verdict may be based entirely on circumstantial evidence.”). Hytmiah’s testimony, though circumstantial, could easily lead a rational trier of fact to find that actual violence against the robbery victim occurred. His testimony described more than a simple “scuffling.” (Trial Tr. (“Tr.”) at 189.) Hytmiah testified that Darby “was beating [the victim] up, assaulting [the victim].” (*Id.* at 190.) Combined with the evidence of Darby’s blood-soaked clothing and Henderson’s blood-stained sweat-shirt, the jury was entitled to infer actual violence against the robbery victim without direct, eyewitness testimony. (*Id.* at 203; GX-302.) Furthermore, Thompson himself bolstered the jury’s inference by conceding in his post-arrest statement that “somebody got f*cked up in there,” and “the blood came from that fu**ing that [sic] robbery.” (GX-600.) The jury was therefore entitled to find that the Government sufficiently established the element of actual or threatened force or violence by making reasonable inferences based solely on the Government’s circumstantial evidence.

Moreover, setting aside Thompson’s specific objection to the sufficiency of the evidence regarding the force or violence element, the court finds that the evidence adduced at trial was sufficient on all elements to sustain Thompson’s Hobbs Act robbery conviction because any rational trier of fact could have found the essential elements beyond a reasonable doubt. *See Cassese*, 428 F.3d at 98. The court makes this determination by evaluating the

evidence in the light most favorable to the Government, mindful of Thompson's "very heavy burden." *Crowley* 318 F.3d at 407. The Government sought to prove its case under two theories—first casting Thompson as a substantive principal and second as an aider and abettor to the Hobbs Act robbery. Both find support in the record.

As to the evidence of Thompson acting as a substantive principal, a rational trier of fact could have inferred that Thompson unlawfully took personal property from another against his will by means of actual force to property. *See* 18 U.S.C. § 1951(a). First, by entering the stash house and stealing marijuana and a safe, a rational trier of fact could have found that Thompson unlawfully took personal property from another against his will. (Tr. 191-194.) Second, regarding the force or violence element, while the court doubts that there was sufficient evidence that Thompson used force or violence against a person—he entered the house after his confederates had already bloodied, beaten, and restrained the victim, (Tr. at 190-91)—this element may apply solely against property. *See United States v. Chappelle*, No. 20-3835, 2022 WL 2837807, at *5 (2d Cir. July 21, 2022) (holding that Hobbs Act robbery includes actual or threatened force, or violence, or fear of injury to *property alone*) (emphasis added); *United States v. Walker*, 314 F. Supp. 3d 400, 416 (E.D.N.Y. 2018) ("[Hobbs Act robbery] occurs regardless of whether the victim's will is overcome by force directed to a person or property."). Here, applying the force or violence element solely against property, the court finds there was sufficient evidence to sustain Thompson's guilt because he exercised force against the stolen safe. With Darby's help, Thompson uprooted the safe from the floor and lugged it to Hytmiah's car, necessarily using force against property in the process. (Tr. at 192-194.) Therefore, Thompson's actions satisfy the elements of Hobbs Act robbery, and there was sufficient evidence to sustain his conviction as a substantive principal.

Under an alternative aider and abettor theory, Thompson's direct role in assembling the robbery team and planning and executing the robbery even more easily sustains his conviction. To be liable under 18 U.S.C § 2 for aiding and abetting a crime, a defendant must "(1) take[] an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense's commission." *Rosemond v. United States*, 572 U.S. 65, 71 (2014). The various actions Thompson took to assemble, plan, and execute the robbery were each affirmative acts in furtherance of the robbery, and they clearly evince his intent to facilitate the robbery.

Thompson's role in planning the robbery began when Shamel Simpkins, an acquaintance who provided the initial tip about the stash house, connected Thompson and Hytmiah. (Tr. at 145-148; GX-300B at 14-15.) On the evening of September 6, 2017, Thompson and Hytmiah spoke over the phone and began planning the robbery that would take place in the early morning hours of September 7th. (Tr. at 147-149; GX-300B at 13 (logging an 8:51 PM FaceTime between Thompson and Hytmiah).) The two determined that Hytmiah would provide some members of the robbery team, with Thompson planning to bring his own men as well. (Tr. at 147; GX-600 at 6 (Thompson describing in post-arrest statement that "[Hytmiah] brings his own collection of people. I brung my collection of people.")) Thompson followed through with his plans and set about recruiting his crew. He called Elias, Henderson, and Lawrence Woods, all of whom eventually joined the team and helped execute the robbery. (GX-300B at 12-13; Tr. at 65.) Thompson, Elias, Henderson, and Woods then met Hytmiah and his crew at Hytmiah's aunt's house (the "Galway Residence") to hammer out the details of the robbery before driving to the stash house. (Tr. at 157, 159.) Thompson's role was to "go[] inside the house." (*Id.* at 155.)

Thompson fulfilled his role, helping to execute the robbery by entering the stash house and taking marijuana and a safe. (*Id.* at

191-194.) When Thompson entered the house he was on the phone with Hytmiah, so at trial Hytmiah was able to narrate Thompson's actions to the jury. (*Id.* at 191-92; GX-300B at 10-11.) First, Thompson found marijuana and dumped it into a black gym bag. (Tr. at 192.) Next, he happened upon a safe, which he uprooted from the floor with Darby's help and brought out to Hytmiah's car. (*Id.* at 192-194.) Thompson then returned to his car and left the scene. (*Id.* at 195, 580-82; GX-409 at 18-19.) The activity log in Thompson's phone corroborated Hytmiah's testimony that Thompson entered the stash house by showing when Thompson ascended and descended the flight of stairs leading up to the second-floor apartment where the stash house was located. (GX-300B at 2; Tr. at 724-26.)

This evidence of Thompson's key role in assembling the team and planning and executing the robbery provided sufficient evidence for the jury to find Thompson guilty beyond a reasonable doubt of aiding and abetting the robbery. He took numerous affirmative acts in furtherance of the robbery, at each stage evincing his intent to facilitate its commission. He held a preliminary planning call with Hytmiah, assembled a robbery team, attended a pre-robbery meeting, entered the stash house, and took marijuana and a safe from the house. The jury was entitled to credit each piece of evidence in reaching its verdict and finding Thompson guilty. This court will not now second-guess the jury's assessments. *See Rea*, 958 F.2d at 1222.

2. Count Four

Thompson claims there was insufficient evidence to sustain his conviction on Count Four of using or carrying a firearm during and in relation to the Hobbs Act robbery. He argues that the Government did not establish that he possessed or carried a firearm prior to or during the robbery, and that his presence in a vehicle in which a firearm was recovered after the robbery is likewise

insufficient to sustain conviction. (Thompson Mot. for J. of Acquittal at 2.)² He also contends that he did not aid and abet the crime because he did not facilitate the use of firearms. *Id.*

The Government did not make a substantive principal argument on this count, instead arguing only that Thompson is guilty because he aided and abetted the crime. (*See* Tr. at 1036; Gov't. Opp'n. at 25-27.) The Government presented evidence that Thompson facilitated the use of a firearm by helping to obtain a firearm that was used in the robbery. This evidence consisted of a Facebook Messenger conversation between Thompson and Henderson in which the two men discussed acquiring a firearm less than three hours before the robbery team met at the Galway Residence. Henderson messaged Thompson that Simpkins "gotta take us 2 get thos jackies," and Thompson replied, "I kno been on him." (GX-301A at 19.) The evidence showed that "jackie" meant firearm. (Tr. at 227.) Any rational trier of fact could reasonably infer that a firearm referenced in this conversation was used during the robbery given the temporal proximity of the conversation to the Galway Residence pre-robbery meeting, the evidence that Henderson eventually carried a gun during the robbery, and the evidence that there was a gun at the Woods residence post-robbery meeting of Thompson, Elias, Henderson, and Woods. (GX-504 at 3 ("I had the grip"); Tr. at 205 ("I seen a gun").) Accordingly, the jury was entitled to find that Thompson facilitated the use of a firearm by pressing Simpkins to provide one and communicating his efforts to Henderson.

² The court admitted evidence that Thompson possessed a firearm the night of the robbery after he denied having done so, but only for the purpose of "deciding whether to believe Latiff Thompson and how much weight to give to his testimony." (Tr. at 1137 (jury charge).) The court instructed the jury to consider this evidence only for that limited purpose. (*Id.*) In this motion, Thompson appears to misunderstand that the evidence was only admitted for this limited purpose, but the court nevertheless addresses the argument in the interest of completeness.

The Government argues that Thompson further facilitated the use of a firearm during and in relation to the Hobbs Act robbery by coordinating his armed confederates' travel to the Galway Residence and the stash house. Thompson found the driver, Elias, who transported Henderson and Woods, both armed, to each location. (Tr. at 162, 177.) At the Galway Residence, Hytmiah warned that there would be guns inside the stash house, and the robbery team would need to be prepared with guns of their own. (*Id.* at 162-63.) In response, Henderson and Woods lifted their sweatshirts to show everyone they were armed with black automatic pistols. (*Id.* at 162, 167.) This display established that Thompson had advance knowledge that his confederates were armed, and because he continued to participate in the robbery thereafter, the jury permissibly inferred Thompson's guilt. *See Rosemond*, 572 U.S. at 67, 78 n.9 (holding that to prove defendant guilty of § 924(c) offense by aiding and abetting, the Government must prove "that the defendant actively participated in the underlying . . . violent crime with advance knowledge that a confederate would use or carry a gun during the crime's commission" and explaining that "if a defendant continues to participate in a crime after a gun was displayed or used by a confederate, the jury can permissibly infer from his failure to object or withdraw that he had such knowledge").

Thompson himself also confirmed that during the robbery his team used the guns that he helped obtain and which he saw displayed at the Galway Residence. In a recorded jail call, he discussed how Henderson felt he had not received his fair share of the loot, which made him "mad" because he was the one to carry the "grip" or "four fever," which the evidence showed meant gun. (GX-504; Tr. at 227, 740.) And in his post-arrest statement, Thompson explained that, in addition to a gun his team found in the stash house, there was also the gun they "went in there with." (GX-600 at 15.) Thus, taking into account the record evidence—including the Facebook conversation, Thompson's

role in coordinating his armed confederates' transportation, his advance knowledge that guns would be used during the robbery, and his recorded jail call and post-arrest statement—there was sufficient evidence for any rational trier of fact to find beyond a reasonable doubt that Thompson aided and abetted the unlawful use or carry of a firearm during and in relation to the Hobbs Act robbery.

Accordingly, Thompson's motions are DENIED.

B. Elias's Motion

1. Count Three

For his part, Elias contends that there was insufficient evidence to sustain his Hobbs Act robbery conviction and that much of the Government's evidence in fact demonstrates his innocence. He claims that he did not participate in the robbery and was not present when it occurred. (Elias Mot. for J. of Acquittal or New Trial ("Elias Mot.") (Dkt. 658) at 3.) He asserts that a recorded jail call in which he expressed regret for exposing himself to criminal liability by allowing an armed person into his car is actually exculpatory. (*Id.*; GX-501 at 2.) He contends that he never asked for a portion of the stolen proceeds, which evinces his innocence. (Elias Mot. at 3.) Further, he argues that Hytmiah provided such "incredible, manipulative and unreliable testimony" that the jury should not have believed his testimony linking Elias to the robbery, including his testimony about Elias's rental car. (*Id.* at 3-4.) Indeed, Elias argues that renting the car for a purpose unrelated to the robbery more than one week before it occurred demonstrates his innocence. (*Id.* at 3.) Last, he contends that the phone evidence was insufficient to support his conviction. Specifically, cell site data did not provide location information for Elias during the relevant time period and therefore could not place him at the robbery, and phone calls he made during the time of the robbery to people unassociated with the robbery are uncharacteristic of a robbery participant, he argues. (*Id.* at 4.)

The record evidence, however, also supports alternative inferences sufficient to sustain his conviction. *See* Fed R. Crim. P. 29. Nor is upholding his guilty verdict a manifest injustice, *see* Fed R. Crim. P. 33, because the court has no “real concern that an innocent person may have been convicted.” *Sanchez*, 969 F.2d at 1414. Because the evidence against Elias is strongest as an aider and abettor of the robbery, and the Government did not expressly argue Elias was a substantive principal, the court analyzes the sufficiency of the evidence against Elias only under an aider and abettor theory.

Contrary to his claim that he did not participate in the robbery, Elias played an instrumental role as the driver. (Tr. at 155.) By carrying out this role, Elias took affirmative acts in furtherance of the robbery that indicated he intended to facilitate the robbery’s commission. *See Rosemond*, 572 U.S. at 71. His affirmative acts as the driver included ferrying Thompson, Henderson, and Woods to the Galway Residence for the pre-robbery meeting, then to the stash house to execute the job. (Tr. at 159, 174-75.) After the robbery, he was Thompson’s getaway man, piloting him back to the Galway Residence. (GX-409 at 18-19; Tr. at 580-84.) And when Hytmiah raced to Woods’s residence upon discovering that Henderson and Woods had brought the marijuana there after leaving the stash house, Elias followed close behind, with Thompson his passenger. (Tr. at 201-02, 424-25.) Last, after rendezvousing and agreeing to return to the Galway Residence, Elias drove Thompson, Henderson (in a still-bloody sweatshirt (GX-302)), and Woods toward that house—only to be pulled over and arrested by NYPD just one hour after the robbery. (Tr. at 439, 731, 733.) Each of these steps was an affirmative act in furtherance of the robbery, *see Rosemond*, 572 U.S. at 71, and contradicts Elias’s claim that he did not participate. (Elias Mot. at 3.) Elias was an instrumental member of the robbery team—without him, his confederates would not have traveled to the pre-

robbery meeting, the stash house, or the various getaway locations. Although Elias claims he was a dollar cab driver wholly unaware of his role in the robbery (Tr. at 803-806), the evidence adduced at trial entitled the jury to draw a different conclusion: that he was well aware of and fully intended to facilitate the commission of the robbery. *See Rosemond*, 572 U.S. at 71.

Various evidence corroborates Elias's role as the driver. First, Hytmiah explained this was Elias's role and described how Elias ferried half the robbery team to the Galway Residence and then to the stash house. (Tr. at 155, 159, 174-75.) Elias asserts that Hytmiah was "incredible, manipulative and unreliable," (Elias Mot. at 4), but these assertions fail under both Rule 29 and Rule 33. When assessing a Rule 29 Motion for Acquittal, "the credibility of witnesses . . . [is] within the province of the jury," *Rea*, 958 F.2d at 1221-22, and the court must "resolve all issues of credibility in the government's favor." *Canady*, 126 F.3d at 356. Likewise, on a Rule 33 motion, "courts generally must defer to the jury's resolution of conflicting evidence and assessment of witness credibility," *Ferguson*, 246 F.3d at 133, unless Hytmiah's testimony was "patently incredible," *Landesman*, 17 F.4th at 331, which it was not, or "defied physical realities," *id.*, which it did not. Nor did "the government's case depend[] upon strained inferences drawn from uncorroborated testimony." *Id.* Accordingly, the jury appropriately credited Hytmiah's testimony establishing Elias as a key participant in the robbery. At this late stage, the court is "not entitled to second-guess the jury's assessments." *Rea*, 958 F.2d at 1221-22.

Second, New York Police Department Lieutenant Javier Rodriguez's testimony provided further evidence of Elias's role as the driver, and Rodriguez's description of Elias's car corroborated Hytmiah's testimony. Rodriguez observed a vehicle matching Hytmiah's description of Elias's car—a silver Nissan Altima with rental plates—speed to Woods's residence. (Tr. at 424-25, 432-

433.) Hytmiah had described Elias's car as a white or gray rental, so the jury was entitled to infer that the car belonged to Elias and that he was driving it. (*Id.* at 155-56.) Elias's argument that renting the car a week prior to the robbery for reasons unrelated to the robbery demonstrates his innocence falls flat because "the relevance of the rental vehicle was its description, color ('white or gray'), appearance (a rental), and driver (the car was rented in Elias's name)." Gov't. Opp'n. at 23. Rodriguez further testified that he saw Elias's and Hytmiah's cars arrive at the Woods residence, then people mingling outside the cars, and 15 minutes later, the people disappearing as the cars departed the scene. (Tr. at 426-28.) The jury was entitled to infer these people were members of the robbery crew that Elias was driving back toward the Galway Residence. As they returned, Rodriguez observed Elias and Hytmiah speed past him, and he placed the radio call that led to the arrests of Elias, Thompson, Henderson, and Woods. (*Id.* at 428, 436-37.) Considering this second set of corroborative evidence from Rodriguez that Elias was the driver, the totality of the evidence was thus sufficient to allow any rational trier of fact to find Elias guilty beyond a reasonable doubt of aiding and abetting the robbery by acting as the driver. *See Cassese*, 428 F.3d at 98.

Additional evidence that Elias argues is exculpatory does not disturb the jury's verdict. Whatever Elias's arguments, the court must now construe the evidence "in the light most favorable to the Government, with all reasonable inferences drawn in favor of the verdict." *Crowley*, 318 F.3d at 407. In this posture, the evidence is clearly sufficient to meet Rule 29's more stringent standard that "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Cassese*, 428 F.3d at 98. While Elias argues that the jail call in which he expressed regret for exposing himself to criminal liability by allowing an armed person into his car shows his innocence, any rational trier of fact could easily find otherwise: that Elias

was aware of his role in aiding and abetting the robbery and only in hindsight and while incarcerated regretted his intent to facilitate its commission. (GX-501T.) As to his claim that he never sought a share of the stolen proceeds, the evidence supported an alternative conclusion. In another jail call, Elias inquired whether “ni**as still dead.” (GX-513 at 3.) Detective Adam Georg explained that to be “dead” is to be cut off, and Hytmiah explained it means “I’m not dealing which [sic] you no more” and “you don’t get nothing.” (Tr. at 150, 741.) The jury was entitled to draw an inference opposite Elias’s that he was indeed seeking his share of the proceeds by inquiring whether he was dead, or cut off from Hytmiah. As to Elias’s argument that the phone evidence, including cell site location information and phone call logs, was insufficient to sustain conviction, any rational trier of fact could have conversely found that it was sufficient. The jury was entitled to infer that cell site location information corroborating Thompson’s location and movements, (*see, e.g.* GX-409 at 19 (showing Thompson’s movement from Galway Residence toward Woods’s residence)), was similarly corroborative of Elias’s whereabouts because the two men drove together. And the jury could have reasonably disagreed with Elias’s argument that calling non-robbery-participants during the robbery is uncharacteristic of a guilty man; he was, after all, waiting around for his confederates in a car outside.

Accordingly, the court finds that the evidence was sufficient to sustain Elias’s Hobbs Act robbery conviction, and the interest of justice does not require that he be granted a new trial.

2. Count Four

Elias next claims there was insufficient evidence to sustain his conviction on Count Four of using or carrying a firearm during and in relation to a Hobbs Act robbery. He argues that Hytmiah’s testimony—which placed him at a pre-robbery meeting where firearms were present, in the car driving armed confederates to

the stash house, and at a post-robbery meeting where firearms were again present—was “unreliable and incredulous [sic].” (Elias Mot. at 4.) He also claims there was no evidence proving that he knew a firearm would be used in connection with a robbery. (*Id.* at 5.) Both arguments are unavailing.

As with Thompson, the Government argued on Count Four that Elias was guilty only as an aider and abettor, so the court proceeds with its analysis accordingly. (*See* Tr. at 1036; Gov’t. Opp’n. at 25-27.) Evaluating the affirmative act and intent requirements of aiding and abetting liability, *see Rosemond*, 572 U.S. at 71, the court finds that Hytmiah’s testimony established sufficient evidence of Elias’s affirmative acts, and Elias’s knowledge that his confederates would use or carry firearms during and in relation to the robbery established sufficient evidence of his intent.

The affirmative acts Elias undertook in furtherance of the robbery were driving armed confederates to a pre-robbery meeting and then driving them to the robbery itself. (Tr. at 159, 174-75.) Hytmiah explained to the jury that Elias performed these acts, and Elias’s attacks on Hytmiah’s credibility fall flat for the same reasons discussed above: Hytmiah’s credibility was for the jury to determine, and the jury’s guilty verdict necessitates that the court credit Hytmiah’s account. The jury was entitled to infer from Hytmiah’s testimony Elias’s role in facilitating the use and carrying of firearms by driving armed confederates in furtherance of the robbery.

As to the second aiding and abetting element, Elias’s knowledge that his confederates would use or carry firearms during and in relation to the robbery established his intent to facilitate the commission of that crime. Analyzing aiding and abetting liability for a § 924(c) offense, the Supreme Court has explained that

the unarmed driver of a getaway car ha[s] the requisite intent to aid and abet armed bank robbery if he ‘knew’ that his confederates would use weapons in carrying out

the crime. . . . So for purposes of aiding and abetting law, a person who actively participates in a criminal scheme knowing its extent and character intends that scheme's commission.

Rosemond, 572 U.S. at 77. Elias, the unarmed getaway driver for a stash house robbery, knew his armed confederates—Henderson and Woods—would use weapons to carry out the robbery. He drove Henderson and Woods to the Galway Residence for a pre-robbery meeting where Hytmiah warned that because there would be guns inside the stash house, the robbery team would need to be prepared with guns of their own. (Tr. at 159, 162-63.) As with Thompson, when Henderson and Woods lifted their sweatshirts to show everyone they were armed with black automatic pistols, their display sufficed for a jury to infer that Elias knew his confederates were armed. (*Id.* at 162, 167.) Evaluating the display in the context of Hytmiah's warnings, the jury could infer that Elias knew the robbery's extent and character: that Henderson and Woods intended to use or carry their firearms to effectuate the robbery. Because Elias knew the robbery's extent and character and actively participated in it by driving his armed confederates to the Galway residence and the stash house, the jury could infer that he intended the robbery's commission. (*Id.* at 159, 174-75); *see also Rosemond*, 572 U.S. at 77. This evidence is sufficient to sustain Elias's conviction.

Moreover, one of Elias's recorded jail calls provided *ex-post* corroboration of his knowledge. Elias argues that call, in which he expressed regret for exposing himself to criminal liability by allowing an armed person into his car, was not inculpatory but merely showed his frustration at being incarcerated for crimes in which he played no role. (GX-501T at 2; Elias Mot. at 5.) But the jury was entitled to draw a contrary inference and find that Elias's call demonstrated that he controlled who and what entered his car. As a result, it stands to reason that Elias would have known

his confederate was armed, and that he permitted the confederate inside his car because he intended to facilitate the use or carrying of a firearm during and in relation to the Hobbs Act robbery. Thus, the court finds that the evidence was sufficient to sustain Elias's conviction of using or carrying a firearm during and in relation to a Hobbs Act robbery, and the interest of justice does not require that he be granted a new trial. His motions are both accordingly DENIED.

III. CONCLUSION

For the reasons set forth above, Defendants' Rule 29 motions and Elias's Rule 33 motion are DENIED.

SO ORDERED.

Dated: Brooklyn, New York
August 5, 2022

s/Nicholas G. Garaufis

NICHOLAS G. GARAUFIS
United States District Judge

**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 6th day of May, two thousand twenty-six.

United States of America,

Appellee,

v.

Matthew Elias, AKA Heddis, Latiff Thompson, AKA
LaBanga,

Defendants - Appellants,

Shamiek Hytmiah, AKA Sha-Balla, Constantin
Cheese, AKA Cons, Desmond Murchison, AKA
Dez, Andre Barnaby, AKA Goonie Dre, Brandon
Darby, AKA Barrack, Antonio Davis, AKA Big
Blood, Tyquan Henderson, AKA Gun Play, Michael
Miles, AKA Menace, Avery Mitchell, AKA
Slav, Nahjuan Perry, AKA Nas, Pierre Raymond, AKA
Leeky, James Roberson, AKA Littles, Shawn
Silvera, AKA Dum Out, Shamel Simpkins, AKA Sha
Bang, Rashawn Smith, AKA Shawn, Kimberly
Thompson, AKA Kimmy, Lawrence Woods, AKA
Lazo, Kahmel Grant, AKA Ornelly,

Defendants.

ORDER

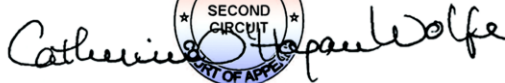
Docket No: 23-6626 (L)
23-6627 (Con)

Appellant Latiff Thompson has filed a petition for rehearing *en banc*. 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

A handwritten signature in black ink, reading "Catherine O'Hagan Wolfe". The signature is written in a cursive style. A circular court seal is stamped over the middle of the signature. The seal is red and blue, with the words "UNITED STATES" at the top, "SECOND CIRCUIT" in the center, and "COURT OF APPEALS" at the bottom.