

17-3515(L)
USA v. McCoy

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 - - - -

4 August Term, 2019

5 (Argued: October 23, 2019

6 Final Briefs Submitted: January 3, 2020

Decided: April 22, 2021)

7 Docket Nos. 17-3515(L), 17-3516, 18-619, 18-625

8
9 UNITED STATES OF AMERICA,

10 *Appellee,*

11
12 - v. -

13 EARL MCCOY, aka P, MATTHEW NIX, aka Meech, aka Mack, aka
14 Mackey,

15 *Defendants-Appellants* *.

16
17 Before: KEARSE, PARKER, and SULLIVAN, *Circuit Judges*.

18 Appeals in Nos. 17-3515 and 17-3516 from judgments of the United States

19 District Court for the Western District of New York, Elizabeth A. Wolford, *Judge*,

* The Clerk of Court is instructed to amend the official caption to conform with the above.

convicting each defendant of Hobbs Act conspiracy, in violation of 18 U.S.C. § 1951(a); Hobbs Act robbery and attempted robbery, in violation of 18 U.S.C. §§ 1951(a) and 2; brandishing firearms during and in relation to crimes of violence, to wit, the Hobbs Act conspiracy, Hobbs Act robbery, and Hobbs Act attempted robbery counts, in violation of 18 U.S.C. §§ 924(c)(1)(C)(i) and 2; conspiracy to distribute and to possess with intent to distribute marijuana and heroin, in violation of 18 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(D); and possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2); convicting defendant McCoy of possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. §§ 924(c)(1)(A)(i) and 2; convicting defendant Nix of possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. §§ 924(c)(1)(C)(i) and 2; and sentencing defendants McCoy and Nix principally to imprisonment for 135 years and 155 years, respectively.

In Nos. 18-619 and 18-625, defendants appeal from an order of the district court denying their postjudgment motions for reconsideration of the denial of their postverdict motions seeking a new trial on the ground that one of the jurors had given false responses to voir dire questions with regard to whether he had previously been

1 convicted of a felony. *See United States v. Nix*, No. 6:14-CR-06181, 2018 WL 1009282
2 (W.D.N.Y. Feb. 20, 2018); *United States v. Nix*, 275 F.Supp.3d 420 (W.D.N.Y. 2017).

3 On appeal, defendants contend principally (a) that they were entitled to
4 a new trial on the ground that the juror's false voir dire responses violated their rights
5 to be tried before a fair and impartial jury; (b) that their firearm-brandishing
6 convictions should be reversed on the ground that none of their Hobbs Act offenses
7 are predicate crimes of violence under 18 U.S.C. § 924(c); (c) that in light of *Rehaif v.*
8 *United States*, 139 S. Ct. 2191 (2019), the trial court erred in failing to instruct the jury
9 on an essential element of the § 922(g)(1) charges of being felons in possession of
10 firearms; and (d) that they are entitled to reduction of their sentences under the First
11 Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194.

12 Finding merit in the contention that Hobbs Act conspiracy is not a
13 § 924(c) crime of violence, *see United States v. Barrett*, 937 F.3d 126 (2d Cir. 2019), we
14 reverse defendants' § 924(c) convictions on Count 2 for brandishing firearms
15 predicated on Hobbs Act conspiracy. Defendants' convictions on all other counts, as
16 well as the denial of their motions for a new trial, are affirmed. The matter is
17 remanded for resentencing, and for consideration by the district court of what relief,
18 if any, may be appropriate under the First Step Act.

Affirmed in part, reversed in part, and remanded for further proceedings
with regard to sentencing.

ROBERT MARANGOLA, Assistant United States Attorney,
Rochester, New York (James P. Kennedy, Jr., United States
Attorney for the Western District of New York, Tiffany H.
Lee, Assistant United States Attorney, Rochester, New
York, on the brief), *for Appellee*.

ROBERT W. WOOD, Rochester, New York, for *Defendant-
Appellant Earl McCoy*.

MICHAEL JOS. WITMER, Rochester, New York, for *Defendant-
Appellant Matthew Nix*.

KEARSE, *Circuit Judge*:

Defendants Earl McCoy and Matthew Nix appeal in Nos. 17-3515 and
17-3516, respectively, from judgments entered in the United States District Court for
the Western District of New York following a jury trial before Elizabeth A. Wolford,
Judge, convicting each defendant on one count of Hobbs Act conspiracy, in violation
of 18 U.S.C. § 1951(a); one count of Hobbs Act robbery and two counts of Hobbs Act
attempted robbery, in violation of 18 U.S.C. §§ 1951(a) and 2; four counts of
brandishing firearms during and in relation to crimes of violence, to wit, the Hobbs
Act conspiracy, Hobbs Act robbery, and Hobbs Act attempted robbery counts, in
violation of 18 U.S.C. §§ 924(c)(1)(C)(i) and 2; one count of conspiracy to distribute

1 and to possess with intent to distribute marijuana and heroin, in violation of 18 U.S.C.
2 §§ 846, 841(a)(1), and 841(b)(1)(D); and one count of possession of a firearm by a
3 convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2); convicting McCoy
4 on one count of possession of a firearm in furtherance of a drug trafficking crime, in
5 violation of 18 U.S.C. §§ 924(c)(1)(A)(i) and 2; and convicting Nix on one count of
6 possession of a firearm in furtherance of a drug trafficking crime, in violation of
7 18 U.S.C. §§ 924(c)(1)(C)(i) and 2. McCoy and Nix were sentenced principally to
8 imprisonment for 135 years and 155 years, respectively.

9 In Nos. 18-619 and 18-625, respectively, McCoy and Nix appeal from an
10 order of the district court denying their postjudgment motions for reconsideration of
11 the denial of their postverdict motions seeking a new trial on the ground that one of
12 the jurors had given false responses to voir dire questions with regard to whether he
13 had previously been convicted of a felony.

14 On appeal, defendants contend principally (a) that they are entitled to
15 a new trial on the ground that the juror's false voir dire responses violated their rights
16 to be tried before a fair and impartial jury (*see* Part II.A. below); (b) that their firearm
17 brandishing convictions should be reversed, and those counts dismissed, on the
18 ground that none of their Hobbs Act offenses are predicate crimes of violence under

1 18 U.S.C. § 924(c) (*see* Part II.B. below); (c) that in light of *Rehaif v. United States*, 139
2 S. Ct. 2191 (2019), the trial court erred in failing to instruct the jury on an essential
3 element of the § 922(g)(1) charges of being felons in possession of firearms (*see* Part
4 II.C.1. below); and (d) that they are entitled to reduction of their sentences under the
5 First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 ("First Step Act") (*see* Part
6 II.D. below). Nix also makes brief sufficiency and instructional challenges.

7 Finding merit in the contention that Hobbs Act conspiracy is not a
8 § 924(c) crime of violence, *see, e.g., United States v. Barrett*, 937 F.3d 126 (2d Cir. 2019),
9 we reverse defendants' § 924(c) convictions on Count 2 for brandishing firearms
10 predicated on Hobbs Act conspiracy. Defendants' convictions on all other counts, as
11 well as the denial of their motions for a new trial, are affirmed. The matter is
12 remanded for defendants' resentencing, and for consideration by the district court of
13 what relief, if any, may be appropriate under the First Step Act.

I. BACKGROUND

The present prosecution focused on a series of home invasions in the Rochester, New York area in September and October 2014. The operative superseding indictment ("Indictment") alleged that McCoy and Nix, along with others including Clarence Lambert, Jecovious Barnes, Jessica Moscicki, and Gary Lambert, unlawfully conspired and attempted to rob other persons of commodities that had been shipped and transported in interstate and foreign commerce, such as diamonds, watches, United States currency, and narcotics, and conspired to traffic in the stolen narcotics. Clarence Lambert (or "Clarence") and Gary Lambert (or "Gary") are McCoy's younger brothers.

The government's evidence at the five-week trial of McCoy and Nix principally included testimony by Barnes, Moscicki, and Gary Lambert, who had entered into plea agreements with the government; testimony by victims of four home invasions; and cellular telephone records indicating that McCoy and Nix were in the immediate vicinity of the invasions, corroborating victim testimony about phone calls made during the robberies. Taken in the light most favorable to the government, the evidence included the following.

1 A. *Coconspirator Testimony as to Planning and Implementation*

2 Gary Lambert testified that in early 2014 he relocated from Brooklyn to
3 Rochester to be with his brothers. He had known that McCoy and Clarence were
4 engaged in the business of prostitution; when he arrived in Rochester, McCoy and
5 Clarence also told him that "they was doing home invasion robberies, robbing people
6 and selling drugs," and they recruited him to join their operation. (Trial Transcript
7 ("Tr.") 2797.)

8 Gary testified that the robbery operation was led by McCoy and Nix and
9 principally targeted persons who were believed to be drug dealers. McCoy, who was
10 generally called "P," and Nix, who was generally called "Meech," had members of
11 their crew, including Clarence, place tracking devices on vehicles driven by the
12 persons targeted. McCoy and Nix were then able to use their phones to track the
13 prospective victims' whereabouts (*see id.* at 2867) and tell Gary, Clarence, and the
14 others whether the homes they were about to invade were unoccupied. Nix "was the
15 one to tell us who had what, where to get it and how to get it." (*Id.* at 2853.)

16 Barnes, who was also known as "Bubbs" (*see* Tr. 1256-58), testified that
17 he had committed some 10-20 "home invasion missions" with Nix (Tr. 1240) and that
18 their targets generally were suspected drug dealers, victims unlikely to report the

1 robberies to the police. Nix would drive Barnes to the locations for the invasions; and
2 although Nix never went inside the homes, he provided weapons and would
3 communicate with Barnes by phone during the robberies. (*See, e.g., id.* at 1227 (Nix
4 and McCoy supplied their crew with guns).) Nix would determine how the proceeds
5 were distributed. (*See id.* at 1225-39.)

6 Moscicki testified that in the summer of 2014 she worked as a prostitute
7 for McCoy, with whom she had a close, but non-romantic relationship; she was the
8 girlfriend of McCoy's brother Clarence. Moscicki testified that, except for a 60-day
9 period when she was in jail for shoplifting, she saw Clarence every day; she also saw
10 McCoy about every two days. Much of the time she was living either with McCoy
11 and his girlfriend "Anness" or with Clarence.

12 She assisted in the robbery operation by receiving on her cellphone
13 messages from Nix to be relayed to Clarence, who did not have a working phone. On
14 at least two occasions, she assisted more directly in invasions, either by knocking at
15 the door of the targeted home to determine whether anyone was there or by driving
16 a getaway car. She testified that she had been aware of the robbery operations
17 conducted by McCoy and Nix, in which Clarence participated, because "Clarence
18 would come back" to where they were staying "with a whole bunch of stuff, money,

1 drugs, electronics" (Tr. 514). Clarence told her he was participating in home invasions
2 with McCoy, Nix, Barnes, and Gary (*see id.* at 515) and described the tracking devices
3 they used on the cars of their prospective victims. Clarence said Nix told the crew
4 which places to rob. Moscicki also heard Clarence discussing such invasions with
5 Gary, Barnes, McCoy, and Nix.

6 Gary described the first home invasion in which he participated, a
7 burglary where no one was at home; Nix told McCoy, Clarence, and Gary that the
8 occupants had a lot of money and marijuana in the house; Nix and McCoy provided
9 information from a tracking device. Gary and Clarence broke in; Gary then let
10 McCoy in; and the three of them searched the house. (*See* Tr. 2868-71.) They found--
11 as Nix had predicted--substantial amounts of cash (totaling some \$64,000) and
12 marijuana (some 24 pounds). All of the proceeds of the robbery were handed over
13 to McCoy and Nix, who divided most of it between themselves and gave the
14 remainder--a total of \$6,000 and one-and-a-half pounds of marijuana--to Gary and
15 Clarence. (*See id.* at 2871-76.) Gary assisted in the sales of McCoy's share of the
16 marijuana. (*See id.* at 2873-79.)

1 B. *Victims' Testimony and Results of the Invasions*

2 Victims of four home invasions described their losses and/or their
3 treatment by the intruders. In an attempted robbery on September 15, two men with
4 guns broke into a home on Hayward Avenue, demanding drugs and assaulting the
5 adult occupants. No drugs were found. One of the would-be robbers was identified
6 at trial as McCoy. Upon realizing that the residents were not drug dealers as
7 defendants had believed, McCoy had made a phone call stating that "there was
8 nothing in the house, that . . . there was just a woman and a man and a little kid."
9 (Tr. 1082.)

10 In another attempted robbery, men broke into a home on Garson Avenue
11 on September 18. They knocked one of the residents down and tied her up,
12 brandished a gun at her mother, and asked "'Where the money, where the money, and
13 the pills at'" (Tr. 1710). One of the victims identified Barnes as one of the intruders.
14 Barnes testified that he had been driven to the Garson Avenue location by Nix and
15 had participated in that attempted robbery with Clarence and McCoy. When no
16 money or pills were found there, Barnes called Nix to report that they had found
17 nothing of value.

1 On September 23, there was a burglary of a house on Maple Street where
2 no one was at home. The victim testified that in 2014 he was a seller of marijuana and
3 cocaine and kept a number of guns in the house. He described returning home at the
4 end of his work day and finding that his drugs, money, and guns were gone. (*See*
5 Tr. 1803, 1816.)

6 Moscicki testified that that Maple Street burglary was the first of
7 defendants' invasions in which she had a direct role, ordered by McCoy to
8 accompany him and Clarence. McCoy drove them to a spot near Maple Street, where
9 they met up with Nix, who had brought Barnes. McCoy conferred with Nix, who
10 said he had been monitoring the house to determine the owner's pattern of comings
11 and goings. (*See* Tr. 519-26, 686.) McCoy instructed Moscicki to knock on the door
12 of the targeted house to learn whether anyone was there. After Moscicki found the
13 right house and no one answered her knock, she returned to McCoy's car; Nix then
14 drove Barnes and Clarence into the driveway of the house. Later, Clarence told
15 Moscicki they had found large quantities of marijuana and guns. (*See id.* at 597-98.)

16 Barnes testified that on that day, Nix had brought him to Maple Street;
17 that McCoy and Clarence had arrived separately; and that McCoy and Nix told
18 Barnes that the targeted home had heroin and cocaine hidden in the walls. Barnes

1 and Clarence, armed, broke into the house and found 10-12 large ziplock bags of
2 marijuana, \$7-10,000 in cash, and a half dozen guns. Barnes telephoned Nix and said,
3 "We hit the jackpot" (Tr. 1321). Barnes and Clarence delivered everything they found
4 to Nix. McCoy and Barnes subsequently "bought capsules to package the" marijuana
5 for sale. (Tr. 1332.)

6 On October 7, there was an invasion of a house on Polo Place in the
7 Rochester suburb of Greece, New York, occupied by a jewelry wholesaler and his
8 wife, who were at home. The jeweler testified that he ran his business from his home.
9 He testified that after the men broke into his house, he and his wife were threatened
10 and repeatedly pistol-whipped. He estimated that the men stole \$20,000 in cash,
11 along with jewelry whose wholesale value was approximately \$200,000. (See
12 Tr. 1926-27.)

13 Barnes and Gary testified that they and Clarence were the ones who had
14 conducted that robbery. Moscicki testified that several days earlier, she had gone to
15 Polo Place with McCoy, Nix, Barnes, and Clarence, and had knocked at the jeweler's
16 door to see whether anyone was at home. After the jeweler answered the knock (and
17 tried his best to help Moscicki find the person or place she claimed to be seeking), the

1 crew regrouped and considered whether to do the robbery that day. Nix said no,
2 which ended the discussion.

3 Barnes testified that they returned on October 7 to rob the house on Polo
4 Place. Moscicki, driving a car belonging to McCoy's girlfriend, waited in the
5 driveway; McCoy and Nix were parked nearby. Barnes and Clarence, along with
6 Gary who had not been on the previous trip, broke into the house. Barnes and Gary
7 testified that they threatened the couple with guns (and BB guns), and pistol-whipped
8 the jeweler to get him to reveal the location of his money and open his safe. When
9 they had collected all the cash, gold coins, watches, and jewelry they could find, they
10 left and sped off in the car driven by Moscicki. They soon met up with McCoy and
11 Nix, and Nix demanded that all of the loot be transferred to his vehicle.

12 As usual, McCoy and Nix were "the ones that did the splitting and
13 division of" the loot (Tr. 2912). They divided most of it between themselves; they
14 gave Barnes, Clarence, and Gary \$3,300 each and allowed each to take a watch. (*See*
15 *id.* at 2911-15.)

16 Defendants' operation began to unravel shortly thereafter when
17 Clarence--despite admonitions by McCoy and Nix not to try to sell the watches in or
18 near Rochester--tried a week later to pawn his chosen watch in Rochester.

1 C. *The Defense Case*

2 Neither McCoy nor Nix testified at trial. They called two witnesses from
3 law enforcement who described possible inconsistencies between various witnesses'
4 trial testimony and their respective prior statements. A Special Agent of the Bureau
5 of Alcohol, Tobacco, Firearms, and Explosives testified that Gary Lambert, in
6 response to postarrest questioning about the Polo Place robbery, did not mention
7 McCoy except to say that McCoy did not enter the building; and that Gary did not
8 mention Nix at all. (*See* Tr. 3300-02.) And a Rochester police investigator testified
9 that the Hayward Avenue victim who identified McCoy at trial as one of the
10 intruders had given the Rochester police descriptions of the two intruders that did not
11 match either Barnes or McCoy, and he had not picked McCoy's picture out of a photo
12 array. (*See id.* at 3349-68.) However, on cross-examination, the investigator testified
13 that, from a different photo array, the victim picked out McCoy as the intruder who
14 had hit him in the face with a gun. (*See id.* at 3373-74).

1 D. *Jury Instructions and the Verdicts*

2 In charging the jury, the district judge segmented its deliberations, giving
3 instructions first on Counts 1-8 and 11-12, leaving Counts 9 and 10, which charged
4 Nix and McCoy, respectively, with firearm possession as a convicted felon, for later
5 consideration.

6 As to the first group of counts to be considered, the court described the
7 subject of each count of the Indictment, to wit: Count 1, conspiracy to commit Hobbs
8 Act robbery; Count 2, brandishing firearms during and in relation to that conspiracy;
9 Counts 3 and 5, the Hobbs Act attempted robberies at Hayward Avenue and Garson
10 Avenue, respectively; Counts 4 and 6, brandishing firearms during and in relation to
11 the Hobbs Act robbery attempts charged in Counts 3 and 5, respectively; Count 7, the
12 narcotics possession-and-distribution conspiracy; Count 8, possession of firearms in
13 furtherance of the Count 7 narcotics conspiracy; Count 11, the Hobbs Act robbery at
14 Polo Place; and Count 12, brandishing firearms during and in relation to the Polo
15 Place robbery.

16 With respect to Count 1, the court explained that conspiracy to commit
17 a crime is itself a crime separate from and independent of the crime that is the
18 objective of the conspiracy; that the government was required to prove beyond a

1 reasonable doubt that "the minds of at least two alleged conspirators met in an
2 understanding way to meet the objectives of the conspiracy" (Tr. 3767); and that the
3 objectives alleged in this case were

4 the robbery of diamonds, watches and United States currency
5 from a person engaged in the business of buying and selling
6 diamonds, watches and other items shipped and transported in
7 interstate and foreign commerce; and the robbery of controlled
8 substances and United States currency from persons engaged in
9 or believed to be engaged in the unlawful possession and
10 distribution of controlled substances,

11 (*id.* at 3768-69). The court reiterated that in order to find a defendant guilty on
12 Count 1, the jury must find that "the defendant under consideration knowingly and
13 willfully became a participant in or member of the conspiracy." (Tr. 3769.)

14 With respect to Counts 2, 4, 6, and 12, charging defendants with
15 brandishing firearms during a crime of violence (the "brandishing counts"), the court
16 instructed that the government was required to prove that each defendant committed
17 the predicate crime of violence, *i.e.*, the Hobbs Act offenses alleged in Counts 1, 3, 5,
18 and 11, respectively; and it instructed that "Hobbs Act conspiracy, attempted Hobbs
19 Act robbery and Hobbs Act robbery all constitute crimes of violence." (Tr. 3787.)
20 However, the court instructed that if the jury found a given defendant not guilty on

1 a particular Hobbs Act count, the jury was not to consider against that defendant the
2 brandishing count for which that Hobbs Act count was a predicate.

3 The court also instructed that, except with respect to the counts charging
4 defendants with conspiracy or with firearm possession as a convicted felon, the
5 Indictment charged each defendant both as a principal and as an aider and abettor,
6 and that it was not necessary for the government to show that a defendant himself
7 personally committed the crime with which he is charged in order for him to be found
8 guilty. The court explained that a person who willfully causes another person to
9 perform an act that is a crime against the United States is punishable as a principal;
10 and that an aider and abettor, *i.e.*, "a person who did not commit the crime, but in
11 some . . . way counseled, advised or in some way assisted the commission of the
12 crime," "is just as guilty of that offense as if they had committed it themselves."
13 (Tr. 3815.)

14 In addition, with respect to the substantive crimes alleged in Counts 2-6,
15 8, and 11-12, the court--over defendants' objections--gave a *Pinkerton* charge, *see*
16 *Pinkerton v. United States*, 328 U.S. 640 (1946), instructing the jury that, as to
17 "reasonabl[y] foreseeable acts" of any member of the conspiracy (Tr. 3804),

1 [i]f you find beyond a reasonable doubt that the defendant whose
2 guilt you are considering was a member of the conspiracy charged
3 in the indictment, then any acts done or statements made in
4 furtherance of the conspiracy by persons also found by you to
5 have been members of the conspiracy may be considered against
6 that defendant. This is so even if such acts were done and
7 statements were made in a defendant's absence and without his
8 knowledge

9 (*id.* at 3804-05).

10 The jury after deliberating for less than three hours, found McCoy and
11 Nix guilty on Counts 1-8 and 11-12.

12 The court then turned to Counts 9 and 10, which charged Nix and
13 McCoy, respectively, with being a felon in possession of firearms on September 23,
14 2014. It informed the jury that defendants and the government had "stipulated that
15 prior to September 23, 2014," Nix and McCoy had each "been convicted of a crime
16 punishable by imprisonment for a term exceeding one year." (Tr. 3873.) The court
17 instructed that "[i]t is not necessary that the government prove that a defendant knew
18 that the crime was punishable by imprisonment for more than one year." (*Id.* at 3874.)
19 After brief deliberations, the jury returned verdicts of guilty on both counts.

20 Defendants thereafter moved for, *inter alia*, a new trial on the ground that
21 they had recently discovered that one of the jurors was a previously convicted felon

1 and had failed to disclose his criminal history during jury selection. As discussed in
2 Part II.A. below, the district court, following an evidentiary hearing at which the juror
3 testified, denied the motion, *see United States v. Nix*, 275 F.Supp.3d 420 (W.D.N.Y.
4 2017) ("*Nix I*").

5 E. *Sentencing*

6 Defendants were sentenced in October 2017 under the advisory
7 Sentencing Guidelines ("Guidelines"), pursuant to calculations they do not challenge
8 on appeal. Each was sentenced principally to imprisonment totaling 30 years for
9 Counts 1, 3, 5, 7, 11, and the felon-in-possession counts (Count 9 for Nix, Count 10 for
10 McCoy), to be followed by 25-year terms for each of Counts 2, 4, 6, and 12. Nix,
11 whose prior record included a § 924(c) conviction, also received a mandatory
12 minimum consecutive sentence of 25 years on Count 8; McCoy, whose record did not
13 include a prior § 924(c) conviction, received a mandatory minimum consecutive
14 sentence of 5 years on Count 8. Thus, Nix's total term of imprisonment was 155 years;
15 McCoy's was 135 years.

1 F. *The Present Appeals*

2 Defendants promptly appealed the judgments of conviction. Thereafter
3 they moved in the district court for reconsideration of the denial of their motions for
4 a new trial on the ground of juror misconduct. Following the denial of
5 reconsideration, *see United States v. Nix*, No. 6:14-CR-06181, 2018 WL 1009282
6 (W.D.N.Y. Feb. 20, 2018) ("*Nix II*"), each defendant appealed that denial, and their four
7 appeals were consolidated. Defendants filed their opening briefs, principally
8 pursuing the contention that they are entitled to a new trial because of juror
9 misconduct, and contending that their convictions on the brandishing counts should
10 be reversed on the ground that the Hobbs Act conspiracy and robbery offenses of
11 which they were convicted are not crimes of violence.

12 Thereafter, prior to the oral argument of their appeals, defendants sought
13 and received permission to file supplemental briefs to contend that, in light of the
14 Supreme Court's decision in *United States v. Davis*, 139 S. Ct. 2319 (2019), Hobbs Act
15 conspiracy is not a crime of violence within the meaning of 18 U.S.C. § 924(c), and to
16 contend that they are entitled to reduction of their sentences under the First Step Act.
17 Following oral argument of the appeals, defendants sought and received permission
18 to file additional supplemental briefs in light of the Supreme Court's decision in *Rehaif*

1 *v. United States*, 139 S. Ct. 2191 (2019), contending that the district court erred in
2 failing to instruct the jury that, in order to establish their guilt under § 922(g)(1) as
3 felons in possession of firearms, the government was required to prove that, when
4 they possessed the firearms, they knew they were convicted felons.

5 II. DISCUSSION

6 On these appeals, defendants contend principally (1) that the juror's
7 misconduct violated their Sixth Amendment rights to an impartial jury and entitled
8 them to a new trial on all viable counts; (2) that none of the Hobbs Act offenses of
9 which they are convicted qualifies as a crime of violence under 18 U.S.C. § 924(c), and
10 thus the § 924(c) firearm-brandishing counts (Counts 2, 4, 6, and 12) predicated on
11 Hobbs Act offenses are not viable and should be dismissed; and (3) that their
12 respective Counts 9 and 10 felon-in-possession-of-firearm convictions should be
13 vacated in light of *Rehaif* because the government did not prove that, when they
14 possessed the firearms, they knew they were convicted felons. They also argue,
15 alternatively, that they are entitled to a reduction of their sentences under the First

1 Step Act; and they make cursory challenges to various aspects of the trial
2 proceedings.

3 Several of defendants' contentions are raised for the first time on these
4 appeals. An error that has not been preserved by timely objection in the district court
5 may be reviewed on appeal if it is "[a] plain error that affects substantial rights." Fed.

6 R. Crim. P. 52(b). Under plain-error review,

7 "before an appellate court can correct an error not raised [in the
8 district court], there must be (1) 'error,' (2) that is 'plain,' and (3)
9 that 'affect[s] substantial rights.' If all three conditions are met, an
10 appellate court may then exercise its discretion to notice a
11 forfeited error, but only if (4) the error 'seriously affect[s] the
12 fairness, integrity, or public reputation of judicial proceedings.'"

13 *United States v. Groysman*, 766 F.3d 147, 155 (2d Cir. 2014) ("*Groysman*") (quoting
14 *Johnson v. United States*, 520 U.S. 461, 466-67 (1997) (which was quoting *United States*
15 *v. Olano*, 507 U.S. 725, 732 (1993))).

16 The burden is on the appellant to meet all four criteria. *See, e.g., United*
17 *States v. Dominguez Benitez*, 542 U.S. 74, 82 (2004); *Groysman*, 766 F.3d at 155; *United*
18 *States v. Dussard*, 967 F.3d 149, 156 (2d Cir. 2020). If all four are met, we have
19 discretion to grant relief despite the defendants' failure to preserve the issue in the

1 district court for normal appellate review. *See, e.g., Johnson*, 520 U.S. at 467; *Olano*, 507
2 U.S. at 732.

3 For the reasons that follow, we find merit only in defendants' contention
4 that Hobbs Act conspiracy is not a crime of violence within the meaning of § 924(c)
5 and that their convictions on Count 2 must therefore be reversed and the case
6 remanded for resentencing.

7 *A. The Motion for a New Trial Based on Juror Misconduct*

8 About a month after the jury's final verdicts were returned, and prior to
9 the imposition of sentences, McCoy and Nix moved pursuant to Fed. R. Crim. P. 33
10 for a new trial, stating that defense counsel had learned that one of the jurors had
11 been convicted of two felonies and had failed to disclose his criminal history during
12 jury selection. The juror was eventually correctly identified as Juror Number 3, and
13 was referred to by the district court--as he will be here--as either "J.B." or "Juror No. 3"
14 in light of general court "rule[s] that the names and personal information concerning
15 jurors and prospective jurors should not be publicly disclosed," *Nix I*, 275 F.Supp.3d
16 at 424 n.2.

1 1. *The Juror Questionnaire and Voir Dire Proceedings*

2 Prior to any oral voir dire at defendants' trial, a questionnaire had been
3 mailed by the court to prospective jurors. Question 6 asked: "Have you ever been
4 convicted, either by your guilty or nolo contendere plea or by a court or jury trial, of
5 a state or federal crime for which punishment could have been more than one year
6 in prison?" J.B. answered this question by checking "No." *Nix I*, 275 F.Supp.3d at 445
7 & n.4.

8 In addition, during the oral voir dire--to the extent "relevant to these
9 post-verdict motions," *id.* at 426 n.6--the court addressed the following questions to
10 a panel of 36 prospective jurors who had been placed under oath, including J.B.:

11 (1) "Has anyone ever been the victim of a home robbery?"
12 ([Tr.] 97);

13 (2) "Has anyone ever served on a jury before?" (*id.* at 205);

14 (3) "Has anyone ever been a defendant in a criminal case?"
15 (*id.* at 214);

16 (4) "Has anyone ever visited a jail or correctional facility
17 other than in connection with . . . your educational curriculum"
18 (*id.* at 229);

19 (5) "Has anyone had anyone close to them, other than what
20 we already discussed, . . . anyone close to them convicted of a
21 crime?" (*id.* at 239).

1 *Nix I*, 275 F.Supp.3d at 426. Juror No. 3 "did not respond" to any of these questions.
2 *Id.* at 425-26.

3 Similarly, Juror No. 3 did not offer any information in
4 response to the Court's "catch-all" questions asked toward the end
5 of *voir dire*: whether there was "anything in fairness to both sides
6 that you think we should know that we haven't covered already"
7 ([Tr.] 221), and "[i]s there anything that you think we should know
8 that we haven't covered up to this point?" (*id.* at 257).

9 *Nix I*, 275 F.Supp.3d at 426.

10 In support of their new-trial motion, defendants produced public records
11 showing, *inter alia*, that Juror No. 3 had previously pleaded guilty and been convicted
12 of two felonies, *i.e.*, possession of stolen property in 1988 and burglary in 1989; that
13 his son had been convicted of a crime; and that Juror No. 3 had been the victim of a
14 home burglary. Defendants contended that they were entitled to a new trial even
15 absent a showing of bias, because convicted felons are statutorily ineligible to serve
16 as jurors in federal court, *see* 28 U.S.C. § 1865(b)(5), and, in any event, that
17 Juror No. 3's nondisclosures demonstrated bias.

18 The district court ordered an evidentiary hearing ("Hearing") at which
19 Juror No. 3 testified, represented by appointed counsel. (*See* New Trial Hearing

1 Transcript, June 12 and 14, 2017 ("H.Tr.".) The government granted Juror No. 3
2 immunity with regard to any nonperjurious testimony he would give at the Hearing.

3 2. *The Hearing*

4 In response to questioning by the court at the Hearing, Juror No. 3
5 acknowledged that he had answered Question 6 on the preliminary questionnaire
6 incorrectly. He testified that he had not been aware that his answer was incorrect.
7 Age 46 when defendants' trial proceedings began, Juror No. 3 testified that he had
8 responded that he had no prior felony convictions because he assumed that the
9 question referred only to crimes committed after the age of 21; that he was 17 or 18
10 at the time he was convicted; and that he believed convictions entered when he was
11 younger than 21 had been expunged from his record. He also testified that he had not
12 believed that his 1989 conviction for burglary required an affirmative answer because,
13 although the sentence was two-to-four years, he "was offered six months in shock
14 camp" and that is how he satisfied the sentence (H.Tr. 72-75); he testified that he did
15 not "know that [he] actually had a felony" (*id.* at 83).

16 In addition, while conceding that the district court had not stated that its
17 voir dire questions applied only to one's experiences over the age of 21, Juror No. 3

1 testified that he had also believed the five questions quoted above did not apply to
2 crimes, convictions, or experiences prior to the age of 21. Juror No. 3 also testified
3 that at the time of trial, he did not know his son had been convicted of a crime; he had
4 not spoken to his son for several years prior to that time and learned of the conviction
5 only a month before the Hearing. Juror No. 3 conceded that his failure to respond to
6 the above five questions posed to the panel as whole was incorrect. (*See id.* at 83-85,
7 89-92, 168-69, 172-75; *see also id.* at 97-98 (stating that he had answered questions on
8 previous calls for jury duty in the same way, on the assumption that they concerned
9 events and experiences after the age of 21).)

10 When questioned further about his own prior record, Juror No. 3 also
11 initially claimed that he had been falsely accused of both of the felonies of which he
12 was convicted, and he claimed to have at best a hazy memory of events that had
13 occurred 28 years earlier, when he was 17 or 18. He said he did not remember how
14 many times he had been convicted of crimes punishable by more than one year in
15 prison. And while he recalled being convicted of breaking into a clothing store when
16 he was 17 or 18, and serving six months in "shock camp" for that crime, he did not
17 remember such aspects as the location of the shock camp, the names of all of his
18 codefendants, whether the prosecution was state or federal, or whether he had

1 pleaded guilty or gone through a trial. (*See id.* at 72-76.) However, on the second day
2 of the Hearing, Juror No. 3 was confronted with his signed confessions in both the
3 burglary case and the stolen property case, and he admitted that he had been
4 involved in both. (*See id.* at 179-84, 222-25, 231.)

5 When asked whether he had wanted to serve as a juror in this case,
6 Juror No. 3 three times responded "Yes" (H.Tr. 93, 96); when asked why, he stated it
7 was because he was picked, and he believed it was his right and his duty (*see id.*
8 at 93). He stated that he is able to vote, and he did not know that having a prior
9 felony conviction disqualified him from serving as a juror. (*See id.* at 82.) However,
10 when later again asked whether he had wanted to serve as a juror in this case,
11 Juror No. 3 answered "No" (*id.* at 97, 235, 242, 243). He testified he had answered yes
12 to that question previously because he was "confused about the question" (*id.* at 242).
13 He said that he had not been happy to receive a summons for jury duty; that his false
14 or inaccurate answers to the voir dire questions were not given out of any desire to
15 serve on the jury (*see id.* at 94, 233-34); and that if he had known that by telling the
16 court about his past experiences with the law he would have been excused, he would
17 have done so (*see id.* at 97, 240, 243).

1 Juror No. 3 answered "No" to all questions as to whether his prior
2 experiences with the law had caused him to be biased for or against the defendants
3 or for or against the government, or had given him reason to credit the testimony of
4 cooperating witnesses against the defendants.

5 3. *The District Court's Ruling*

6 In a thorough opinion, *Nix I*, 275 F.Supp.3d 420, the district court denied
7 defendants' motion for a new trial based on juror misconduct. It rejected their
8 contention that Juror No. 3's felony conviction, absent any showing of bias,
9 automatically warranted the granting of a new trial based on the statutory
10 disqualification of convicted felons from serving on federal juries, *see* 28 U.S.C.
11 § 1865(b)(5). The court noted that "[t]his argument has been rejected by every circuit
12 court to have considered the issue." *Nix I*, 275 F.Supp.3d at 436 n.17; *see, e.g., United*
13 *States v. Boney*, 977 F.2d 624, 633 (D.C. Cir. 1992) (the "Sixth Amendment right to an
14 impartial jury . . . does not require an absolute bar on felon-jurors"); *see also United*
15 *States v. Langford*, 990 F.2d 65, 69 (2d Cir. 1993) ("*Langford*") (rejecting the argument
16 that a juror's intentionally false response during voir dire is an automatic ground for
17 a new trial).

1 Rather, pointing to "the Sixth Amendment's guarantee to a trial by an
 2 impartial jury," and noting that "[a]n impartial jury is one in which all of its members,
 3 not just most of them, are free of interest and bias," *Nix I*, 275 F.Supp.3d at 424
 4 (quoting *United States v. Parse*, 789 F.3d 83, 111 (2d Cir. 2015) ("*Parse*")--but that a
 5 defendant is "entitled to a fair trial but not a perfect one, for there are no perfect
 6 trials," *Nix I*, 275 F.Supp.3d at 424 (quoting *McDonough Power Equipment, Inc. v.*
 7 *Greenwood*, 464 U.S. 548, 553 (1984) ("*McDonough*")--the district court noted that

8 the Second Circuit has adopted a two-part test that a defendant
 9 must establish in order to justify granting a new trial based upon
 10 incorrect responses by a juror during *voir dire*: (1) the defendant
 11 must first demonstrate that the juror "failed to answer *honestly* a
 12 material question on *voir dire*"; and (2) the defendant *then must also*
 13 *demonstrate* that "a correct response would have provided a valid
 14 basis for a challenge for cause"--in other words, the juror would
 15 have been excused *for bias* based on the correct *voir dire* response.
 16 *Langford*, 990 F.2d at 68-69 (quoting *McDonough*, 464 U.S. at 556-58
 17 . . .).

18 *Nix I*, 275 F.Supp.3d at 437 (emphases ours). The district court stated that under the
 19 first part of this test

20 the Court must assess whether Juror No. 3 deliberately lied or
 21 consciously deceived the Court, as opposed to providing
 22 inaccurate responses as a result of a mistake, misunderstanding
 23 or embarrassment. *See McDonough*, 464 U.S. at 555, 104 S.Ct. 845;
 24 *Langford*, 990 F.2d at 69-70 (finding *where a juror's intentionally false*
 25 *statements at voir dire were caused by embarrassment, and there was no*

1 *evidence "that she gave false answers because of any desire to sit on the*
2 *jury,"* it was proper for the district court to deny the defendant's
3 motion for a new trial

4 *Nix I*, 275 F.Supp.3d at 437-38 (emphasis ours).

5 The court here found that Juror No. 3 had made some intentionally false
6 statements at voir dire; but it found that they were in no way motivated by a desire
7 to sit on the jury:

8 The Court does not doubt that Juror No. 3's inaccurate
9 testimony regarding his criminal record was due, in part, to the
10 age of the convictions. However, *given Juror No. 3's false testimony*
11 *during the evidentiary hearing about his culpability for the two felony*
12 *convictions, the Court does not credit Juror No. 3's explanation that he*
13 *was confused by the voir dire questions or thought that the questions*
14 *applied to criminal convictions only after the age of 21.* Based on Juror
15 No. 3's continued refusal to disclose the full extent of his criminal
16 history during the evidentiary hearing--until faced with
17 documentary evidence of the same--the Court concludes that
18 Juror No. 3 failed to respond truthfully to the juror questionnaire
19 and the Court's voir dire questions as they pertained to both his
20 criminal convictions and his exposure to a jail.

21 *However, this finding does not mean that the Court concludes*
22 *that Juror No. 3 provided false information about his criminal record in*
23 *an effort to intentionally deceive the Court so as to be selected to serve on*
24 *the jury. Here, Juror No. 3 did not lie "for the purpose of securing a*
25 *seat on the jury,"* *Parse*, 789 F.3d at 111, nor can his lies be
26 characterized as "premeditated and deliberate" so as to hide his
27 true identity and ensure his selection on the jury, *id.* at 92-93.

28 *Nix I*, 275 F.Supp.3d at 447-48 (emphases ours).

1 The court found that the very fact that Juror No. 3 continued to lie about
2 his criminal history at the evidentiary Hearing, after having been granted immunity
3 for nonperjurious Hearing testimony, indicated he had a persisting motive for
4 refusing to be honest about his criminal past at the Hearing until confronted with
5 documentary evidence. The court was persuaded that "his motives had nothing to
6 do with securing a seat on this jury." *Id.* at 448. While the court was "not persuaded
7 that Juror No. 3 misunderstood the scope of the questions as only applying to
8 convictions at the age of 21 and older, when responding to either this Court or other
9 courts in the past," *id.*, it found that Juror No. 3's motivation for the inaccurate
10 responses was not nefarious, but

11 rather, . . . more likely originates from the simple fact that, at 47
12 years old, Juror No. 3 would prefer to shut out any recollection of
13 his criminal history--the most recent of which (if [a] domestic
14 violence incident from 1999 is included) was about 20 years ago,
15 and most of which occurred when he was a teenager.

16 *Id.* Thus, although the court found "that Juror No. 3 testified falsely about certain
17 information during the Hearing that was conducted on June 12 and 14, 2017," it

18 *reject[ed] the notion that Juror No. 3 intentionally deceived the Court*
19 *during voir dire as to his criminal history so as to gain a seat on the jury.*
20 Although Juror No. 3's voir dire answers regarding his criminal
21 history were inaccurate, *the Court cannot conclude that they rise to*

1 *the level of intentional falsehood necessary to satisfy the first prong of the*
 2 *McDonough test.*

3 *Id.* (emphases added).

4 The court further saw no evidence from which to find or infer that
 5 Juror No. 3 had had any bias, whether actual, implied, or inferred. As to actual bias,
 6 *i.e.*, "the existence of a state of mind that leads to an inference that the person will not
 7 act with entire impartiality," *Nix I*, 275 F.Supp.3d at 449 (quoting *United States v.*
 8 *Torres*, 128 F.3d 38, 43 (2d Cir. 1997) ("*Torres*"), *cert. denied*, 523 U.S. 1065 (1998)), the
 9 court found that

10 [t]his was plainly not a case of Juror No. 3 wanting to hide
 11 information about his past *to make himself more marketable as a juror*,
 12 like the juror in *Parse*. Early in the *voir dire*, Juror No. 3 expressed
 13 reservations about serving because of his job responsibilities.
 14 (Dkt. 328 at 41). During the jury selection, Juror No. 3 was
 15 frustrated with the Court about the length of the proceedings (*see*
 16 Dkt. 359 at 238-39), and in fact, once selected to serve, he left the
 17 courtroom as the Court was still informing the jurors about some
 18 housekeeping matters (*see* Dkt. 327 at 32).

19 *Nix I*, 275 F.Supp.3d at 450 (emphasis added). Further, there was

20 *no evidence that Juror No. 3 knew that disclosure of his criminal record*
 21 *would have disqualified him from jury service.* The Court believes that
 22 if Juror No. 3 had known this information, his reluctance to be
 23 honest about his criminal history would have likely been
 24 overcome by a desire to avoid jury service. *In sum, the Court finds*
 25 *that there is no evidence of actual bias on the part of Juror No. 3, in favor*

1 *of or against either the Government or Defendants.* Even evaluating
2 the facts in the light most favorable to Defendants (which is not
3 the standard), no actual bias has been shown in this case. *There is*
4 *just no proof that Juror No. 3 intentionally lied to smuggle his way onto*
5 *the jury.*

6 *Id.* at 451 (emphases added).

7 Nor did the court find any basis to find "implied bias"--a concept that is
8 "reserved for 'extreme situations'" warranting a conclusive presumption of bias as a
9 matter of law. *Id.* (quoting *United States v. Greer*, 285 F.3d 158, 172 (2d Cir. 2002)
10 ("Greer")); *see, e.g., Torres*, 128 F.3d at 45. Implied bias generally "'deals mainly with
11 jurors who are related to the parties or who were victims of the alleged crime itself."
12 *Nix I*, 275 F.Supp.3d at 451 (quoting *Greer*, 285 F.3d at 172 (other internal quotation
13 marks omitted)). The court found that Juror No. 3 had no relationships with any of
14 the parties, victims, witnesses, or attorneys; and it saw "no [other] fact in the record
15 which, had it been elicited during jury selection, would have required the Court to
16 automatically assume bias on the part of Juror No. 3 or that Juror No. 3 was
17 prejudiced against Defendants or in favor of the Government." *Nix I*, 275 F.Supp.3d
18 at 451.

19 Finally, the district court found no evidence from which it should "infer"
20 bias. It noted that

1 "[b]ias may be inferred when a juror discloses a fact that
2 *bespeaks a risk* of partiality sufficiently significant to warrant
3 granting the trial judge discretion to excuse the juror for cause, *but*
4 *not so great as to make mandatory a presumption of bias.*"

5 *Id.* at 453 (quoting *Torres*, 128 F.3d at 47 (emphases ours)); *see, e.g., Greer*, 285 F.3d
6 at 172 (findings as to inferred bias lie "within the discretion of the trial court"). After
7 reviewing all of the evidence and defense contentions before it, the court concluded
8 that there was no evidence to support defendants' contention that Juror No. 3 had
9 "had bad experiences with law enforcement" or that his experiences would cause him
10 to be biased against defendants; and it found no evidence to support their contention
11 that because Juror No. 3 had pleaded guilty in a case in which he had codefendants,
12 he would be predisposed to credit the views of cooperating witnesses and thus be
13 biased against defendants. *Id.* (internal quotation marks omitted). The court also
14 deemed the mere existence of Juror No. 3's criminal history--nearly three decades
15 old--too remote to warrant inferring bias.

16 The district court further found that defendants' own jury selection
17 strategy strongly suggested the absence of reason to infer that Juror No. 3 was biased
18 against defendants based on his criminal record: When the government moved,
19 during jury selection, to dismiss a prospective juror ("T.P.") for cause upon learning

1 that T.P. had prior felony convictions that he had not disclosed, defendants
 2 vigorously objected to T.P.'s dismissal. *Nix I*, 275 F.Supp.3d at 426-27, 429; *see also id.*
 3 at 453 ("McCoy even admits that it would have been the Government who challenged
 4 Juror No. 3 for cause if his criminal history had been revealed.").

5 In sum, the court concluded that defendants also failed to meet the
 6 second prong of the *McDonough* test because it concluded that

7 [t]here is no actual bias because there is no finding of partiality
 8 based upon either the juror's own admission or the judge's
 9 evaluation of the juror's demeanor and credibility following voir
 10 dire questioning as to bias,

11 *id.* at 453 (internal quotation marks and emphasis omitted); that

12 there is no implied bias because the disclosed fact does not
 13 establish the kind of relationship between the juror and the parties
 14 or issues in the case that mandates the juror's excusal for cause,

15 *id.* (internal quotation marks and emphasis omitted); and that

16 the record does not provide a basis to infer bias. Even if the first
 17 prong of the *McDonough* test was satisfied, *there is no evidence of*
 18 *extreme deceit* (such as in *Parse*) that would support the showing
 19 required under *McDonough*'s second prong. Put simply, the Court
 20 does not believe that the deliberateness of [Juror No. 3's]
 21 particular lies evidenced partiality . . . ; and *even if Juror No. 3 did*
 22 *intentionally attempt to deceive the Court*, the deliberateness of his
 23 lies is not sufficiently intentional or premeditated so as to, in and
 24 of themselves, establish bias under the second prong,

1 *Nix I*, 275 F.Supp.3d at 454 (internal quotation marks omitted (emphases added)).

2 4. *Abuse-of-Discretion Review*

3 A district court's denial of a Rule 33 motion for a new trial is reviewable
4 for abuse of discretion. *See, e.g., Parse*, 789 F.3d at 110. A court abuses its discretion
5 if (1) it takes an erroneous view of the law, (2) its decision rests on a clearly erroneous
6 finding of fact, or (3) its decision "cannot be located within the range of permissible
7 decisions." *Id.* We see no such flaws in the denial at issue here.

8 First, we see no error in the district court's ruling that the statutory
9 disqualification of felons from serving on the jury, raised for the first time after trial,
10 did not provide an automatic basis for a new trial. Under the Jury Selection and
11 Service Act of 1968 ("Jury Selection Act"), 28 U.S.C. § 1861 *et seq.*, the court, in
12 determining "whether a person is unqualified for . . . jury service" in federal court, *id.*
13 § 1865(a), shall deem ineligible a person who "has been convicted in a State or Federal
14 court of record of[] a crime punishable by imprisonment for more than one year and
15 his civil rights have not been restored," *id.* § 1865(b)(5). In a criminal case, a defendant
16 who contends that there has been a substantial failure to comply with the Jury
17 Selection Act's provisions may move to stay or dismiss the proceedings "*before the voir*

1 *dire examination begins*, or within seven days after the defendant discovered or could
 2 have discovered, by the exercise of diligence, the grounds therefor, *whichever is*
 3 *earlier.*" *Id.* § 1867(a) (emphases added). Without precluding such other remedies as
 4 may be available for challenges based on prohibited discrimination, the statute
 5 provides that "[t]he *procedures described by this section shall be the exclusive means* by
 6 which a person accused of a Federal crime . . . may challenge any jury on the ground
 7 that such jury was not selected in conformity with the provisions of this title." *Id.*
 8 § 1867(e) (emphasis added).

9 In light of the procedural limitations imposed by §§ 1867(a) and (e), this
 10 Circuit and most others have concluded that the mere fact that the jury included a
 11 person whom § 1865 made ineligible to serve as a juror is not a ground for a new trial
 12 when the objection is not raised until after voir dire has begun. *See, e.g., United States*
 13 *v. Silverman*, 449 F.2d 1341, 1343-44 (2d Cir. 1971) ("*Silverman*") ("the statute clearly
 14 requires that a challenge on this ground be made at or before the v[oi]r dire"), *cert.*
 15 *denied*, 405 U.S. 918 (1972); *United States v. Paradies*, 98 F.3d 1266, 1277-78 (11th Cir.
 16 1996), *as amended* (Nov. 6, 1996) ("once voir dire begins, Jury Selection Act challenges
 17 are barred, even where the grounds for the challenge are discovered only later"), *cert.*
 18 *denied*, 522 U.S. 1014 (1997); *United States v. Candelaria-Silva*, 166 F.3d 19, 31-32 (1st Cir.

1 1999) (same), *cert. denied*, 529 U.S. 1055 (2000); *United States v. Jasper*, 523 F.2d 395, 398
2 (10th Cir. 1975) ("a motion" under § 1865 must "be filed prior to the beginning of the
3 voir dire examination"); *Dawson v. Wal-Mart Stores, Inc.*, 978 F.2d 205, 209 (5th Cir.
4 1992) ("section 1867 precludes any statutory challenges to irregularities in jury
5 selection that are not made before voir dire"); *but see United States v. Webster*, 639 F.2d
6 174, 180 (4th Cir. 1981), *modified*, 669 F.2d 185 (4th Cir. 1982) ("Any objection to the
7 composition of the jury was waived, however, because defendants first sought to
8 raise it at a time subsequent *both* to the beginning of the voir dire examination and to
9 a point seven days after they could have discovered the grounds for the challenge by
10 the exercise of due diligence." (emphasis added)), *cert. denied*, 456 U.S. 935 (1982).

11 In *Silverman*, which concerned a juror who was disqualified under
12 § 1865(b)(2) because she was unable to read or write the English language, we
13 concluded that "[s]ince defendant failed to raise any objection to [the disqualified
14 juror's] serving on the jury until after his conviction, his attack on that conviction
15 cannot be founded on [her] disqualification under the statute." 449 F.2d at 1344. We
16 ruled that after trial, "[t]he inclusion in the panel of a disqualified juror does not
17 require reversal of a conviction unless there is a showing of actual prejudice." *Id.*

1 Defendants have proffered no basis for deviating from this principle or
2 from our view of the timing restrictions imposed by the statute. Accordingly, their
3 contention that, because Juror No. 3 would have been excluded from the jury if his
4 statutorily disqualifying prior conviction had been known, they are entitled to a new
5 trial without consideration of whether Juror No. 3 was biased or whether his being
6 on the jury caused them actual prejudice, was correctly rejected by the district court.

7 The district court instead properly turned to the question of whether the
8 presence of Juror No. 3 on the jury violated defendants' rights under the Sixth
9 Amendment to trial before a jury that was unbiased. The court correctly laid out the
10 relevant Sixth Amendment principles, describing standards indicated by the Supreme
11 Court in *McDonough* and applied in past cases in this Court, *see, e.g., Parse*, 789 F.3d
12 83; *Greer*, 285 F.3d 158; *Torres*, 128 F.3d 38; *Langford*, 990 F.2d 65. As reflected in the
13 above description of the district court's decision, the court properly recognized that
14 the initial question to be explored is whether the juror's nondisclosure was deliberate
15 or inadvertent; and it recognized that the ensuing determination as to the existence
16 of bias--whether actual, or implied as a matter of law, or permissibly inferred--may
17 well be affected both by whether the nondisclosure was deliberate and, if it was, by

1 the juror's motivation to conceal the truth. Such determinations required assessments
2 of the juror's credibility.

3 As was well within its prerogative as finder of fact, the court found
4 Juror No. 3 to have been truthful in some parts of his testimony while not in others.
5 The court here relied on, *inter alia*, its observation of Juror No. 3's "facial expressions,
6 demeanor, and intonation"; it noted that Juror No. 3 appeared to be unsophisticated
7 and had demonstrable "problems understanding the questions and expressing
8 himself clearly," *Nix I*, 275 F.Supp.3d at 440; and it drew permissible inferences both
9 with respect to the likely truthfulness of Juror No. 3's explanations for his inaccuracy
10 about, for example, the life experiences of his relatives, and with respect to the likely
11 motivation for Juror No. 3's false statements at the Hearing and on voir dire about his
12 own criminal history. Although defendants view Juror No. 3's statements as
13 "dubious" or "not ring[ing] true" (McCoy brief on appeal at 69, 70), the court explored
14 the possible sources of bias on the part of Juror No. 3 and found none. The record
15 does not support a conclusion that the court erred in its assessments of Juror No. 3's
16 credibility or in its ultimate conclusion that his false statements as to his criminal
17 history were not motivated by any desire to serve as a juror in the present case.

1 Accordingly, we see no error of law or clearly erroneous finding of fact,
2 and no other basis for overturning the district court's ruling that the record does not
3 suggest that Juror No. 3 had any bias against defendants or in favor of the
4 government, and its consequent denial of defendants' juror-misconduct-based motion
5 for a new trial.

6 5. *Defendants' Postjudgment Motion for Reconsideration*

7 Nor is there merit in defendants' appeals from the denial of their
8 postjudgment motion for reconsideration of the denial of their Rule 33 new-trial
9 motion. A motion for reargument, while proper for calling to the court's attention
10 controlling decisions or data the court has overlooked, is inappropriate for the
11 presentation of new facts or contentions, or for an attempt to reargue old ones. *See,*
12 *e.g., Shrader v. CSX Transportation, Inc.*, 70 F.3d 255, 257 (2d Cir. 1995). The denial of
13 a motion for reconsideration is reviewable only for abuse of discretion. *See, e.g.,*
14 *United States v. Bayless*, 201 F.3d 116, 131 (2d Cir.), *cert. denied*, 120 S. Ct. 1571 (2000).

15 The district court denied defendants' motion for reargument in part
16 because it was based on supposedly new evidence that was not new; and it was
17 unaccompanied by a showing of diligence as to why the evidence had not been

1 sought or discovered earlier. *See Nix II*, 2018 WL 1009282, at *3-*4. The court also
2 found that what defendants proffered was not sufficiently significant to influence the
3 decision of the Rule 33 motion.

4 What defendants sought to introduce as new evidence was "actual
5 evidence" that Juror No. 3 had been "arrested" for burglary in 1989. *Nix II*, 2018
6 WL 1009282, at *5. The record is clear, however, that "[i]n rendering its decision [in
7 *Nix I*], the Court was already aware that there was some evidence that Juror No. 3
8 was arrested for a home burglary in May of 1989," *Nix II*, 2018 WL 1009282, at *5; *see*,
9 *e.g.*, *Nix I*, 275 F.Supp.3d at 453 n.30 ("*There is some evidence in the record that Juror No. 3*
10 *may have been arrested for burglarizing a home in May of 1989 (when he was 19*
11 *years old). . . . Juror No. 3 had no recollection of this alleged incident, and there is no*
12 *evidence that he was convicted of this crime.*" (emphasis added)).

13 Thus, defendants' "new" evidence concerned an arrest that had in fact
14 been discussed at the Hearing. And defendants' desire to renew a challenge to
15 Juror No. 3's claimed lack of memory--of an arrest not shown to have led to a
16 conviction--hardly seems likely to shed light on the material issue of whether
17 Juror No. 3's failure to disclose any part of his criminal history was motivated by a
18 desire to be seated as a juror for the trial in this case.

1 As to that material issue, the court reaffirmed its *Nix I* assessment of
2 Juror No. 3's credibility and motivation:

3 Having observed Juror No. 3 firsthand during the course of the
4 trial and the two-day evidentiary hearing, this Court rejects the
5 notion that Juror No. 3 lied during *voir dire* so as to secure a spot
6 on the jury.

7 *Nix II*, 2018 WL 1009282, at *5. The district court correctly stated that "Defendants are
8 not entitled to reconsideration merely because they disagree with the outcome of the
9 Rule 33 Denial Order and the Court's determination as to Juror No. 3's alleged bias
10" *Id.*

11 We see nothing in the record to suggest that the denial of defendants'
12 request for reconsideration of their juror-misconduct-based motion for a new trial
13 constituted an abuse of the district court's discretion.

14 B. *Which Hobbs Act Offenses Are Crimes of Violence Within the Meaning of § 924(c)*

15 Section 924(c), as pertinent to defendants' convictions on the brandishing
16 counts (Counts 2, 4, 6, and 12), prescribes enhanced punishment for any person who
17 brandished a firearm "during and in relation to any crime of violence." 18 U.S.C.
18 § 924(c)(1)(A). Although prior to the Supreme Court's decision in *Davis*, 139 S. Ct.

2319, § 924(c) also contained an alternative definition of crime of violence in subpart (c)(3)(B) (*see* Part II.B.1. below), for purposes of § 924(c) a "crime of violence" is now defined only 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) (emphases added).

The crimes on which defendants' brandishing-count convictions are predicated are offenses proscribed by the Hobbs Act (or "Act"), 18 U.S.C. § 1951. The Act in pertinent part, prohibits a person from

affect[ing] commerce . . . *by robbery . . . or attempt[ing] or conspir[ing] to do so, or commit[ting] or threaten[ing] physical violence* to any person or property in furtherance of a plan or purpose to do anything in violation of this section.

18 U.S.C. § 1951(a) (emphases added). Hobbs Act "robbery" is defined to

mean[] 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.*

Id. § 1951(b)(1) (emphases added).

McCoy and Nix, convicted of three types of Hobbs Act offenses--robbery (Count 11), conspiracy to commit robbery (Count 1), and attempted robbery (Counts 3

1 and 5)--contend that none of the Hobbs Act crimes are crime of violence. We agree
2 only with respect to Hobbs Act conspiracy.

3 1. *Hobbs Act Conspiracy*

4 Defendants' convictions on the brandishing charge in Count 2 of the
5 Indictment were predicated on their convictions of the Hobbs Act conspiracy alleged
6 in Count 1. It is now established that Hobbs Act conspiracy is not a crime of violence
7 within the meaning of § 924(c). *See United States v. Barrett*, 937 F.3d 126 (2d Cir. 2019)
8 ("*Barrett II*").

9 In *United States v. Barrett*, 903 F.3d 166 (2d Cir. 2018) ("*Barrett I*"), *vacated*
10 *and remanded for further consideration*, 139 S. Ct. 2274 (2019), we had affirmed the
11 defendant's convictions on several § 924(c) counts that were predicated on Hobbs Act
12 robbery (*see* Part II.B.3 below), and had affirmed one § 924(c) conviction that was
13 predicated on Hobbs Act conspiracy. We had affirmed the latter § 924(c) conviction
14 based in part on § 924(c)(3)(B) because Hobbs Act conspiracy (an offense that is
15 complete without performance of any overt act *see, e.g., United States v. Maldonado-*
16 *Rivera*, 922 F.2d 934, 983 (2d Cir. 1990), *cert. denied*, 501 U.S. 1211 (1991); *United States*

1 *v. Persico*, 832 F.2d 705, 713 (2d Cir. 1987), *cert. denied*, 486 U.S. 1022 (1988)), poses a
2 risk of the use of force, *see Barrett I*, 903 F.3d at 175-77.

3 While the present appeals were pending, the Supreme Court decided
4 *United States v. Davis*, --- U.S. ----, 139 S. Ct. 2319 (2019), ruling that § 924(c)(3)(B), in
5 defining crime of violence in terms of a "risk" that physical force would be used, was
6 unconstitutionally vague, *see* 139 S. Ct. at 2323-24. As "a vague law is no law at all,"
7 *id.* at 2323, we concluded in *Barrett II* that *Davis* "precludes" a conclusion "that [a]
8 Hobbs Act robbery conspiracy crime qualifies as a § 924(c) crime of violence," 937 F.3d
9 at 127.

10 Accordingly, we conclude, and the government agrees, that defendants'
11 convictions on Count 2 must be reversed, and the case remanded for resentencing.

12 2. *Hobbs Act Robbery*

13 Defendants' contention that Hobbs Act robbery is also not a crime of
14 violence within the meaning of § 924(c), however, is contrary to the law of this
15 Circuit. *See Barrett II*, 937 F.3d at 128; *United States v. Hill*, 890 F.3d 51 (2d Cir. 2018)
16 ("*Hill*"), *cert. denied*, 139 S. Ct. 844 (2019). In *Hill*, we employed the "categorical
17 approach" prescribed by *Taylor v. United States*, 495 U.S. 575 (1990), which requires

1 that where Congress has defined a violent felony as a crime that has the use or threat
2 of force "as an element," the courts must determine whether a given offense is a crime
3 of violence by focusing categorically on the offense's statutory definition, *i.e.*, the
4 intrinsic elements of the offense, rather than on the defendant's particular underlying
5 conduct, *id.* at 600-01. We stated that

6 [a]s relevant here, the categorical approach requires us to consider
7 the minimum conduct necessary for a conviction of the predicate
8 offense (in this case, a Hobbs Act robbery), and then to consider
9 whether such conduct amounts to a crime of violence under
10 § 924(c)(3)(A).

11 *Hill*, 890 F.3d at 56.

12 We noted that subpart (3)(A) of § 924(c) defines crime of violence as a
13 felony that "'has as an element the use, attempted use, or threatened use of physical
14 force against the person or property of another.'" *Hill*, 890 F.3d at 54 (quoting
15 § 924(c)(3)(A)). And we noted that the Hobbs Act penalizes a person who affects
16 commerce "'by robbery . . . or attempts or conspires so to do, or commits or threatens
17 physical violence to any person or property in furtherance of a plan or purpose to do
18 anything in violation of this section,'" and that the Act defines robbery in part as "'the
19 unlawful taking or obtaining of personal property from the person or in the presence
20 of another, against his will, by means of actual or threatened force, or violence, or fear of

1 *injury, immediate or future, to his person or property," id.* 890 F.3d at 54-55 (quoting
2 19 U.S.C. §§ 1951(a) and (b)(1) (emphases ours)). Comparing these statutes, we
3 concluded that "Hobbs Act robbery 'has as an element the use, attempted use, or
4 threatened use of physical force against the person or property of another,' 18 U.S.C.
5 § 924(c)(3)(A)," and thus is a crime of violence within the meaning of that provision.
6 *Hill*, 890 F.3d at 60; *see also id.* at 60 & n.7 (noting that "all of the circuits to have
7 addressed the issue" have "h[e]ld that Hobbs Act robbery 'has as an element the use,
8 attempted use, or threatened use of physical force against the person or property of
9 another'" (citing cases)).

10 *Hill's* conclusion that Hobbs Act robbery is a crime of violence within the
11 meaning of § 924(c)(3)(A) was not eroded by the Supreme Court's subsequent ruling
12 in *Davis* that the alternative crime-of-violence definition in § 924(c)(3)(B) was
13 unconstitutionally vague. Rather, after *Davis*, a § 924(c) conviction based on a crime
14 of violence is valid only under § 924(c)(3)(A). *See, e.g., Barrett II*, 937 F.3d at 128
15 (noting that Hobbs Act robbery is "a crime of violence under § 924(c)(3)(A) applying
16 the traditional, elements only, categorical approach not at issue in *Davis*").
17 Accordingly, we "affirm[ed] Barrett's convictions on" the § 924(c) counts for which the

1 predicate crime of violence was "*substantive* Hobbs Act robbery." *Id.* (emphasis in
2 original).

3 Although McCoy and Nix contend that Hobbs Act robbery is not
4 categorically a crime of violence even under § 924(c)(3)(A), arguing that property
5 could be obtained by threatening to withhold care from a person in need or to
6 "poison" a person, and that such means do not constitute physical force (*e.g.*, McCoy
7 brief on appeal at 82), we expressly rejected just such an argument in *Hill*. We noted
8 that such hypothetical possibilities as the withholding of vital care, which have never
9 been the basis of a Hobbs Act charge, are ineffective to deflect the stated thrust of the
10 statute; and that "physical force 'encompasses even its indirect application,' as when
11 a battery is committed by administering a poison." *Hill*, 890 F.3d at 59 (quoting *United*
12 *States v. Castleman*, 572 U.S. 157, 170 (2014)).

13 In sum, defendants' contention that Hobbs Act robbery is not a crime of
14 violence within the meaning of § 924(c)(3)(A) is foreclosed by *Hill* and *Barrett II*.

15 3. *Hobbs Act Attempted Robbery*

16 Defendants' contention that their firearm-brandishing convictions on
17 Counts 4 and 6 should be reversed on the ground that the offense of Hobbs Act

1 attempted robbery (Counts 3 and 5) does not constitute a crime of violence--a
2 contention not raised in the district court, and thus reviewable only under plain-error
3 analysis--is also unpersuasive. We address this issue as to the nature of the Act's
4 prohibition of attempted robbery, which is one of first impression in this Circuit,
5 again using the categorical approach.

6 As set out above, the surviving § 924(c) definition of "crime of violence"
7 expressly includes a felony that "has as an element the . . . *attempted* use . . . of physical
8 force against the person or property of another." 18 U.S.C. § 924(c)(3)(A) (emphasis
9 added). It is a fundamental principle of statutory interpretation that, "absent other
10 indication, Congress intends to incorporate the well-settled meaning of the
11 common-law terms it uses." *Sekhar v. United States*, 570 U.S. 729, 732 (2013) (internal
12 quotation marks omitted). The definition of "attempt" both in federal law and in the
13 Model Penal Code had long been settled by 1986, when the operative language of
14 § 924(c)(3)(A) was adopted. *See* Firearms Owners' Protection Act, Pub. L. No. 99-308,
15 § 104(a)(2), 100 Stat. 449, 456-57 (1986) (first defining "crime of violence" to include
16 "attempted use . . . of physical force"); *United States v. Farhane*, 634 F.3d 127, 146 (2d
17 Cir.) ("*Farhane*") ("This court effectively adopted the Model Code's formulation of
18 attempt in *United States v. Stallworth*, 543 F.2d 1038, 1040-41 (2d Cir. 1976)."), *cert.*

1 *denied*, 565 U.S. 1088 (2011). Accordingly, when Congress used "attempted use" in
2 § 924(c) without providing a different definition for the phrase, it adopted the concept
3 of "attempt" existing under federal law.

4 "Under federal law, '[a] person is guilty of an attempt to commit a crime
5 if he or she (1) had the intent to commit the crime, and (2) engaged in conduct
6 amounting to a "substantial step" towards the commission of the crime.'" *United States*
7 *v. Thrower*, 914 F.3d 770, 776 (2d Cir.) ("*Thrower*") (quoting *United States v. Martinez*,
8 775 F.2d 31, 35 (2d Cir. 1985)), *cert. denied*, 140 S. Ct. 305 (2019). This means that, for
9 substantive crimes of violence that include the use of physical force as an element,
10 defendants also commit crimes of violence when commission of those crimes is
11 attempted--because such attempts necessarily require (a) an intent to complete the
12 substantive crime (including an intent to use physical force) and (b) a substantial step
13 towards completing the crime (which logically means a substantial step towards
14 completion of all of that crime's elements, including the use of physical force). *See*
15 *United States v. Taylor*, 979 F.3d 203, 209 (4th Cir. 2020) ("*Taylor*"). Because we held in
16 *Hill* that Hobbs Act robbery categorically constitutes a crime of violence, *see* 890 F.3d
17 at 53, it follows as a matter of logic that an "attempt[]" to commit Hobbs Act

1 robbery--which the statute also expressly prohibits, *see* 18 U.S.C.
2 § 1951(a)--categorically qualifies as a crime of violence.

3 McCoy and Nix raise two principal arguments for why this should not
4 be so. First, they contend that Hobbs Act attempted robbery is not a crime of violence
5 because it is possible for a defendant to "take a substantial step towards commission
6 of an offense without engaging in a violent act." (McCoy first supplemental brief on
7 appeal at 16). But while it is true that a substantial step towards a completed Hobbs
8 Act robbery need not itself involve the "use . . . of physical force" within the meaning
9 of § 924(c)(3)(A), *see, e.g., United States v. Jackson*, 560 F.2d 112, 120 (2d Cir.) ("*Jackson*")
10 ("reconnoiter[ing] the place contemplated for the commission of the crime and
11 possess[ing] the paraphernalia to be employed in the commission of the crime"
12 constituted substantial steps towards a bank robbery in violation of 18 U.S.C.
13 § 2113(a)), *cert. denied*, 434 U.S. 914 (1977); *United States v. Gonzalez*, 441 F. App'x 31,
14 36 (2d Cir. 2011) (applying *Jackson* to Hobbs Act attempted robbery), *cert. denied*, 565
15 U.S. 1218 (2012), that is of no moment, since the substantive Hobbs Act robbery
16 towards which that substantial step leads necessarily would involve the "use of
17 physical force," if completed. To be guilty of Hobbs Act attempted robbery, a
18 defendant must necessarily (1) intend to commit all of the elements of a substantive

1 robbery, including the use of physical force, and (2) take a substantial step towards
2 committing the substantive robbery, which logically includes taking a substantial step
3 towards completing all of its elements, including the use of force. Accordingly, even
4 if a defendant's substantial step does not itself involve the use of physical force, a
5 defendant must necessarily intend to use physical force and take a substantial step
6 towards using physical force, which constitutes "attempted . . . use of physical force"
7 within the meaning of § 924(c)(3)(A). *Accord United States v. Walker*, 990 F.3d 316, 325
8 (3d Cir. 2021); *United States v. Dominguez*, 954 F.3d 1251, 1262 (9th Cir. 2020), *petition*
9 *for cert. filed*, No. 20-1000 (U.S. Jan. 26, 2021); *United States v. Ingram*, 947 F.3d 1021,
10 1026 (7th Cir.), *cert. denied*, 141 S. Ct. 323 (2020); *United States v. St. Hubert*, 909 F.3d
11 335, 351-52 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1394 (2019). *Cf. United States v.*
12 *Hendricks*, 921 F.3d 320, 328-29 & n.40 (2d Cir. 2019) (holding that attempted bank
13 robbery by intimidation in violation of § 2113(a) is a crime of violence because
14 intimidation "means that the defendant did or said something that would make an
15 ordinary reasonable person fear bodily harm" (internal quotation marks omitted)),
16 *cert. denied*, 140 S. Ct. 870 (2020).

17 McCoy and Nix next argue that Hobbs Act attempted robbery does not
18 categorically constitute a crime of violence because substantive Hobbs Act robbery

1 need not always involve the actual use of force; rather, the statute defines "robbery"
2 as "the unlawful taking . . . of personal property . . . by means of actual *or threatened*
3 force." 18 U.S.C. § 1951(b)(1) (emphasis added). Based on this definition of "robbery,"
4 as the Fourth Circuit recently observed, Hobbs Act attempted robbery could also
5 theoretically include "attempt[s] to *threaten* force," which would appear not to
6 constitute an "attempt to *use* force" as required by § 924(c)(3)(A). *Taylor*, 979 F.3d
7 at 209 (emphases in original).

8 However, even though it is theoretically possible that a defendant could
9 be charged with Hobbs Act attempted robbery under such an attempt-to-threaten
10 theory, we have made clear that "to show a predicate conviction is not a crime of
11 violence 'requires more than the application of legal imagination to [the] . . . statute's
12 language'; rather 'there must be 'a realistic probability, not a theoretical possibility,'
13 that the statute at issue could be applied to conduct that does not constitute a crime
14 of violence.'" *Hill*, 890 F.3d at 56 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193
15 (2007)). To show such a "realistic probability," a defendant "'must at least point to his
16 own case or other cases in which the . . . courts did in fact apply the statute in the . . .
17 manner for which he argues.'" *Hill*, 890 F.3d at 56 (quoting *Duenas-Alvarez*, 549 U.S.
18 at 193).

1 McCoy and Nix have failed to make such a showing here. They point to
2 no case in which a defendant has been convicted of Hobbs Act attempted robbery
3 premised on an *attempted* "threat[]" to use force, and we are aware of none. And for
4 good reason: For purposes of the federal crime of attempt, a "substantial step" means
5 conduct (a) that is "planned to culminate in the commission of the *substantive* crime
6 being attempted," *Farhane*, 634 F.3d at 147 (internal quotation marks omitted
7 (emphasis ours)), and (b) that "is strongly corroborative of the criminal intent of the
8 accused," *United States v. Davis*, 8 F.3d 923, 927 (2d Cir. 1993). It is difficult even to
9 imagine a scenario in which a defendant could be engaged in conduct that would
10 "culminate" in a robbery and that would be "strongly corroborative of" his intent to
11 commit that robbery, but where it would also be clear that he only "attempt[ed]" to
12 "threaten[]," and neither used nor even actually "threatened" the use of force.

13 Indeed, in *Thrower* we made a similar observation when considering
14 whether the New York crime of attempted third-degree robbery involves the
15 "attempted use . . . of physical force" within the meaning of 18 U.S.C. § 924(e)(2)(B),
16 since New York law defines robbery similarly to Hobbs Act robbery, *see* N.Y.Penal
17 Law § 160.0 (defining "[r]obbery" as "us[ing] or threaten[ing] the immediate use of
18 physical force" "in the course of committing a larceny"). We observed that "[t]hough

1 Thrower posits that a defendant might be convicted of attempted robbery in New
2 York *for an attempt to threaten to use physical force--as distinct from an attempt to use*
3 *physical force or a threat to use physical force--he fails to 'at least point to his own case*
4 *or other cases in which the state courts did in fact apply the statute in the . . . manner*
5 *for which he argues.'*" *Thrower*, 914 F.3d at 777 (quoting *Duenas-Alvarez*, 549 U.S.
6 at 193 (emphases ours)).

7 In sum, we hold that Hobbs Act attempted robbery qualifies as a crime
8 of violence under § 924(c) because an attempt to commit Hobbs Act robbery using
9 force necessarily involves the "attempted use . . . of force" under § 924(c)(3)(A), and
10 because, even though a conviction for an inchoate attempt to threaten is theoretically
11 possible, McCoy and Nix have not shown that there is a "realistic probability" that the
12 statute will be applied in such a manner, *Duenas-Alvarez*, 549 U.S. at 193.

13 4. *Liability for Aiding-and-Abetting*

14 Finally, McCoy and Nix contend--for the first time on these appeals--that
15 their § 924(c) firearm-brandishing convictions on Counts 4, 6, and 12 should be
16 reversed for lack of a proper predicate because their convictions of the corresponding
17 substantive Hobbs Act offenses (Counts 3 and 5 (attempted robbery) and Count 11

1 (robbery)) were based on an aiding-and-abetting theory of liability. Given evidence
2 that they normally sat in nearby cars while their brothers and/or friends entered the
3 targeted homes, threatened the victims, and stole or attempted to steal the victims'
4 property, McCoy and Nix contend that aiding-and-abetting a substantive Hobbs Act
5 offense is not a crime of violence. This contention need not detain us long.

6 Section 2 of Title 18 provides in part that "[w]hoever commits an offense
7 against the United States or aids, abets, counsels, commands, induces or procures its
8 commission, is punishable as a principal." 18 U.S.C. § 2(a). For the aiding-and-
9 abetting theory of liability to apply, the underlying federal crime must have been
10 committed by someone other than the defendant; and the defendant himself must
11 either have acted, or have failed to act, with the specific intent of aiding the
12 commission of that underlying crime. *See, e.g., Rosemond v. United States*, 572 U.S. 65,
13 77 (2014); *United States v. Smith*, 198 F.3d 377, 382-83 (2d Cir. 1999) ("*Smith*"), *cert.*
14 *denied*, 531 U.S. 864 (2000). Section 2(a) makes an aider and abetter as guilty of the
15 underlying crime as the person who committed it.

16 There is no culpable aiding and abetting without an underlying crime
17 committed by some other person; and aiding and abetting itself is not the predicate
18 crime for firearm brandishing under § 924(c). The aiding-and-abetting concept

describes the role of the defendant that makes him liable for the underlying offense. "[W]hen a person is charged with aiding and abetting the commission of a substantive offense, the 'crime charged' is . . . the substantive offense itself." *Smith*, 198 F.3d at 383 (other internal quotation marks omitted); see, e.g., *United States v. Richardson*, 906 F.3d 417, 426 (6th Cir. 2018) ("*Richardson I*") ("There is no distinction between aiding and abetting the commission of a crime and committing the principal offense. *Aiding and abetting is simply an alternative theory of liability; it is not a distinct substantive crime.*" (internal quotation marks omitted) (emphasis ours)), *vacated and remanded on other grounds, Richardson v. United States*, 139 S. Ct. 2713 (2019) ("*Richardson II*").

The crime charged in a prosecution for aiding and abetting a Hobbs Act robbery is thus Hobbs Act robbery. *Accord In re Colon*, 826 F.3d 1301, 1305 (11th Cir. 2016) ("Because an aider and abettor is responsible for the acts of the principal as a matter of law, an aider and abettor of a Hobbs Act robbery necessarily commits all the elements of a principal Hobbs Act robbery."); *United States v. Deiter*, 890 F.3d 1203, 1215-16 (10th Cir.) (courts should look to "the underlying statute of conviction, rather than § 2, to decide whether [§ 924(c)(3)(A)] is satisfied"), *cert. denied*, 139 S. Ct. 647 (2018).

1 If the underlying offense is a crime of violence, it is a predicate for
2 § 924(c) liability; if the defendant aided and abetted that underlying offense, he is
3 guilty of the underlying offense. As we have concluded above, Hobbs Act robbery
4 and Hobbs Act attempted robbery are crimes of violence within the meaning of
5 § 924(c). As McCoy and Nix--either directly or as aiders and abettors--were found
6 guilty of those crimes of violence, they were convicted of crimes that are proper
7 predicates for § 924(c) liability. Their § 924(c) convictions, based on their guilt as
8 aiders and abettors of the violent crimes of Hobbs Act robbery and attempted
9 robbery, are not error, much less plain error.

10 *C. Instructional and Sufficiency Challenges*

11 Defendants also make several other challenges to their convictions,
12 principally contending that, in light of the Supreme Court's decision in *Rehaif*, their
13 § 922(g)(1) convictions as felons in possession of firearms should be vacated because
14 the district court failed to instruct the jury that the government was required to prove
15 that when they possessed the firearms, they knew their status as felons. Nix also
16 contends that the evidence was insufficient to support his convictions on Counts 3,

1 4, and 7, and that the court erred in giving the jury a *Pinkerton* instruction. We reject
2 all of these challenges.

3 1. *The Rehaif Challenges*

4 On Counts 9 and 10, respectively, Nix and McCoy were convicted of
5 having been in possession of firearms on September 23, 2014, in violation of 18 U.S.C.
6 § 922(g), which makes firearm possession unlawful by "any person . . . who has been
7 convicted in any court of[] a crime punishable by imprisonment for a term exceeding
8 one year." 18 U.S.C. § 922(g)(1) (the "felon-in-possession" subparagraph). Anyone
9 who "knowingly violates" any of the nine subparagraphs of § 922(g), including
10 subparagraph (g)(1), is subject to imprisonment for up to 10 years. *Id.* § 924(a)(2).

11 While the present appeals were pending, the Supreme Court in *Rehaif*,
12 which involved a defendant convicted under a different § 922(g) subparagraph, ruled
13 that "in prosecutions under § 922(g) and § 924(a)(2), the Government must prove that
14 a defendant knows of his status as a person barred from possessing a firearm," 139 S.
15 Ct. at 2195; *see id.* at 2194 (the government must show not only that "the defendant
16 knew he possessed a firearm" but "also that he knew he had the relevant status when
17 he possessed it").

1 In charging the jury in the present case, the district court instructed that
2 each defendant had "stipulated" with the government "that prior to September 23,
3 2014," he had in fact "been convicted of a crime punishable by imprisonment for a
4 term exceeding one year" (Tr. 3873); but it did not instruct that the jury must find that,
5 when they possessed firearms on that date defendants knew they had been convicted
6 of a crime that was punishable by imprisonment for more than one year. Defendants
7 contend that they are thus entitled to have their convictions on Counts 9 and 10
8 vacated and the matter remanded for further proceedings. We disagree. As
9 defendants neither requested an instruction as to their knowledge of their felony
10 status nor objected to the instructions that were given, we review these challenges
11 only for plain error, and we conclude that defendants do not meet that standard.

12 In light of *Rehaif*, it was error not to instruct that the government was
13 required to prove defendants' knowledge of their status as convicted felons at the
14 time of their firearm possession; and that error is plain, *see, e.g., Henderson v. United*
15 *States*, 568 U.S. 266, 279 (2013) ("it is enough that an error be 'plain' at the time of
16 appellate consideration for [t]he second part of the [four-part] *Olano* test [to be]
17 satisfied" (other internal quotation marks omitted)); *United States v. Balde*, 943 F.3d 73,
18 97 (2d Cir. 2019). Thus, the first two prongs of plain-error analysis have been met.

1 It is also arguable that the third prong of the plain-error test--an error
2 affecting substantial rights--may have been met. The Supreme Court in *Rehaif*, while
3 noting that, as to the relevant status element of § 922(g), the requisite "knowledge can
4 be inferred from circumstantial evidence," 139 S. Ct. at 2198 (internal quotation marks
5 omitted), also suggested that an inference of knowledge as to felony status with
6 respect to the felon-in-possession subparagraph of § 922(g) might not be available if
7 the "person . . . was convicted of a prior crime but sentenced only to probation," and
8 "d[id] not know that the crime [wa]s *punishable* by imprisonment for a term exceeding
9 one year," *id.* (emphasis in original).

10 In the present case, while McCoy and Nix stipulated that they had
11 previously been convicted of crimes punishable by imprisonment for a term
12 exceeding one year, their stipulations neither included acknowledgement that they
13 knew those crimes were punishable to that extent nor specified the length of the
14 sentences actually imposed on them. And the government has not called to our
15 attention any trial evidence from which the jury, if properly instructed, could have
16 found beyond a reasonable doubt that they had such knowledge.

17 In a case raising post-*Rehaif* issues similar to those here, we "decline[d]
18 to decide whether a properly-instructed jury would have found that [the defendant]

1 was aware of his membership in § 922(g)(1)'s class," *United States v. Miller*, 954 F.3d
2 551, 559 (2d Cir. 2020) ("*Miller*"), and we instead proceeded directly to "the fourth
3 prong of plain-error review, which examines whether not reversing would seriously
4 affect[] the fairness, integrity or public reputation of judicial proceedings and which
5 does not necessarily confine us to the *trial* record," *id.* (internal quotation marks and
6 footnote omitted) (emphasis ours). In *Miller* we found reliable information in the
7 presentence report ("PSR") prepared on the defendant, which, *inter alia*, described his
8 criminal record. As a defendant's criminal history is an essential factor in the district
9 court's required calculation of the sentence recommended for him by the Guidelines,
10 the contents of the PSR will have been subjected to close scrutiny by both sides. The
11 PSR for the defendant at issue in *Miller* showed that he had prior felony convictions
12 for which he received "a total effective sentence of ten years' imprisonment, with
13 execution suspended after three years, which remove[d] any doubt that [he] was
14 aware of his membership in § 922(g)(1)'s class." *Id.* at 560.

15 Accordingly, we concluded that the *Miller* trial court's failure to instruct
16 the jury on the element of whether the defendant knew he was a convicted felon "did
17 not rise to the level of reversible plain error" because it does no disservice to the
18 judicial system to hold that a person who was sentenced to and served a prison term

1 of more than one year must have been aware of both the extent of his sentence and
2 the length of time he spent in prison. *Id.* We have reached the same result in other
3 post-*Rehaif* cases in which the district court records revealed that the defendant had
4 received, and had served, a prison sentence exceeding one year. *See, e.g., United States*
5 *v. Sandford*, 814 F. App'x 649, 652-53 (2d Cir. 2020); *United States v. Smith*, 814 F. App'x
6 634, 635-36 (2d Cir. 2020); *United States v. Goolsby*, 820 F. App'x 47, 50 (2d Cir. 2020);
7 *United States v. Johnson*, 816 F. App'x 604, 607-08 (2d Cir. 2020); *United States v. Frye*,
8 826 F. App'x 19, 23-24 (2d Cir. 2020); *United States v. Feaster*, 833 F. App'x 494, 497 (2d
9 Cir. 2020).

10 The district court record in the present case includes PSRs with similar
11 details--unobjected to by McCoy or Nix--as to the sentences actually imposed on them
12 for their prior felony convictions and the amounts of prison time they served for those
13 convictions. McCoy, in 2001, was convicted in New York State court, following his
14 plea of guilty, on two felony counts of criminal possession of controlled substances
15 and was sentenced to a prison term of 54 months to nine years; as a result he was
16 imprisoned for nearly six years. Nix, in 2008, was convicted in federal court,
17 following his plea of guilty, of possession of narcotics with intent to distribute and
18 possession of a firearm in furtherance of the drug offense; he was sentenced to 24

1 months' imprisonment for each offense, to be served consecutively. As a result, Nix
2 spent some four years in prison.

3 On this record, we conclude that there can be no reasonable doubt that
4 each of these defendants knew he had been convicted of a crime punishable by
5 imprisonment for a term exceeding one year. McCoy and Nix thus have not shown
6 that the trial court's failure to instruct the jury that it must find that a defendant had
7 such knowledge seriously affected the fairness, integrity, or public reputation of
8 judicial proceedings. The unobjected-to error provides no basis for vacating the
9 convictions on Counts 9 and 10.

10 2. *Nix's Sufficiency Challenges*

11 Nix contends that the evidence at trial was insufficient to convict him on
12 Count 7 of the Indictment, which charged the narcotics distribution conspiracy, and
13 on Counts 3 and 4, which concerned the attempted robbery and use of firearms at
14 Hayward Avenue. In considering a challenge to the sufficiency of the evidence to
15 support a conviction, we view the evidence, whether direct or circumstantial, in the
16 light most favorable to the government, crediting every inference that could have
17 been drawn in the government's favor, and deferring to the jury's assessments of

1 witness credibility and the weight of the evidence. *See, e.g., United States v. Lyle*, 919
2 F.3d 716, 737 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 846 (2020); *United States v. O'Brien*,
3 926 F.3d 57, 79 (2d Cir. 2019); *United States v. Praddy*, 725 F.3d 147, 152 (2d Cir. 2013).
4 With the evidence at trial viewed in that light, and considered as a whole rather than
5 piecemeal, *see, e.g., United States v. Podlog*, 35 F.3d 699, 705 (2d Cir. 1994), *cert. denied*,
6 513 U.S. 1135 (1995); *United States v. Brown*, 776 F.2d 397, 403 (2d Cir. 1985), *cert.*
7 *denied*, 475 U.S. 1141 (1986), a conviction will be upheld so long as, "*any* rational trier
8 of fact could have found the essential elements of the crime beyond a reasonable
9 doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original).

10 In a prosecution for conspiracy to possess with intent to distribute a
11 prohibited substance, the element of intent to distribute--as contrasted with an intent
12 to possess only for personal use--"may be inferred from the volume of drugs with
13 which defendant was associated or that was in his actual or constructive possession."
14 *United States v. Anderson*, 747 F.3d 51, 62 n.8 (2d Cir. 2014), *cert. denied*, 574 U.S. 850
15 (2014); *see, e.g., United States v. Brockman*, 924 F.3d 988, 993 (8th Cir. 2019) (finding that
16 the district court did not clearly err in determining that "eight ounces [of marijuana]
17 exceeded a user quantity"); *United States v. Martinez*, 964 F.3d 1329, 1334 (11th Cir.
18 2020) ("A pound, whether it's cocaine, heroin, marijuana, or methamphetamine, is

1 more than personal users typically buy."). And we have noted quantity is not always
2 dispositive: "[A]ny amount of drugs, however small, will support a conviction when
3 there is additional evidence of intent to distribute." *United States v. Martinez*, 54 F.3d
4 1040, 1043 (2d Cir. 1995).

5 Nix, in challenging the sufficiency of the evidence to support his Count 7
6 conviction of conspiracy to distribute narcotics, argues that there was no direct
7 testimony that he engaged in narcotics distribution, and that Barnes testified that he
8 never observed Nix engaging in such distribution. (*See* Nix brief on appeal at 55-56.)
9 Given the record before us, and the fact that Count 7 charged conspiracy, rather than
10 actual distribution, this challenge is meritless.

11 First, there was abundant proof of the existence of a robbery conspiracy
12 whose principal members were McCoy, Barnes, Clarence and Gary Lambert, and
13 Nix--who was called "Meech" (Tr. 1223). The evidence included, as described in Part
14 I.A. above, the testimony of Barnes who admitted having engaged in 10-20 home
15 invasions with Nix; and through Nix, Barnes met, and participated in home invasions
16 with, Clarence, Gary, and McCoy. (*See* Tr. 1240, 1230-31.) Although Nix himself did
17 not enter the invaded homes, he selected the persons to be robbed, conducted
18 preliminary surveillance of targeted premises, planned the invasions, provided guns,

1 and gave the men who would enter information as to what to expect and where to
2 search (*see, e.g., id.* at 1239 (Barnes: "Meech would tell me the location and take me
3 there and I would go in the house with somebody else")). And while his associates
4 were inside, Nix would wait for them in the car "either down the street or around the
5 corner" (*id.* at 1236); the men who had entered would phone Nix to report whether
6 they were finding the expected trove of money and/or drugs (*see id.* at 1236-37).
7 When the men who had entered emerged with stolen property, they turned it over
8 to Nix who, with McCoy, decided how it would be divided. (*See, e.g., id.* at 1237-40,
9 2912.)

10 Second, there was ample evidence that a principal goal of the conspiracy
11 was to rob drug dealers. Barnes testified that in all but one instance, the residents of
12 the invaded homes were persons Nix believed to be drug dealers. (*See* Tr. 1228.) And
13 it was understood among the coconspirators that Nix and McCoy intended to sell the
14 narcotics obtained in those robberies. (*See, e.g., id.* at 1238 (as to drugs obtained in
15 such a robbery, "Meech would take it and sell it and give me what he felt like I should
16 get off those"); *id.* ("[Meech] would sell the drugs and give me money, bring me
17 money back off the drugs").) Barnes testified that drug dealers were targeted

1 precisely because they would have "[m]oney, drugs, drugs that we could sell." (*Id.*
2 at 1228.)

3 For example, Barnes testified that for the September 23 burglary, Nix
4 drove him to Maple Street and identified the intended house; Nix then phoned
5 McCoy and Clarence. After McCoy and Clarence arrived and got into Nix's car, Nix
6 and McCoy told Barnes and Clarence what kind of drugs they would find in the
7 house and said that drugs could be found hidden in the walls. (*See* Tr. 1312-15.)
8 Barnes testified that the "plan . . . if [they] got drugs from inside that house," was that
9 "Meech and P was going to sell" the drugs and give Barnes and Clarence some of the
10 proceeds. (*Id.* at 1316.)

11 According to plan, Barnes and Clarence, armed with guns, entered the
12 Maple Street house and, as predicted by Nix, found cash and drugs. Barnes phoned
13 Nix from the house and said, "We hit the jackpot"; Nix told him to "Get everything
14 and I'll be there . . . I'm coming." (Tr. 1321.) What they found in the Maple Street
15 house included 10-12 "large" ziplock bags--an estimated eight inches by six or eight
16 inches--"full of weed." (*Id.* 1322-33.) Nix, McCoy, Barnes, and Clarence then went to
17 Barnes's then-house, and Nix--who had taken possession of the \$7-10,000 in cash that
18 Barnes and Clarence had found--gave Barnes and Clarence each \$1,000. "[Nix] took

1 all of the drugs" (Tr. 1332); and McCoy and Barnes subsequently "bought capsules to
2 package the" marijuana "[s]o we could sell it" (*id.*).

3 The jury could also infer that the amounts of narcotics stolen by the
4 conspirators and appropriated by Nix as his share--especially given the large number
5 of home invasions done by defendants and their crew seeking to obtain drugs, *see*,
6 *e.g., id.* at 2871-76 (Gary describing an earlier burglary that yielded 24 pounds of
7 marijuana, of which Nix's share was more than 11 pounds)--were inconsistent with
8 possession merely for Nix's personal use.

9 In sum, the evidence was ample to allow the jury to find that Nix was
10 part of a conspiracy whose express goal was to rob drug dealers of narcotics in
11 quantities sufficient to allow members of the conspiracy to be drug dealers
12 themselves.

13 In challenging his conviction on Counts 3 and 4 with respect to the
14 Hayward Avenue attempted robbery, Nix argues that the cellphone evidence that he
15 was near that location at the time of that event was "dispute[d]," and that "mere
16 presence at the scene of a crime, even when coupled with knowledge that at that
17 moment a crime is being committed is insufficient to establish the defendant's

1 participation in criminal activity." (Nix brief on appeal at 56, 55 (internal quotation
2 marks omitted).) This argument is meritless as well.

3 As discussed above, coconspirators at trial described the usual operations
4 of the conspiracy, in which Nix organized and planned the home invasions and
5 remained nearby while they took place, and the men who actually entered the homes
6 would telephone Nix after entering and inform him of what they found. One of the
7 armed men who broke into the Hayward Avenue home, expecting to find drugs, was
8 identified at trial as McCoy. After he and the other invader failed to find any drugs,
9 McCoy made a telephone call in which one of the victims heard him report that "there
10 was nothing in the house" (Tr. 1082). Evidence of telephone and cellphone tower
11 records identified calls between phones of McCoy and Nix, both of which were in the
12 immediate vicinity of the Hayward Avenue residence during the time of this robbery
13 attempt; and both defendants' phones were tracked to the house of Nix's mother
14 immediately thereafter. (*See, e.g.*, Tr. 3133-39.)

15 Thus, although Nix did not himself enter the home, the evidence was
16 plainly sufficient to permit the jury to find him guilty of the Counts 3 and 4
17 substantive offenses of attempted robbery and firearm use on Hayward Avenue,

1 either by aiding and abetting the attempted robbery (*see generally* Part II.B.4. above)
2 or on the *Pinkerton* theory of conspiratorial vicarious liability, to which we now turn.

3 3. *Nix's Pinkerton Challenge*

4 Nix contends that it was error for the district court to give the jury a
5 *Pinkerton* charge, which informs the jury that it may find a defendant guilty of a
6 substantive offense that he did not personally commit if it was committed by a
7 coconspirator in furtherance of the conspiracy, and if commission of that offense was
8 a reasonably foreseeable consequence of the conspiratorial agreement, *see Pinkerton*,
9 328 U.S. at 646-48. Nix argues that such an instruction was improper here, claiming
10 that the evidence of conspiracy was "sufficiently thin that the charge invite[d] the
11 jury" to "infer[] the conspiracy from the substantive offense." (Nix brief on appeal
12 at 60.) This argument lacks any foundation in the evidentiary record or in the
13 instructions as given.

14 To begin with, the court expressly instructed the jury that, in order to
15 find a defendant guilty of a substantive offense committed by another person on this
16 theory of conspiratorial vicarious liability, it must first find beyond a reasonable
17 doubt that both the defendant and the person who actually committed the substantive

1 offense were members of the charged conspiracy at the time the substantive offense
2 was committed, that the substantive offense was committed pursuant to the common
3 plan of the coconspirators, and that the commission of the substantive offense was
4 reasonably foreseeable to the defendant. (*See* Tr. 3819-21.) The court then reiterated
5 that the jury could not find a defendant guilty on this theory of liability if it had not
6 made all of the described preliminary findings. (*See id.* at 3821-22.) The court in no
7 way invited the jury to infer the existence of a conspiracy from the performance of the
8 substantive acts.

9 Further, the evidence supporting the charges of conspiracy was anything
10 but "thin." As discussed above, the testimony of Gary, Moscicki, and Barnes, who
11 were coconspirators of McCoy and Nix--which plainly was credited by the jury--
12 abundantly established the existence of a conspiracy, *i.e.*, an agreement among Nix,
13 McCoy, Gary and Clarence Lambert, Barnes, and others to act together to commit
14 home invasions, principally against persons thought to be drug dealers, and indeed
15 established that Nix was the conspiracy's principal leader. We see no *Pinkerton* error.

1 D. Resentencing

2 When the district court sentenced McCoy and Nix in 2017, § 924(c)(1)(C)
3 had been interpreted to require that a defendant convicted of multiple § 924(c)
4 violations in a single prosecution be sentenced to consecutive 25-year minimum
5 prison terms for the second violation and each subsequent violation. *See Deal v.*
6 *United States*, 508 U.S. 129, 132-37 (1993). In 2018, however, Congress adopted the
7 First Step Act (or "FSA"), amending § 924(c)(1)(C) "to provide that only a second
8 section 924(c) conviction 'that occurs after a prior conviction under [section 924(c)] has
9 become final' requires the consecutive minimum 25-year sentence provided by
10 subsection 924(c)(1)(C)(i)." *United States v. Brown*, 935 F.3d 43, 45 n.1 (2d Cir. 2019)
11 ("*Brown*") (quoting First Step Act, Pub L. No. 115-391, § 403(a), 132 Stat. 5194, 5221-22).

12 In supplemental briefing, defendants argue--in the event that their
13 requests for a new trial and their challenges to the viability of any of their § 924(c)
14 convictions are unsuccessful--that we should remand to the district court for
15 reduction of their sentences on the surviving § 924(c) counts in light of § 403 of the
16 First Step Act. McCoy and Nix argue that they are eligible for such relief because
17 their convictions will not become final until appellate review rights have been
18 exhausted.

1 While defendants' concept of finality is generally correct, its applicability
2 here is unclear. With respect to the temporal applicability of its provisions, the First
3 Step Act provides that its amendments to § 924(c) "shall *apply to any offense* that was
4 committed before the date of enactment of this Act, *if a sentence for the offense **has not***
5 ***been imposed** as of such date of enactment,*" FSA § 403(b) (emphases added). When an
6 FSA reduction in sentence has been sought by a defendant who was sentenced before
7 the FSA's date of enactment and who was not otherwise entitled to appellate relief on
8 his § 924(c) convictions, courts have concluded that FSA relief was not available. *See,*
9 *e.g., United States v. Cruz-Rivera*, 954 F.3d 410, 413 (1st Cir.), *cert. denied*, 2020 141 S. Ct.
10 601 (2020) (interpreting Congress's focus on the time at which a sentence was
11 "imposed" as intending to deny eligibility for FSA relief to any defendant originally
12 sentenced prior to the FSA's enactment, reflecting the customary understanding that
13 a sentence is "imposed either when it is pronounced or entered in the trial court,
14 regardless of subsequent appeals" (internal quotation marks omitted)); *United States*
15 *v. Jordan*, 952 F.3d 160, 174 (4th Cir. 2020) ("Congress decided to extend the more
16 lenient terms of § 403(a) of the First Step Act to some but not all pre-Act offenders,
17 with the date of sentencing in the district court drawing the line between those who
18 are covered and those who are not." (internal quotation marks omitted)), *cert. denied*,

1 141 S. Ct. 1051 (2021); *United States v. Gomez*, 960 F.3d 173, 177 (5th Cir. 2020) ("A
2 sentence is 'imposed' when the district court pronounces it, not when the defendant
3 exhausts his appeals."). However, at least one court has held that as to a defendant
4 who was originally sentenced prior to the FSA's date of enactment and whose
5 "sentences were remanded prior to the First Step Act's enactment but who were not
6 . . . resentenced" until after enactment, "both the text of the statute and Congress's
7 purpose in enacting the legislation make clear that § 403 applies." *United States v.*
8 *Henry*, 983 F.3d 214, 219 (6th Cir. 2020).

9 In *Davis*, the Supreme Court itself described Congress in the First Step
10 Act as having "changed the law . . . *going forward*." 139 S. Ct. at 2324 n.1 (emphasis
11 added). However, a week before *Davis* was filed, the Supreme Court in *Richardson II*
12 had granted certiorari and remanded, stating, without other substantive comment,
13 "[j]udgment vacated, and case remanded to the United States Court of Appeals for the
14 Sixth Circuit for the court to consider the First Step Act of 2018, Pub. L. No. 115-391
15 (2018)," 139 S. Ct. at 2713-14--in a case that had been the subject of appellate review
16 in the court of appeals and the Supreme Court for several years with respect to a
17 sentence originally imposed on the defendant in 2013 and reimposed in 2017, *see*
18 *Richardson I*, 906 F.3d at 421-22. Nonetheless, the Supreme Court denied further

1 review after the Sixth Circuit, following the *Richardson II* remand, concluded that
2 retroactive FSA relief was unavailable to Richardson because "[i]n the general context
3 of criminal sentencing, a sentence is 'imposed' when the trial court announces it, not
4 when the defendant has exhausted his appeals from the trial court's judgment," *United*
5 *States v. Richardson*, 948 F.3d 733, 748 (6th Cir.) ("*Richardson III*"), *cert. denied*, 141 S. Ct.
6 344 (2020) ("*Richardson IV*").

7 In *Brown*, we quoted the *Davis* Court's "'changed the law . . . going
8 forward'" language, but we also stated that "at the resentencing, which will occur as
9 a result of our remand, Brown will have the opportunity to argue that he is
10 nevertheless entitled to benefit from section 403(b) of the [FSA]." 935 F.3d at 45 n.1.

11 Here too, as we have reversed defendants' convictions on Count 2 and
12 are remanding for resentencing, we leave it to the district court in the first instance
13 to consider the applicability of the First Step Act to McCoy and Nix in light of the
14 possible temporal limitation on retroactivity dictated by Congress's reference to the
15 time when a sentence was "imposed." We also note that although Nix adopts without
16 elaboration the arguments made by McCoy for First Step Act relief, the results might
17 not be the same for both defendants because, leaving aside common questions as to

1 the FSA's temporal applicability, differences in the criminal records of McCoy and
2 Nix (*see* Part I.E. above) may dictate different outcomes.

3 CONCLUSION

4 We have considered all of defendants' arguments on these appeals and,
5 except as indicated above, have found them to be without merit. Defendants'
6 convictions on Count 2 are reversed; their convictions on all other counts are
7 affirmed. The matter is remanded for dismissal of Count 2 and for resentencing,
8 including consideration by the district court of the First Step Act.

9 Should any appeal ensue after resentencing, either party may restore our
10 jurisdiction pursuant to the procedure outlined in *United States v. Jacobson*, 15 F.3d 19,
11 22 (2d Cir. 1994), in which event the appeal will be referred to this panel.