No. 26-

IN THE

Supreme Court of the United States

MATTHEW NIX,

Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

MICHAEL JOS. WITMER
Counsel of Record
ATTORNEY AND COUNSELOR AT LAW
28 East Main Street,
Suite 900
Rochester, NY 14614
michael@therochesterattorney.com

Counsel for Petitioner
Matthew Nix

395424

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QUESTIONS PRESENTED

In *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556 (1984), this Court held that a party seeking a new trial on the basis of juror dishonesty must "first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause."

The Court said nothing more about how either prong is to be applied, and the courts of appeals at every circuit have splintered on the meaning of each. The questions presented are:

1. In applying *McDonough*'s first prong, which asks whether "a juror failed to answer honestly a material question on voir dire," should the court apply

a) the First Circuit's reasonable-judge, totality-of-the-circumstances inquiry, under which even inadvertent dishonesty may bear on the analysis and no motive to serve need be shown;

b) the Second Circuit's requirement that the juror's dishonesty be motivated by a desire to secure a seat on the jury;

c) the Third and Seventh Circuits' plain inquiry into whether the juror in fact failed to answer honestly, keyed to for-cause materiality rather than motive;

d) the Fourth Circuit's rule that the *McDonough* test reaches innocent nondisclosure as well as deliberate concealment, so that even inadvertent nondisclosure may satisfy the prong;

e) the Fifth Circuit's requirement that the dishonest nondisclosure be rooted in bias or prejudice;

f) the Sixth Circuit's rule that deliberate concealment permits an inference of bias while unintentional nondisclosure requires proof of actual bias;

g) the Eighth, Tenth, and Eleventh Circuits' requirement of intentional dishonesty with no motive-to-serve element;

h) the Ninth Circuit's recognition of multiple forms of bias amid acknowledged intercircuit disarray; or

i) the D.C. Circuit's requirement of a showing of actual bias rather than treating voir dire dishonesty as per se evidence of partiality?

2. In applying *McDonough*'s second prong, which asks whether "a correct response would have provided a valid basis for a challenge for cause," should a court apply

a) the Third, Sixth, and Eleventh Circuits' traditional for-cause-challenge test, under which it is enough that a correct answer would have supported a challenge for cause;

b) the First and Second Circuits' trial-court-discretion test, under which relief rests in the court's discretion and no formal for-cause basis is indispensable;

c) the Fourth and Eighth Circuits' test requiring a for-cause basis plus a showing that the juror's motivation affected the fairness of the trial; or

d) the D.C. Circuit's test requiring a for-cause basis plus a showing of actual bias?

PARTIES TO THE PROCEEDING AND RELATED CASES

Petitioner is Matthew Nix, defendant-appellant below. Respondent is the United States of America. Earl McCoy was a co-defendant-appellant below and is a related petitioner before this Court, whose related petition is docketed in this Court as No. 25-7433.

The following proceedings are directly related to this case:

United States v. Nix, No. 6:14-CR-06181 (EAW), U.S. District Court for the Western District of New York. Judgment entered Nov. 17, 2023.

United States v. McCoy, Nos. 17-3515(L), 17-3516, 18-619, 18-625, U.S. Court of Appeals for the Second Circuit. Judgment entered Apr. 22, 2021.

United States v. McCoy, No. 17-3515, U.S. Court of Appeals for the Second Circuit. Judgment entered Jan. 23, 2023.

United States v. McCoy, Nos. 23-7841(L), 23-7910(Con), U.S. Court of Appeals for the Second Circuit. Judgment entered Feb. 25, 2026; rehearing denied May 8, 2026.

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The Second Circuit's summary order (App. 1a–12a) is unreported. The Second Circuit's prior opinion (App. 13a–37a) is reported at *United States v. McCoy*, 995 F.3d 32 (2d Cir. 2021), vacated and remanded sub nom. *Nix v. United States*, 142 S. Ct. 2860 (2022), and *McCoy v. United States*, 142 S. Ct. 2863 (2022), the juror-misconduct holding left undisturbed on remand, *United States v. McCoy*, 58 F.4th 72, 75 n.1 (2d Cir. 2023). The district court's decision denying a new trial (App. 43a) is reported at *United States v. Nix*, 275 F. Supp. 3d 420 (W.D.N.Y. 2017). The district court's decision on reconsideration is reported at *United States v. Nix*, 2018 WL 1009282 (W.D.N.Y. Feb. 20, 2018).

JURISDICTION

The Second Circuit entered its summary order affirming the judgments on February 25, 2026 (App. 1a). A timely petition for panel rehearing and rehearing en banc was denied on May 8, 2026 (App. 70a). This petition is filed within 90 days of that denial. See Sup. Ct. R. 13.1, 13.3. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

STATEMENT OF THE CASE

Petitioner Matthew Nix and co-defendant Earl McCoy were tried in the Western District of New York on charges read to the venire as encompassing theft, robbery of jewelry, and unlawful possession and distribution of drugs. (CA. 69-75.) The Government's theory was a series of home-invasion robberies with its principal cooperating witness, Jecovious Barnes, testifying that he committed the robberies and a burglary while others profited and he got nothing. Nix was convicted and later resentenced to 105 years.

Jury selection began with the court repeatedly telling the panel it wanted their "true answer," that there were "no right or wrong answers" except honesty, and that it was "so critical that you are honest when you answer my questions" so the court could seat "a fair and impartial jury." (CA. 26-28; CA. 33-34.)

Before the jury was sworn, the Government notified the Court that it ran a Black prospective juror and he had two felony convictions. (CA. 269-275.) The court set a categorical rule that the prospective juror has a "prior felony conviction, which would automatically disqualify him from serving on the jury," and added "[s]o, if he has a felony conviction, he is automatically disqualified." (CA. 269-275.) The court repeated that "if he has been convicted of a felony, he is automatically disqualified." (CA. 269-275.) This juror, like the seated juror the courts below would later call Juror No. 3, both had felony convictions.

The juror the courts below referred to as Juror No. 3 completed a sworn juror questionnaire that asked whether he had "ever been convicted, either by your guilty or nolo contendere plea or by court or jury trial of a state or federal crime for which punishment could have been more than one year in prison?" (CA. 371-372.) He swore that he had never been so convicted. (CA. 379.) That was false. He had pleaded guilty to Criminal Possession of Stolen Property, a felony, and was sentenced to six months in County Jail. (CA. 491.) A year later he pleaded guilty to another felony, Burglary, and was sentenced as a predicate felon to a term of two to four years in state prison. (CA. 498.)

At voir dire, Juror No. 3 stayed silent through question after question that called for disclosure. When the court asked whether anyone had ever been a defendant in a criminal case, the panel answered, "No." (CA. 214.) When it asked whether anyone had ever been to a jail or correctional facility, seven people responded; Juror No. 3 did not. (CA. 229, 231.) He did not respond when the court asked whether anyone close to the jurors had been convicted of a crime. (CA. 239-241.) And he sat silent through the court's repeated questions about whether anyone had been the victim of a home robbery. (CA. 97; CA. 175-176, 179.) When given the chance to speak, he lied about his own marital status, stating he was single though he was married. (CA. 245, 72.) The court closed by asking whether there was "anything that you think we should know that we haven't covered up to this point," warning jurors not to withhold information merely because they assumed they would not be picked. (CA. 257.) Juror No. 3 said nothing.

He also worked to stay on the panel even though the five weeks of service conflicted with his night-shift cleaning business. "Right now it's covered because I'm working at night" he told the court and returned after the lunch break to report, "I was able to switch everything around," confirming he had rearranged everything to serve. (CA. 40-42; CA. 86.) He was the sixth of thirty-six prospective jurors seated. (CA. 29.)

After the verdict, defense investigation revealed that this sworn juror, Juror No. 3, had felony convictions. (A. 2939-2943.) The defense moved under Federal Rule of Criminal Procedure 33 to vacate, arguing that his status as a convicted felon made him ineligible to serve. (A. 2939-2943.) The district court held an evidentiary hearing over two sessions, on June 12 and June 14, 2017, and granted Juror No. 3 immunity, warning that his statements could not be used against him except in a prosecution for perjury if he testified falsely. (A. 1932-2115; A. 1941-1942.)

Sworn and cautioned that he could be prosecuted for perjury, Juror No. 3 said there was no reason he could not testify truthfully. (CA. 375, 378.) He then again lied at the juror hearings. He admitted his questionnaire answer was inaccurate but claimed, "[a]t the time, I thought that it meant 21 and over." (CA. 378-380.) Asked how many felonies he had, he answered, "[t]ruthfully I don't remember, your Honor." (CA. 381.)

He alleged that he could name only one felony conviction, that of breaking into a clothing store, but claimed innocence despite the conviction. Juror No. 3 told the Court "[n]o I did not. I was – somebody actually wrote a statement saying we broke into a clothing store." (CA. 383.) Asked directly whether he had committed that crime, he answered, "No," insisting he had been falsely accused and had served six months in a prison camp for a crime he did not commit. (Tr. 79.)

The Defense then produced and handed Juror No. 3 his own signed confession to the clothing-store burglary. Confronted with his signature, he abandoned the innocence he had sworn to two days earlier. "I admitted to driving the car, yes," and confirmed the statement was true. (CA. 490.) Pressed on why he had testified he was falsely accused, he offered, "Because I, I assumed that, that didn't mean me, so," explaining, "I assumed that that didn't mean me because I was the driver. I didn't actually go into the store." (CA. 490.) He conceded he had known the plan to break into the store when he drove there. (CA. 485-489.) Shown a police report of a search of his residence, he admitted police recovered stolen jeans from his dresser and that he kept items stolen from the store. (CA. 490.)

He admitted he had testified falsely on Monday about the clothing-store break-in. (CA. 536-537.) He professed not to remember arrests for other crimes including assault and larceny, not to remember jail time. (CA. 388; CA. 390-391.) Confronted with his failure to disclose that he had been a criminal defendant, he first said the question "didn't respond to me" and then claimed, "I don't understand what you mean, your honor." (CA. 392-393.) Despite convicting the Defendant, he testified he did not know what a Defendant was. He conceded he had not answered the jail-visit question truthfully and agreed he had not answered truthfully. (CA. 394-395.)

Asked whether he had wanted to serve, Juror No. 3 said yes "[b]ecause I was picked. It's my right, I'm assuming" and confirmed it again. (CA. 402-403; CA. 405.) Only after a seventh iteration of the question (having stated he wanted to get on the jury six previous times), and after his appointed counsel intervened, telling him to change his answer while standing behind him, did he reverse course and say he had not wanted to serve. (CA. 406.) He also disclosed that he had twice before been called for jury service: "I was called for two but they took the plea, so I didn't have to." (CA. 406-407.)

His story further collapsed at the second day of the hearing. The court had received police records revealing that Juror No. 3 not only committed burglaries but had himself been the victim of a home burglary in which jewelry was stolen, "just like in the Defendants' case." (CA. 459.) He conceded the burglary of his home, then said it had "slipped [his] mind" and that he "forgot all about it." (CA. 479.) He admitted the stolen items included jewelry (rubies and diamonds) and, tellingly, a ring bearing his name and a bracelet bearing his name, and admitted he had been "very upset about the entire experience." (CA. 504-506.) The Government's case, again almost identically, included trial testimony that a personalized ring was stolen during a charged home robbery.

His criminal record, which he grudgingly conceded was extensive, included an assault charge, larceny convictions with jail time, the stolen-property felony and six-month jail sentence, the burglary felony and predicate-felon prison term, and a stolen-car conviction with an admission that he had probably been in jail more than five times. (CA. 520-524.)

He also, after first denying it, admitted he had written two statements to police naming co-defendants, conceding, "I guess so," when asked whether he had cooperated with police. (CA. 528.) Asked why the court should believe him, he answered that if he had understood the consequence for jury service, "I would have never said what I said. I would have put yes on there instead of no, if I knew that." (CA. 548.) And on his desire to serve and initial testimony, he conceded "[t]hat's what I said originally and I changed it." (CA. 549-550.)

After the hearings, and after repeated FOIA requests and subpoenas that the county had not timely honored, counsel obtained records of Juror No. 3's additional second-degree burglary. (A. 3969-3987; A. 3990-3991.) Those records showed a home invasion arising from a drug dispute and, after Juror No. 3's associates paid $18,000 for a half-kilo of what turned out to be baking soda, the group burglarized the victim's home to "cut their losses." (CA. 3969-3987.)

Juror No. 3 admitted he broke the back window by firing five to ten shots through it with a BB gun, entered, and that the group took cocaine, gold, and two handguns. (Br. at 37-38.) The charged offenses in this very case involved home-invasion robberies of drugs and jewelry; the Government's cooperator, like Juror No. 3, described doing the dirty work while others profited. (Br. at 37-38; Br. at 38.)

On December 15, 2018, both defendants filed a second Rule 33 motion based on this material. (A. 3961-3991.) The district court held it was not "newly discovered" and faulted counsel's diligence. (SPA. 24-25.)

The district court found that Juror No. 3 was a "47-year-old African American male" who "admittedly blundered his way on the jury, but he did not smuggle his way onto the jury through intentional deceit." (A. 3767-3831; A. 3803-3804, 3818.)

The court excused his silence about being a criminal defendant by crediting his claim that he did not understand the word "defendant," and it declined to rely on his testimony about wanting to serve, finding his "varying statements about his interest in serving on the jury" to be "of little or no value." (A. 3803-3804, 3818; A. 3823.)

The court denied the Rule 33 motion, reasoning that although Juror No. 3 had "failed to respond truthfully to the juror questionnaire and the Court's voir dire questions," his "false statements as to his criminal history were not motivated by any desire to serve as a juror in the present case." The Second Circuit affirmed on the same ground in *McCoy*, 995 F.3d 32 (App. 13a), and again by summary order on February 25, 2026 (App. 1a). Neither court found that Juror No. 3 answered honestly; both denied relief solely because a seat-securing motive had not been proven.

THE McDONOUGH STANDARD

First prong. *McDonough*'s first prong requires that "a party must first demonstrate that a juror failed to answer honestly a material question on voir dire." 464 U.S. at 556.

Second prong. Its second prong requires that the party "then further show that a correct response would have provided a valid basis for a challenge for cause." Id.

The Court added only one further sentence bearing on how the test operates, ruling "[t]he motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial." Id.

Beyond these two sentences, *McDonough* says nothing more explicit about how either prong is to be applied. It does not define what makes an answer "dishonest"; it does not state whether the dishonesty must be intentional or may be inadvertent; it does not require proof of any particular motive for the concealment, let alone a motive to secure a seat; and it does not elaborate what showing satisfies "a valid basis for a challenge for cause." The competing circuit tests catalogued below are judicial glosses the courts of appeals have supplied to fill that silence, and those glosses now openly conflict.

REASONS FOR GRANTING THE PETITION

I. THE COURTS OF APPEALS ARE INTRACTABLY DIVIDED OVER McDONOUGH'S FIRST PRONG.

Although *McDonough* announced one national standard, the courts of appeals have splintered over its first prong. At one pole, the Fourth Circuit (and the First Circuit under its totality approach) treat even innocent or inadvertent nondisclosure as capable of satisfying the first prong. In the middle, a large group of circuits (the Third, Fifth, Sixth, Seventh, Eighth, Tenth, Eleventh, and D.C.) require intentional dishonesty but impose no requirement that the juror lied in order to be seated, though several overlay an actual- or inferred-bias inquiry. At the opposite pole, the Second Circuit stands alone in requiring proof that the juror lied for the specific purpose of securing a seat on the jury. The following table sets out every circuit's first-prong formulation.

Circuit	Lead Authority	First-Prong Formulation	Camp
First	*Amirault v. Fair*, 968 F.2d 1404 (1st Cir. 1992); *Sampson v. United States*, 724 F.3d 150 (1st Cir. 2013)	Honesty is the threshold question; bias is assessed under a reasonable-judge, totality-of-the-circumstances inquiry (articulated in *Sampson* as the second-prong analysis). No seat-securing motive required.	No motive-to-serve requirement
Second	*United States v. Parse*, 789 F.3d 83 (2d Cir. 2015); *United States v. McCoy*, 995 F.3d 32 (2d Cir. 2021) (App. 13a)	As applied, deliberate dishonesty is treated as insufficient unless the juror lied "for the purpose of securing a seat on the jury."	Seat-securing motive required (stands alone)
Third	*United States v. Claxton*, 766 F.3d 280 (3d Cir. 2014)	Plain "failed to answer honestly" inquiry; no seat-securing motive required.	Intentional dishonesty; no motive requirement
Fourth	*Jones v. Cooper*, 311 F.3d 306 (4th Cir. 2002); *Conaway v. Polk*, 453 F.3d 567 (4th Cir. 2006)	The *McDonough* test applies equally to deliberate concealment and innocent nondisclosure, so even inadvertent nondisclosure may satisfy the first prong.	Inadvertent nondisclosure may satisfy first prong
Fifth	*United States v. Bishop*, 264 F.3d 535 (5th Cir. 2001)	Dishonest nondisclosure is not a basis for reversal unless rooted in bias or prejudice; no seat-securing motive required.	Intentional dishonesty; no motive requirement
Sixth	*Zerka v. Green*, 49 F.3d 1181 (6th Cir. 1995); *Johnson v. Luoma*, 425 F.3d 318 (6th Cir. 2005)	Deliberate concealment permits an inference of bias (in exceptional cases); unintentional nondisclosure requires proof of actual bias.	No motive requirement
Seventh	*United States v. Warner*, 498 F.3d 666 (7th Cir. 2007)	Plain "failed to answer honestly" inquiry turning on for-cause materiality, not motive to serve.	Intentional dishonesty; no motive requirement
Eighth	*United States v. Tucker*, 137 F.3d 1016 (8th Cir.	Intentional dishonesty required; focus is bias and	Intentional dishonesty; no

	1998); *United States v. Hawkins*, 796 F.3d 843 (8th Cir. 2015)	partiality, not the motive for lying.	motive requirement
Ninth	*Dyer v. Calderon*, 151 F.3d 970 (9th Cir. 1998) (en banc); *Scott v. Arnold*, 962 F.3d 1128 (9th Cir. 2020)	Recognizes multiple forms of bias; has acknowledged intercircuit disarray over *McDonough*'s meaning.	Acknowledged split; no motive requirement
Tenth	*Gonzales v. Thomas*, 99 F.3d 978 (10th Cir. 1996)	Directed at intentionally incorrect responses; no motive element.	Intentional dishonesty; no motive requirement
Eleventh	*United States v. Perkins*, 748 F.2d 1519 (11th Cir. 1984); *United States v. Carpa*, 271 F.3d 962 (11th Cir. 2001)	Whether the juror knew answers were false; dishonesty itself strongly indicates bias; motive is a prong-two factor.	Intentional dishonesty; no motive requirement
D.C.	*United States v. North*, 910 F.2d 843 (D.C. Cir. 1990); *United States v. Boney*, 977 F.2d 624 (D.C. Cir. 1992)	Requires a showing of actual bias; declines to treat voir dire dishonesty as per se evidence of partiality; no motive-to-serve requirement.	Intentional dishonesty; actual bias; no motive requirement

The consequence of this fracture is not academic. Because each circuit applies a different first-prong test, the same juror, on the same facts, is treated differently depending only on the courthouse. A felon juror who concealed his record and gave admittedly false answers would satisfy *McDonough*'s first prong in most of the Nation, yet was excused in the Second Circuit for lack of a seat-securing motive. That the same two-part federal test yields such drastically different outcomes from circuit to circuit is precisely the disuniformity this Court's certiorari jurisdiction exists to correct.

II. THE NINTH CIRCUIT HAS ITSELF ACKNOWLEDGED THAT THE DOCTRINE IS IN DISARRAY.

The need for review is not merely inferable from the divergent outcomes but has been outright stated by a court of appeals. The Ninth Circuit has described the state of *McDonough* doctrine by acknowledging that "fairminded disagreement" currently exists as to its application. *Scott v. Arnold*, 962 F.3d 1128 (9th Cir. 2020). This candid judicial recognition that the meaning of *McDonough*'s prongs is unsettled necessitates this Court's resolution. When a federal court of appeals reports that it cannot locate a settled national rule, the case for this Court's review is at its strongest.

III. THE DIVISION EXTENDS TO McDONOUGH'S SECOND PRONG AS WELL.

The fracture is not confined to the first prong. Once dishonesty is assumed, the circuits diverge again over what the second prong, "a valid basis for a challenge for cause," requires. The circuits sort into at least four positions on the second prong, set out below.

Second-Prong Standard	Circuits	What the Movant Must Show
Traditional for-cause challenge	Third, Sixth, Eleventh	A correct answer would have supported a challenge for cause, standing alone.
No for-cause requirement; committed to trial court's discretion	First, Second	Relief rests in the court's discretion; a formal for-cause basis is not indispensable.
For-cause challenge plus juror motivation	Fourth, Eighth	A for-cause basis and a showing that the juror's motivation (partiality) affected the fairness of the trial. (In the Eighth Circuit,

affecting trial fairness		partiality and the for-cause basis are separate prongs of a three-part test.)
For-cause challenge plus actual bias	D.C.	A for-cause basis coupled with a showing of actual bias.

That a single, two-part federal test has generated conflict at both steps, first over what dishonesty must be shown, then over what the correct answer must have established, confirms that the disuniformity is structural rather than incidental. Taken together, the two splits mean that the outcome of an identical juror-concealment claim can turn entirely on geography, with forty-eight (48) different permutations of analysis (twelve circuits' analyses on the first prong and at least four different analyses on the second prong, not including the distinct treatment of actual, inferred, and implied bias, which makes the possible analyses potentially more than 100), producing results that are not merely different but, from the standpoint of a single national Sixth Amendment guarantee, inexplicable. Only this Court can restore a common standard.

IV. THE SECOND CIRCUIT'S "SEAT-SECURING MOTIVE" REQUIREMENT HAS NO FOOTING IN McDONOUGH.

McDonough's first prong asks the singular question of whether the juror "failed to answer honestly a material question on voir dire." 464 U.S. at 556. The Court's reference to motive appears not as an element of that prong, but as an observation that "[t]he motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial." Id. Nothing in that passage conditions relief on proof that the juror lied in order to be seated.

As applied by the courts below, however, the Second Circuit's rule treats that observation as a controlling element: relief was denied solely because a seat-securing motive had not been proven, even though the district court found that Juror No. 3 had failed to answer honestly. That application converts a general observation about impartiality into a discrete, movant-defeating requirement the text does not contain.

The concurrences confirm this point, as the inquiry is directed at "actual bias" or, "in exceptional circumstances," inferred bias, id. at 556–57 (Blackmun, J., concurring), and this Court in *Smith v. Phillips* held that "the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias," 455 U.S. 209, 215 (1982), while Justice O'Connor emphasized that "the opinion does not foreclose the use of 'implied bias' in appropriate circumstances," id. at 221 (O'Connor, J., concurring).

That reading also cuts against the Sixth Amendment interest *McDonough* protects. A juror who deliberately conceals a disqualifying felony history corrupts the voir dire process whatever his unknowable private reason for the concealment. This Court has twice reserved, without resolving, whether some juror bias is "so extreme that, almost by definition, the jury trial right has been abridged." *Warger v. Shauers*, 574 U.S. 40, 51 n.3 (2014); accord *Peña-Rodriguez v. Colorado*, 580 U.S. 206, 224 (2017) (reiterating that the no-impeachment rule "may admit exceptions" for such bias).

The Second Circuit's rule pulls in the opposite direction, immunizing even a proven, deliberate lie by a felon juror whenever the defendant cannot prove the juror's subjective purpose in lying.

V. THIS CASE IS AN IDEAL VEHICLE.

This case presents the question cleanly and dispositively. Both courts denied relief solely because a seat-securing motive was not proven; neither found that Juror No. 3 answered honestly, and the courts did not rest on any conclusion that his statements were inadvertent. *Nix*, 275 F. Supp. 3d at 447–49 (App. 43a).

Under the first-prong rule of essentially every other circuit surveyed above, the first prong would have been satisfied and the courts would have proceeded to the for-cause and bias inquiry, where the second-prong split would then have controlled. The issue was pressed and passed upon at every stage, from the district court through the panel and the denial of rehearing, and it arises on an undisputed record. A seated felon juror admittedly answered falsely about his criminal history, and there was an express finding of no seat-securing motive. No antecedent procedural obstacle could prevent the Court from reaching the question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,
/s/ Michael Jos. Witmer
Michael Jos. Witmer
Counsel of Record
Attorney and Counselor at Law
28 East Main Street, Suite 900
Rochester, New York 14614
michael@therochesterattorney.com
Counsel for Petitioner Matthew Nix

APPENDIX

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**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 25th day of February, two thousand twenty-six.

PRESENT:

RICHARD J. SULLIVAN,
MYRNA PÉREZ,
Circuit Judges.
P. KEVIN CASTEL,
District Judge.*

UNITED STATES OF AMERICA,

Appellee,

v. Nos. 23-7841 (L)
23-7910 (Con)

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* Judge P. Kevin Castel, of the United States District Court for the Southern District of New York, sitting by designation.

CLARENCE LAMBERT, JECOVIOUS BARNES,
a.k.a. BUBBA, a.k.a. BUBBS, a.k.a. BUB,

Defendants,

EARL MCCOY, a.k.a "P", and MATTHEW NIX,
a.k.a. MEECH, a.k.a. MACK, a.k.a. MACKEY,

Defendants-Appellants.

For Defendant-Appellant Earl McCoy:	Jamesa J. Drake, Drake Law LLC, Auburn, MN.
For Defendant-Appellant Matthew Nix:	MICHAEL JOS. WITMER, Rochester, NY.
For Appellee:	ROBERT A. MARANGOLA (Tiffany H. Lee, *on the brief*), Assistant United States Attorneys, *for* Michael DiGiacomo, United States Attorney for the Western District of New York, Rochester, NY.

Appeal from amended judgments of the United States District Court for the Western District of New York (Elizabeth A. Wolford, *Chief Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the November 17, 2023 judgments of the district court are **AFFIRMED**.

Earl McCoy and Matthew Nix (together, "Defendants") appeal from amended judgments of conviction following a jury trial in 2017 in which they were found guilty of Hobbs Act robbery, multiple attempted Hobbs Act robberies, Hobbs Act conspiracy, narcotics conspiracy, and related firearms offenses. On what is now their third appeal to this Court, Defendants (1) seek to relitigate arguments heard twice previously by this Court regarding juror misconduct, and (2) raise new due-process challenges. McCoy separately argues – for the first time – that 18 U.S.C. § 922(g)(1) is unconstitutional as applied to him; he also asserts a variety of challenges to his sentence in a *pro se* supplemental brief. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal, to which we refer only as necessary to explain our decision.

I. Procedural History

On March 17, 2017, a jury convicted Defendants of one count of Hobbs Act Conspiracy, in violation of 18 U.S.C. §§ 1951(a), (b)(1) (Count 1); two counts of Attempted Hobbs Act Robbery, in violation of 18 U.S.C. §§ 1951(a) and 2 (Counts 3 and 5); three counts of Brandishing Firearms During and in Relation to a Crime of Violence, in violation of 18 U.S.C. §§ 924(c)(1)(C)(i) and 2 (Counts 2, 4, and 6); one count of Conspiracy to Possess with Intent to Distribute Marijuana, Heroin, and Cocaine, in violation of 21 U.S.C. §§ 846, 841(a)(1), and (b)(1)(D) (Count 7); one count 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 (Count 8); one count of Hobbs Act Robbery, in violation of 18 U.S.C. §§ 1951(a) and 2 (Count 11); and one count of Brandishing Firearms During and in Relation to a Crime of Violence, in violation of 18 U.S.C. §§ 924(c)(1)(C)(ii) and 2 (Count 12). McCoy and Nix were also each convicted of one count of Possession of a Firearm by a Convicted Felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2) (Counts 9 and 10).

On Defendants' first appeal, we reversed their conviction under section 924(c) on Count 2 and affirmed their convictions on all other counts. *See United States v. McCoy*, 995 F.3d 32, 37 (2d Cir. 2021) ("*McCoy I*"). The Supreme Court then vacated our judgment and remanded for further consideration in light of *United States v. Taylor*, 596 U.S. 845 (2022). *See McCoy v. United States*, 142 S. Ct. 2863 (2022); *Nix v. United States*, 142 S. Ct. 2860 (2022). On remand, we reversed Defendants' section 924(c) convictions on Counts 4 and 6, affirmed their convictions in all other respects, and remanded to the district court "for dismissal of Counts 2, 4, and 6 and for resentencing, including consideration of the First Step Act in the first instance." *United States v. McCoy*, 58 F.4th 72, 75 (2d Cir. 2023) ("*McCoy II*"). Following dismissal of counts 2, 4, and 6, the district court resentenced McCoy to 87 years' imprisonment, to be followed by a five-year term of supervised release, and Nix to 105 years' imprisonment, to be followed by a five-year term of supervised release.

II. Discussion

Given the unusual procedural history in this case, we must first determine which of Defendants' arguments, if any, "are properly before us and not barred by the law of the case doctrine." *United States v. Quintieri*, 306 F.3d 1217, 1225 (2d Cir. 2002). That doctrine "ordinarily forecloses relitigation of issues expressly or impliedly decided by the appellate court." *United States v. Frias*, 521 F.3d 229, 234 (2d Cir. 2008) (internal quotation marks omitted). "[W]here an issue was ripe for review at the time of an initial appeal but was nonetheless foregone, it is considered waived and the law of the case doctrine bars . . . an appellate court in a subsequent appeal from reopening such issues unless the mandate can reasonably be understood as permitting it to do so." *Id.* (internal quotation marks omitted). We depart from the law-of-the-case doctrine "sparingly and only when presented with cogent and compelling reasons," *Puricelli v. Argentina,* 797 F.3d 213, 218–19 (2d Cir. 2015), such as where there is (1) "an intervening change of controlling law," (2) "the availability of new evidence," or (3) "the need to correct a clear error or prevent manifest injustice," *United States v. Tenzer*, 213 F.3d 34, 39 (2d Cir. 2000) (citation omitted).

Defendants, for the second time, ask us to reconsider our holding in *McCoy I* pertaining to alleged juror misconduct and the proper interpretation of *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548 (1984). We rejected the argument that juror misconduct necessitated a new trial in *McCoy I* and declined to reconsider our decision in *McCoy II*. *See McCoy I*, 995 F.3d at 44–52; *McCoy II*, 58 F.4th at 75 n.1. Defendants raise no compelling reason to reconsider our prior decisions: they point to no "intervening Supreme Court decision that casts doubt on our controlling precedent," identify no newly available evidence, and articulate no "need to correct a clear error or prevent manifest injustice." *United States v. Plugh*, 648 F.3d 118, 123–24 (2d Cir. 2011) (emphasis added) (internal quotation marks omitted). Thus, we again decline to do so. *See Quintieri*, 306 F.3d at 1225.

Defendants also argue – for the first time – that they were denied due process because of (1) an FBI agent's alleged decision to run criminal histories on potential jurors during jury selection, and (2) the cumulative effect of various trial errors. But these arguments were "ripe for review at the time of [their] initial appeal" to this Court and "w[ere] nonetheless foregone." *Frias*, 521 F.3d at 234 (internal quotation marks omitted). Because Defendants fail to explain why they are raising these claims only now – almost nine years after they were convicted – the law-of-the-case doctrine forecloses their due-process arguments.

McCoy next asserts that we should reverse his conviction under section 922(g)(1) because the statute is unconstitutional as applied to him in light of the Supreme Court's decision in *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022). Even assuming we could consider such a challenge, McCoy's challenge is foreclosed by our own Circuit precedent in *Zherka v. Bondi*, 140 F.4th 68 (2d Cir. 2025), *cert. denied*, No. 25-269, 2026 WL 135708 (U.S. Jan. 20, 2026), where we expressly held that section 922(g)(1) does not violate the Second Amendment and is constitutional as applied to felons, *see id.* at 91–96. Since *Zherka*, we have consistently rejected challenges like McCoy's, *see, e.g.*, *United States v. Gonzalez*, No. 24-1539, 2025 WL 2327335, at *1 (2d Cir. Aug. 13, 2025); *United States v. Rodriguez*, No. 25-181, 2025 WL 3716677, at *1 (2d Cir. Dec. 23, 2025), and we do the same here.

In a *pro se* supplemental brief, McCoy separately argues that the district court (1) erroneously imposed concurrent terms of supervised release on his remaining section 924(c) convictions, (2) improperly considered acquitted conduct in fashioning his sentence, and (3) should have submitted the facts used to support the application of various enhancements under the advisory Sentencing Guidelines to a jury. Because McCoy did not object to the terms of his supervised release or to any sentencing error below, we review for plain error. *See United States v. Villafuerte*, 502 F.3d 204, 207 (2d Cir. 2007). We find none here.

For starters, 18 U.S.C. § 3624(e) expressly provides that terms of supervised release are to run concurrently where a defendant is convicted of multiple offenses. Moreover, 18 U.S.C. § 924(c)(1)(D)(ii), the provision McCoy points to in support of his assertion that the concurrent terms of *supervised release* are improper, says nothing whatsoever about supervised release and instead prohibits district courts from imposing concurrent terms of *imprisonment* where a defendant is convicted of multiple counts. Consequently, the district court did not err when it imposed concurrent terms of supervised release on McCoy's remaining section 924(c) convictions – Counts 8 and 12.

With respect to McCoy's contention that the district court wrongly considered "acquitted conduct" when resentencing him, McCoy misconstrues the vacatur of three of his section 924(c) convictions – on Counts 2, 4, and 6 – as acquittals. They are not. Moreover, the Supreme Court has expressly recognized that "when a defendant's [section] 924(c) conviction is invalidated, courts of appeals routinely vacate the defendant's entire sentence on all counts so that the district court may increase the sentences for any remaining counts if such an increase is warranted." *United States v. Davis,* 588 U.S. 445, 469 (2019) (internal quotations omitted). And it is well established that district courts may consider sentencing enhancements not previously applied following vacatur of a section 924(c) conviction. *See, e.g., United States v. Cain*, 837 F. App'x 853, 855–56 (2d Cir. 2021) (finding no error where the district court, after vacatur of the defendant's section 924(c) conviction, newly applied a five-level enhancement for the defendant's use of a firearm in connection with a robbery conspiracy); *see also United States v. Pizzuti*, 843 F. App'x 383, 384 (2d Cir. 2021).

That is precisely what happened here. By virtue of the vacatur of Counts 2, 4, and 6, the district court was obliged to recalculate the advisory Guidelines range for Counts 1, 3, and 5 pursuant to U.S.S.G. § 2B3.1(b)(2), which provides for enhancements when the underlying Hobbs Act Robbery offense involved the discharge, use, brandishing, or possession of a firearm. Although those enhancements did not apply in connection with McCoy's prior sentences because of the imposition of sentences for the section 924(c) convictions, *see* U.S.S.G.

§ 2K2.4, App. Note 4(A) (directing district courts to "not apply any specific offense characteristics for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense" if a sentence for a violation of section 924(c) has already been imposed), the vacatur of those convictions and sentences made it appropriate on remand for the district court to consider McCoy's use of firearms during the underlying offenses. Accordingly, the district court did not err in considering the "same underlying criminal conduct for which [McCoy] was sentenced initially" when resentencing him, even though three counts of his original conviction had been vacated. McCoy App'x at 117.

As for McCoy's contention that he was entitled to a jury finding with respect to any and all facts relied on by the court in assessing enhancements under the advisory Sentencing Guidelines, the law is clear that such facts may be determined by the district court by a preponderance of the evidence. *See United States v. Holguin*, 436 F.3d 111, 119 (2d Cir. 2006). Because the evidence relied on by the district court easily met that standard, the district court did not err in making the Guidelines calculations that it did.

Finally, McCoy challenges the substantive reasonableness of his 87-year term of imprisonment. In reviewing for substantive unreasonableness, we consider "the totality of the circumstances, giving due deference to the sentencing judge's exercise of discretion, and bearing in mind the institutional advantages of district courts," and reverse "only when the trial court's sentence cannot be located within the range of permissible decisions." *United States v. Smith*, 949 F.3d 60, 66 (2d Cir. 2020) (internal quotation marks omitted). "In the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances." *United States v. Perez-Frias*, 636 F.3d 39, 43 (2d Cir. 2011) (alterations adopted and internal quotation marks omitted).

McCoy's within-Guidelines sentence was not substantively unreasonable. The district court considered McCoy's substantial criminal history, the seriousness of his offenses of conviction, the "violent, horrific acts" he personally committed or was involved in, McCoy App'x at 114, his "complete disregard for the law," and the need to "protect[]" society from him, *id.* at 116. Given the totality of the circumstances and the severity of McCoy's conduct, we cannot say that the district court imposed a substantively unreasonable sentence.

*   *   *

We have considered all of McCoy and Nix's arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgments of the district court.

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

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit

995 F.3d 32
United States Court of Appeals, Second Circuit.

UNITED STATES of America, Appellee,
v.
Earl MCCOY, aka P, Matthew NIX, aka Meech, aka Mack, aka Mackey, Defendants-Appellants *.

Docket Nos. 17-3515(L), 17-3516, 18-619, 18-625
|
August Term, 2019
|
Argued: October 23, 2019
|
Final Briefs Submitted: January 3, 2020
|
Decided: April 22, 2021

Synopsis

Background: Defendants were convicted in the United States District Court for the Western District of New York, Elizabeth A. Wolford, J., of Hobbs Act conspiracy, Hobbs Act robbery, Hobbs Act attempted robbery, brandishing firearms during and in relation to crimes of violence, conspiracy to distribute and to possess with intent to distribute marijuana and heroin, possession of firearm by convicted felon, and possession of firearm in furtherance of drug trafficking crime, and then their motion for new trial was denied, 275 F.Supp.3d 420, as was their motion for judicial recusal and reconsideration, 271 F.Supp.3d 436 and 2018 WL 1009282. Defendants appealed.

Holdings: The Court of Appeals, Kearse, Senior Circuit Judge, held that:

juror's felony conviction, raised for first time after trial, did not automatically warrant granting new trial based on statutory disqualification of convicted felons from serving on federal juries, absent any showing of bias;

juror did not have any bias against defendants or in favor of government, and therefore defendants were not entitled to new trial on basis of juror misconduct for non-disclosure of prior felony conviction;

district court did not abuse its discretion in denying defendants' request for reconsideration;

on issue of first impression, attempt to commit Hobbs Act robbery using force necessarily involved attempted use of force, and therefore Hobbs Act attempted robbery was crime of violence;

trial court's failure to instruct jury that it had to find that defendants had knowledge that they had been convicted of crime punishable by imprisonment for term exceeding one year to convict them of being felon in possession of firearm did not seriously affect fairness, integrity, or public reputation of judicial proceedings;

evidence was sufficient to convict defendant of narcotics distribution conspiracy; and

evidence was sufficient to permit jury to find defendant guilty of substantive offenses of attempted robbery and firearm use.

Affirmed in part, reversed in part, and remanded.

Procedural Posture(s): Appellate Review; Post-Trial Hearing Motion.

***36** Appeal from the United States District Court for the Western District of New York, Elizabeth A. Wolford, *Judge*

Attorneys and Law Firms

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.

Before: KEARSE, PARKER, and SULLIVAN, Circuit Judges.

Opinion

KEARSE, Circuit Judge:

***37** 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 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 one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2); convicting McCoy on one count 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; and convicting Nix on one count 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. McCoy and Nix were sentenced principally to imprisonment for 135 years and 155 years, respectively.

In Nos. 18-619 and 18-625, respectively, McCoy and Nix 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 convicted of a felony.

On appeal, defendants contend principally (a) that they are entitled to a new trial on the ground that the juror's false voir dire responses violated their rights to be tried before a fair and impartial jury (*see* Part II.A. below); (b) that their firearm brandishing convictions should be reversed, and those counts dismissed, on the ground that none of their Hobbs Act offenses are predicate crimes of violence under 18 U.S.C. § 924(c) (*see* Part II.B. below); (c) that in light of *Rehaif v. United States*, ––– U.S. ––––, 139 S. Ct. 2191, 204 L.Ed.2d 594 (2019), the trial court erred in failing to instruct the jury on an essential element of the § 922(g)(1) charges of being felons in possession of firearms (*see* Part II.C.1. below); and (d) that they are entitled to reduction of their sentences under the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 ("First Step Act") (*see* Part II.D. below). Nix also makes brief sufficiency and instructional challenges.

Finding merit in the contention that Hobbs Act conspiracy is not a § 924(c) crime of violence, *see, e.g.*, *United States v. Barrett*, 937 F.3d 126 (2d Cir. 2019), we reverse defendants' § 924(c) convictions on Count 2 for brandishing firearms predicated on Hobbs Act conspiracy. Defendants' convictions on all other counts, as well as the denial of their motions for a new trial, are affirmed. The matter is remanded for defendants' resentencing, and for consideration by the district court of 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, ***38** 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.

A. *Coconspirator Testimony as to Planning and Implementation*

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

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

Barnes, who was also known as "Bubbs" (*see* Tr. 1256-58), testified that he had committed some 10-20 "home invasion missions" with Nix (Tr. 1240) and that their targets generally were suspected drug dealers, victims unlikely to report the robberies to the police. Nix would drive Barnes to the locations for the invasions; and although Nix never went inside the homes, he provided weapons and would communicate with Barnes by phone during the robberies. (*See*, *e.g.*, *id*. at 1227 (Nix and McCoy supplied their crew with guns).) Nix would determine how the proceeds were distributed. (*See id*. at 1225-39.)

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

She assisted in the robbery operation by receiving on her cellphone messages from Nix to be relayed to Clarence, who did not have a working phone. On at least two occasions, she assisted more directly in invasions, either by knocking at the door of the targeted home to determine whether ***39** anyone was there or by driving a getaway car. She testified that she had been aware of the robbery operations conducted by McCoy and Nix, in which Clarence participated, because "Clarence would come back" to where they were staying "with a whole bunch of stuff, money, drugs, electronics" (Tr. 514). Clarence told her he was participating in home invasions with McCoy, Nix, Barnes, and Gary (*see id*. at 515) and described the tracking devices they used on the cars of their prospective victims. Clarence said Nix told the crew which places to rob. Moscicki also heard Clarence discussing such invasions with Gary, Barnes, McCoy, and Nix.

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

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

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

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

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

Moscicki testified that that Maple Street burglary was the first of defendants' invasions in which she had a direct role, ordered by McCoy to accompany him and Clarence. McCoy drove them to a spot near Maple Street, where they met up with Nix, who had brought Barnes. McCoy conferred with Nix, who said he had been monitoring the house to determine the owner's pattern of comings and goings. (*See* Tr. 519-26, 686.) McCoy instructed Moscicki to knock on the door of the targeted house to learn whether anyone was there. After Moscicki found the right ***40** house and no one answered her knock, she returned to McCoy's car; Nix then drove Barnes and Clarence into the driveway of the house. Later, Clarence told Moscicki they had found large quantities of marijuana and guns. (*See id*. at 597-98.)

Barnes testified that on that day, Nix had brought him to Maple Street; that McCoy and Clarence had arrived separately; and that McCoy and Nix told Barnes that the targeted home had heroin and cocaine hidden in the walls. Barnes and Clarence, armed, broke into the house and found 10-12 large ziplock bags of marijuana, $7-10,000 in cash, and a half dozen guns. Barnes telephoned Nix and said, "We hit the jackpot" (Tr. 1321). Barnes and Clarence delivered everything they found to Nix. McCoy and Barnes subsequently "bought capsules to package the" marijuana for sale. (Tr. 1332.)

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

Barnes and Gary testified that they and Clarence were the ones who had conducted that robbery. Moscicki testified that several days earlier, she had gone to Polo Place with McCoy, Nix, Barnes, and Clarence, and had knocked at the jeweler's door to see whether anyone was at home. After the jeweler answered the knock (and tried his best to help Moscicki find the person or place she claimed to be seeking), the crew regrouped and considered whether to do the robbery that day. Nix said no, which ended the discussion.

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

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

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

C. *The Defense Case*

Neither McCoy nor Nix testified at trial. They called two witnesses from law enforcement who described possible inconsistencies between various witnesses' trial testimony and their respective prior statements. A Special Agent of the Bureau of Alcohol, Tobacco, Firearms, and Explosives testified that Gary Lambert, in response to postarrest questioning about the Polo Place robbery, did not mention McCoy except to say that McCoy did not enter the building; and that Gary did not ***41** mention Nix at all. (*See* Tr. 3300-02.) And a Rochester police investigator testified that the Hayward Avenue victim who identified McCoy at trial as one of the intruders had given the Rochester police descriptions of the two intruders that did not match either Barnes or McCoy, and he had not picked McCoy's picture out of a photo array. (*See id*. at 3349-68.) However, on cross-examination, the investigator testified that, from a different photo array, the victim picked out McCoy as the intruder who had hit him in the face with a gun. (*See id*. at 3373-74).

D. *Jury Instructions and the Verdicts*

In charging the jury, the district judge segmented its deliberations, giving instructions first on Counts 1-8 and

11-12, leaving Counts 9 and 10, which charged Nix and McCoy, respectively, with firearm possession as a convicted felon, for later consideration.

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

With respect to Count 1, the court explained that conspiracy to commit a crime is itself a crime separate from and independent of the crime that is the objective of the conspiracy; that the government was required to prove beyond a reasonable doubt that "the minds of at least two alleged conspirators met in an understanding way to meet the objectives of the conspiracy" (Tr. 3767); and that the objectives alleged in this case were

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

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

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

The court also instructed that, except with respect to the counts charging defendants with conspiracy or with firearm possession as a convicted felon, the Indictment ***42** charged each defendant both as a principal and as an aider and abettor, and that it was not necessary for the government to show that a defendant himself personally committed the crime with which he is charged in order for him to be found guilty. The court explained that a person who willfully causes another person to perform an act that is a crime against the United States is punishable as a principal; and that an aider and abetter, *i.e.*, "a person who did not commit the crime, but in some ... way counseled, advised or in some way assisted the commission of the crime," "is just as guilty of that offense as if they had committed it themselves." (Tr. 3815.)

In addition, with respect to the substantive crimes alleged in Counts 2-6, 8, and 11-12, the court--over defendants' objections--gave a *Pinkerton* charge, *see* *Pinkerton v. United States*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946), instructing the jury that, as to "reasonabl[y] foreseeable acts" of any member of the conspiracy (Tr. 3804),

> [i]f you find beyond a reasonable doubt that the defendant whose guilt you are considering was a member of the conspiracy charged in the indictment, then any acts done or statements made in furtherance of the conspiracy by persons also found by you to have been members of the conspiracy may be considered against that defendant. This is so even if such acts were done and statements were

> made in a defendant's absence and without his knowledge

(*id*. at 3804-05).

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

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

Defendants thereafter moved for, *inter alia*, a new trial on the ground that they had recently discovered that one of the jurors was a previously convicted felon and had failed to disclose his criminal history during jury selection. As discussed in Part II.A. below, the district court, following an evidentiary hearing at which the juror testified, denied the motion, *see* *United States v. Nix*, 275 F.Supp.3d 420 (W.D.N.Y. 2017) ("*Nix I*").

E. *Sentencing*

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

***43** F. *The Present Appeals*

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

Thereafter, prior to the oral argument of their appeals, defendants sought and received permission to file supplemental briefs to contend that, in light of the Supreme Court's decision in *United States v. Davis*, ––– U.S. ––––, 139 S. Ct. 2319, 204 L.Ed.2d 757 (2019), Hobbs Act conspiracy is not a crime of violence within the meaning of 18 U.S.C. § 924(c), and to contend that they are entitled to reduction of their sentences under the First Step Act. Following oral argument of the appeals, defendants sought and received permission to file additional supplemental briefs in light of the Supreme Court's decision in *Rehaif v. United States*, ––– U.S. ––––, 139 S. Ct. 2191, 204 L.Ed.2d 594 (2019), contending that the district court erred in failing to instruct the jury that, in order to establish their guilt under § 922(g)(1) as felons in possession of firearms, the government was required to prove that, when they possessed the firearms, they knew they were convicted felons.

II. DISCUSSION

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

Several of defendants' contentions are raised for the first time on these appeals. An error that has not been preserved by timely objection in the district court may be reviewed on appeal if it is "[a] plain error that affects substantial rights." Fed. R. Crim. P. 52(b). Under plain-error review,

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

United States v. Groysman, 766 F.3d 147, 155 (2d Cir. 2014) ("*Groysman*") (quoting ***44** *Johnson v. United States*, 520 U.S. 461, 466-67, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (which was quoting *United States v. Olano*, 507 U.S. 725, 732, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993))).

The burden is on the appellant to meet all four criteria. *See, e.g.*, *United States v. Dominguez Benitez*, 542 U.S. 74, 82, 124 S.Ct. 2333, 159 L.Ed.2d 157 (2004); *Groysman*, 766 F.3d at 155; *United States v. Dussard*, 967 F.3d 149, 156 (2d Cir. 2020). If all four are met, we have discretion to grant relief despite the defendants' failure to preserve the issue in the district court for normal appellate review. *See, e.g.*, *Johnson*, 520 U.S. at 467, 117 S.Ct. 1544; *Olano*, 507 U.S. at 732, 113 S.Ct. 1770.

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

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

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

1. *The Juror Questionnaire and Voir Dire Proceedings*

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

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

> (1) "Has anyone ever been the victim of a home robbery?" ([Tr.] 97);
>
> (2) "Has anyone ever served on a jury before?" (*id.* at 205);
>
> (3) "Has anyone ever been a defendant in a criminal case?" (*id.* at 214);
>
> (4) "Has anyone ever visited a jail or correctional facility other than in connection with ... your educational curriculum" (*id.* at 229);
>
> (5) "Has anyone had anyone close to them, other than what we already discussed, ... anyone close to them convicted of a crime?" (*id.* at 239).

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

> Similarly, Juror No. 3 did not offer any information in response to the Court's "catch-all" questions asked toward the end of *voir dire*: whether there was "anything in fairness to both sides that you think we should know that we haven't

covered already" ([Tr.] 221), and "[i]s there anything that you think we should know that we haven't covered up to this point?" (*id*. at 257).

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

In support of their new-trial motion, defendants produced public records showing, ***45** *inter alia*, that Juror No. 3 had previously pleaded guilty and been convicted of two felonies, *i.e.*, possession of stolen property in 1988 and burglary in 1989; that his son had been convicted of a crime; and that Juror No. 3 had been the victim of a home burglary. Defendants contended that they were entitled to a new trial even absent a showing of bias, because convicted felons are statutorily ineligible to serve as jurors in federal court, *see* 28 U.S.C. § 1865(b)(5), and, in any event, that Juror No. 3's nondisclosures demonstrated bias.

The district court ordered an evidentiary hearing ("Hearing") at which Juror No. 3 testified, represented by appointed counsel. (*See* New Trial Hearing Transcript, June 12 and 14, 2017 ("H.Tr.").) The government granted Juror No. 3 immunity with regard to any nonperjurious testimony he would give at the Hearing.

2. *The Hearing*

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

In addition, while conceding that the district court had not stated that its voir dire questions applied only to one's experiences over the age of 21, Juror No. 3 testified that he had also believed the five questions quoted above did not apply to crimes, convictions, or experiences prior to the age of 21. Juror No. 3 also testified that at the time of trial, he did not know his son had been convicted of a crime; he had not spoken to his son for several years prior to that time and learned of the conviction only a month before the Hearing. Juror No. 3 conceded that his failure to respond to the above five questions posed to the panel as whole was incorrect. (*See id*. at 83-85, 89-92, 168-69, 172-75; *see also id*. at 97-98 (stating that he had answered questions on previous calls for jury duty in the same way, on the assumption that they concerned events and experiences after the age of 21).)

When questioned further about his own prior record, Juror No. 3 also initially claimed that he had been falsely accused of both of the felonies of which he was convicted, and he claimed to have at best a hazy memory of events that had occurred 28 years earlier, when he was 17 or 18. He said he did not remember how many times he had been convicted of crimes punishable by more than one year in prison. And while he recalled being convicted of breaking into a clothing store when he was 17 or 18, and serving six months in "shock camp" for that crime, he did not remember such aspects as the location of the shock camp, the names of all of his codefendants, whether the prosecution was state or federal, or whether he had pleaded guilty or gone through a trial. (*See id*. at 72-76.) However, on the second day of the Hearing, Juror No. 3 was confronted with his signed confessions in both the burglary case and the stolen property case, and he ***46** admitted that he had been involved in both. (*See id*. at 179-84, 222-25, 231.)

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

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

3. *The District Court's Ruling*

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

Rather, pointing to "the Sixth Amendment's guarantee to a trial by an impartial jury," and noting that " '[a]n impartial jury is one in which all of its members, not just most of them, are free of interest and bias,' " *Nix I*, 275 F.Supp.3d at 424 (quoting *United States v. Parse*, 789 F.3d 83, 111 (2d Cir. 2015) ("*Parse*"))--but that a defendant is " 'entitled to a fair trial but not a perfect one, for there are no perfect trials,' " *Nix I*, 275 F.Supp.3d at 424 (quoting *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 553, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984) ("*McDonough*"))--the district court noted that

> the Second Circuit has adopted a two-part test that a defendant must establish in order to justify granting a new trial based upon incorrect responses by a juror during *voir dire*: (1) the defendant must first demonstrate that the juror "failed to answer *honestly* a material question on *voir dire*"; and (2) the defendant *then must also demonstrate* that "a correct response would have provided a valid basis for a challenge for cause"--in other words, the juror would have been excused *for bias* based on the correct *voir dire* response. *Langford*, 990 F.2d at 68-69 (quoting *McDonough*, 464 U.S. at 556-58, 104 S.Ct. 845 ...).

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

> the Court must assess whether Juror No. 3 deliberately lied or consciously deceived the Court, as opposed to providing inaccurate responses as a result of a mistake, misunderstanding or embarrassment. *See* *McDonough*, 464 U.S. at 555, 104 S.Ct. 845; *Langford*, 990 F.2d at 69-70 (finding *where a juror's intentionally false statements at voir dire were caused by embarrassment, and there was no evidence "that she gave false answers because of any desire to sit on the jury,"* it was proper for the district court to deny the defendant's motion for a new trial ....

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

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

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

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

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

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

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

Id. Thus, although the court found "that Juror No. 3 testified falsely about certain ***48** information during the Hearing that was conducted on June 12 and 14, 2017," it

> *reject[ed] the notion that Juror No. 3 intentionally deceived the Court during voir dire as to his criminal history so as to gain a seat on the jury*. Although Juror No. 3's voir dire answers regarding his criminal history were inaccurate, *the Court cannot conclude that they rise to the level of intentional falsehood necessary to satisfy the first prong of the* McDonough *test*.

Id. (emphases added).

The court further saw no evidence from which to find or infer that Juror No. 3 had had any bias, whether actual, implied, or inferred. As to actual bias, *i.e.*, " 'the existence of a state of mind that leads to an inference that the person will not act with entire impartiality,' " *Nix I*, 275 F.Supp.3d at 449 (quoting *United States v. Torres*, 128 F.3d 38, 43 (2d Cir. 1997) ("*Torres*"), *cert. denied*, 523 U.S. 1065, 118 S.Ct. 1399, 140 L.Ed.2d 657 (1998)), the court found that

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

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

> *no evidence that Juror No. 3 knew that disclosure of his criminal record would have disqualified him from jury service*. The Court believes that if Juror No. 3 had known this

> information, his reluctance to be honest about his criminal history would have likely been overcome by a desire to avoid jury service. *In sum, the Court finds that there is no evidence of actual bias on the part of Juror No. 3, in favor of or against either the Government or Defendants*. Even evaluating the facts in the light most favorable to Defendants (which is not the standard), no actual bias has been shown in this case. *There is just no proof that Juror No. 3 intentionally lied to smuggle his way onto the jury*.

Id. at 451 (emphases added).

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

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

> "[b]ias may be inferred when a juror discloses a fact that *bespeaks a risk* of partiality sufficiently significant to warrant granting the trial judge discretion ***49** to excuse the juror for cause, *but not so great as to make mandatory a presumption of bias*."

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

The district court further found that defendants' own jury selection strategy strongly suggested the absence of reason to infer that Juror No. 3 was biased against defendants based on his criminal record: When the government moved, during jury selection, to dismiss a prospective juror ("T.P.") for cause upon learning that T.P. had prior felony convictions that he had not disclosed, defendants vigorously objected to T.P.'s dismissal. *Nix I*, 275 F.Supp.3d at 426-27, 429; *see also id.* at 453 ("McCoy even admits that it would have been the Government who challenged Juror No. 3 for cause if his criminal history had been revealed.").

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

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

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

> there is no implied bias because the disclosed fact does not establish the kind of relationship between the juror

> and the parties or issues in the case that mandates the juror's excusal for cause,

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

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

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

4. *Abuse-of-Discretion Review*

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

First, we see no error in the district court's ruling that the statutory disqualification ***50** of felons from serving on the jury, raised for the first time after trial, did not provide an automatic basis for a new trial. Under the Jury Selection and Service Act of 1968 ("Jury Selection Act"), 28 U.S.C. § 1861 *et seq.*, the court, in determining "whether a person is unqualified for ... jury service" in federal court, *id.* § 1865(a), shall deem ineligible a person who "has been convicted in a State or Federal court of record of[ ] a crime punishable by imprisonment for more than one year and his civil rights have not been restored," *id.* § 1865(b)(5). In a criminal case, a defendant who contends that there has been a substantial failure to comply with the Jury Selection Act's provisions may move to stay or dismiss the proceedings "*before the voir dire examination begins*, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, *whichever is earlier*." *Id*. § 1867(a) (emphases added). Without precluding such other remedies as may be available for challenges based on prohibited discrimination, the statute provides that "[t]he *procedures described by this section shall be the exclusive means* by which a person accused of a Federal crime ... may challenge any jury on the ground that such jury was not selected in conformity with the provisions of this title." *Id*. § 1867(e) (emphasis added).

In light of the procedural limitations imposed by §§ 1867(a) and (e), this Circuit and most others have concluded that the mere fact that the jury included a person whom § 1865 made ineligible to serve as a juror is not a ground for a new trial when the objection is not raised until after voir dire has begun. *See*, *e.g.*, *United States v. Silverman*, 449 F.2d 1341, 1343-44 (2d Cir. 1971) ("*Silverman*") ("the statute clearly requires that a challenge on this ground be made at or before the v[oi]r dire"), *cert. denied*, 405 U.S. 918, 92 S.Ct. 943, 30 L.Ed.2d 788 (1972); *United States v. Paradies*, 98 F.3d 1266, 1277-78 (11th Cir. 1996), *as amended* (Nov. 6, 1996) ("once voir dire begins, Jury Selection Act challenges are barred, even where the grounds for the challenge are discovered only later"), *cert. denied*, 522 U.S. 1014, 118 S.Ct. 598, 139 L.Ed.2d 487 (1997); *United States v. Candelaria-Silva*, 166 F.3d 19, 31-32 (1st Cir. 1999) (same), *cert. denied*, 529 U.S. 1055, 120 S.Ct. 1559, 146 L.Ed.2d 463 (2000); *United States v. Jasper*, 523 F.2d 395, 398 (10th Cir. 1975) ("a motion" under § 1865 must "be filed prior to the beginning of the voir dire examination"); *Dawson v. Wal-Mart Stores, Inc.*, 978 F.2d 205, 209 (5th Cir. 1992) ("section 1867 precludes any statutory challenges to irregularities in jury selection that are not made before voir dire"); *but see United States v. Webster*, 639 F.2d 174, 180 (4th Cir. 1981), *modified*, 669 F.2d 185 (4th Cir. 1982) ("Any objection to the composition of the jury was waived, however, because defendants first sought to raise it at a time subsequent *both* to the beginning of the voir dire examination and to a point seven days after they could have discovered the grounds for the challenge by the exercise of due diligence." (emphasis added)), *cert. denied*, 456 U.S. 935, 102 S.Ct. 1991, 72 L.Ed.2d 455 (1982).

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

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

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

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

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

5. *Defendants' Postjudgment Motion for Reconsideration*

Nor is there merit in defendants' appeals from the denial of their postjudgment motion for reconsideration of the denial of their Rule 33 new-trial motion. A motion for reargument, while proper for calling to the court's attention controlling decisions or data the court has overlooked, is inappropriate for the presentation of new facts or contentions, or for an attempt to reargue old ones. *See, e.g.*, ***52** *Shrader v. CSX Transportation, Inc.*, 70 F.3d 255, 257 (2d Cir. 1995). The denial of a motion for reconsideration is reviewable only for abuse of discretion. *See, e.g.*, *United States v. Bayless*, 201 F.3d 116, 131 (2d Cir.), *cert. denied*, 529 U.S. 1061, 120 S. Ct. 1571, 146 L.Ed.2d 474 (2000).

The district court denied defendants' motion for reargument in part because it was based on supposedly new evidence that was not new; and it was unaccompanied by a showing of diligence as to why the evidence had not been sought or discovered earlier. *See* *Nix II*, 2018 WL 1009282, at *3-*4. The court also found that what defendants proffered was not sufficiently significant to influence the decision of the Rule 33 motion.

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

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

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

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

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

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

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

Section 924(c), as pertinent to defendants' convictions on the brandishing counts (Counts 2, 4, 6, and 12), prescribes enhanced punishment for any person who brandished a firearm "during and in relation to any crime of violence." 18 U.S.C. § 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 ***53** "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 and 5)--contend that none of the Hobbs Act crimes are crime of violence. We agree only with respect to Hobbs Act conspiracy.

1. *Hobbs Act Conspiracy*

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

In *United States v. Barrett*, 903 F.3d 166 (2d Cir. 2018) ("*Barrett I*"), *vacated and remanded for further consideration*, ––– U.S. ––––, 139 S. Ct. 2774, 204 L.Ed.2d 1154 (2019), we had affirmed the defendant's convictions on several § 924(c) counts that were predicated on Hobbs Act robbery (*see* Part II.B.3 below), and had affirmed one § 924(c) conviction that was predicated on Hobbs Act conspiracy. We had affirmed the latter § 924(c) conviction based in part on § 924(c)(3)(B) because Hobbs Act conspiracy (an offense that is complete without performance of any overt act *see*, *e.g.*, *United States v. Maldonado-Rivera*, 922 F.2d 934, 983 (2d Cir. 1990), *cert. denied*, 501 U.S. 1211, 111 S.Ct. 2811, 115 L.Ed.2d 984 (1991); *United States v. Persico*, 832 F.2d 705, 713 (2d Cir. 1987), *cert. denied*, 486 U.S. 1022, 108 S.Ct. 1995, 100 L.Ed.2d 227 (1988)), poses a risk of the use of force, *see Barrett I*, 903 F.3d at 175-77.

While the present appeals were pending, the Supreme Court decided *United States v. Davis*, ––– U.S. ––––, 139 S. Ct. 2319, 204 L.Ed.2d 757 (2019), ruling that § 924(c)(3)(B), in defining crime of violence in terms of a "risk" that physical force would be used, was unconstitutionally vague, *see* 139 S. Ct. at 2323-24. As "a vague law is no law at all," *id.* at 2323, we concluded in *Barrett II* that *Davis* "precludes" a conclusion "that [a] Hobbs Act robbery conspiracy crime qualifies as a § 924(c) crime of violence," 937 F.3d at 127.

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

2. *Hobbs Act Robbery*

Defendants' contention that Hobbs Act robbery is also not a crime of violence within the meaning of § 924(c), however, is contrary to the law of this Circuit. *See Barrett II*, 937 F.3d at 128; *United States v. Hill*, 890 F.3d 51 (2d Cir. 2018) ("*Hill*"), *cert. denied*, ––– U.S. ––––, 139 S. Ct. 844, 202 L.Ed.2d 612 (2019). In *Hill*, we employed ***54** the "categorical approach" prescribed by *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), which requires that where Congress has defined a violent felony as a crime that has the use or threat of force "as an element," the courts must determine whether a given offense is a crime of violence by focusing categorically on the offense's statutory definition, *i.e.*, the intrinsic elements of the offense, rather than on the defendant's particular underlying conduct, *id.* at 600-01, 110 S.Ct. 2143. We stated that

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

Hill, 890 F.3d at 56.

We noted that subpart (3)(A) of § 924(c) defines crime of violence as a felony that " 'has as an element the use, attempted use, or threatened use of physical force against the person or property of another.' " Hill, 890 F.3d at 54 (quoting § 924(c)(3)(A)). And we noted that the Hobbs Act penalizes a person who affects commerce " '*by robbery* ... or attempts or conspires so to do, *or commits or threatens physical violence* to any person or property in furtherance of a plan or purpose to do anything in violation of this section,' " and that the Act defines robbery in part as " 'the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, *by means of actual or threatened force*, *or violence*, *or fear of injury*, *immediate or future*, *to his person or property*,' " *id.* 890 F.3d at 54-55 (quoting 19 U.S.C. §§ 1951(a) and (b)(1) (emphases ours)). Comparing these statutes, we concluded that "Hobbs Act robbery 'has as an element the use, attempted use, or threatened use of physical force against the person or property of another,' 18 U.S.C. § 924(c)(3)(A)," and thus is a crime of violence within the meaning of that provision. Hill, 890 F.3d at 60; *see also* *id.* at 60 & n.7 (noting that "all of the circuits to have addressed the issue" have "h[e]ld that Hobbs Act robbery 'has as an element the use, attempted use, or threatened use of physical force against the person or property of another' " (citing cases)).

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

Although McCoy and Nix contend that Hobbs Act robbery is not categorically a crime of violence even under § 924(c)(3)(A), arguing that property could be obtained by threatening to withhold care from a person in need or to "poison" a person, and that such means do not constitute physical force (*e.g.*, McCoy brief on appeal at 82), we expressly rejected just such an argument in *Hill*. We noted that such hypothetical possibilities as the withholding of vital care, which have never been the basis of a Hobbs Act charge, are ineffective to deflect the stated thrust of the statute; and that "physical force 'encompasses even its indirect application,' as ***55** when a battery is committed by administering a poison." *Hill*, 890 F.3d at 59 (quoting *United States v. Castleman*, 572 U.S. 157, 170, 134 S.Ct. 1405, 188 L.Ed.2d 426 (2014)).

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

3. *Hobbs Act Attempted Robbery*

Defendants' contention that their firearm-brandishing convictions on Counts 4 and 6 should be reversed on the ground that the offense of Hobbs Act attempted robbery (Counts 3 and 5) does not constitute a crime of violence--a contention not raised in the district court, and thus reviewable only under plain-error analysis--is also unpersuasive. We address this issue as to the nature of the Act's prohibition of attempted robbery, which is one of first impression in this Circuit, again using the categorical approach.

As set out above, the surviving § 924(c) definition of "crime of violence" expressly includes a felony that "has as an element the ... *attempted* use ... of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A) (emphasis added). It is a fundamental principle of statutory interpretation that, "absent other indication, Congress intends to incorporate the well-settled meaning of the common-law terms it uses." *Sekhar v. United States*, 570 U.S. 729, 732, 133 S.Ct. 2720, 186 L.Ed.2d 794 (2013) (internal quotation marks omitted). The definition of "attempt" both in federal law and in the Model Penal Code had long been settled by 1986, when the operative language of § 924(c)(3)(A) was adopted. *See* Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104(a)(2), 100 Stat. 449, 456-57 (1986) (first defining "crime of violence" to include "attempted use ... of physical force"); *United States v. Farhane*, 634 F.3d 127, 146 (2d Cir.) ("*Farhane*") ("This court effectively adopted the Model Code's formulation of attempt in *United States v. Stallworth*, 543 F.2d 1038, 1040-41 (2d Cir. 1976)."), *cert. denied*, 565 U.S. 1088, 132 S.Ct. 833, 181 L.Ed.2d 542 (2011). Accordingly, when Congress used "attempted use" in § 924(c) without providing a different definition for the phrase, it adopted the concept of "attempt" existing under federal law.

"Under federal law, '[a] person is guilty of an attempt to commit a crime if he or she (1) had the intent to commit the crime, and (2) engaged in conduct amounting to a "substantial step" towards the commission of the crime.' " *United States v. Thrower*, 914 F.3d 770, 776 (2d Cir.) ("*Thrower*") (quoting *United States v. Martinez*, 775 F.2d 31, 35 (2d Cir. 1985)), *cert. denied*, ––– U.S. ––––, 140 S. Ct. 305, 205 L.Ed.2d 200 (2019). This means that, for substantive crimes of violence that include the use of physical force as an element, defendants also commit crimes of violence when commission of those crimes is attempted--because such attempts necessarily require (a) an intent to complete the substantive crime (including an intent to use physical force) and (b) a substantial step towards completing the crime (which logically means a substantial step towards completion of all of that crime's elements, including the use of physical force). *See* *United States v. Taylor*, 979 F.3d 203, 209 (4th Cir. 2020) ("*Taylor*"). Because we held in *Hill* that Hobbs Act robbery categorically constitutes a crime of violence, *see* 890 F.3d at 53, it follows as a matter of logic that an "attempt[ ]" to commit Hobbs Act robbery--which the statute also expressly prohibits, *see* 18 U.S.C. § 1951(a)--categorically qualifies as a crime of violence.

***56** McCoy and Nix raise two principal arguments for why this should not be so. First, they contend that Hobbs Act attempted robbery is not a crime of violence because it is possible for a defendant to "take a substantial step towards commission of an offense without engaging in a violent act." (McCoy first supplemental brief on appeal at 16). But while it is true that a substantial step towards a completed Hobbs Act robbery need not itself involve the "use ... of physical force" within the meaning of § 924(c)(3)(A), *see, e.g.*, *United States v. Jackson*, 560 F.2d 112, 120 (2d Cir.) ("*Jackson*") ("reconnoiter[ing] the place contemplated for the commission of the crime and possess[ing] the paraphernalia to be employed in the commission of the crime" constituted substantial steps towards a bank robbery in violation of 18 U.S.C. § 2113(a)), *cert. denied*, 434 U.S. 941, 98 S.Ct. 434, 54 L.Ed.2d 301 (1977); *United States v. Gonzalez*, 441 F. App'x 31, 36 (2d Cir. 2011) (applying *Jackson* to Hobbs Act attempted robbery), *cert. denied*, 565 U.S. 1218, 132 S.Ct. 1585, 182 L.Ed.2d 200 (2012), that is of no moment, since the substantive Hobbs Act robbery towards which that substantial step leads necessarily would involve the "use of physical force," if completed. To be guilty of Hobbs Act attempted robbery, a defendant must necessarily (1) intend to commit all of the elements of a substantive robbery, including the use of physical force, and (2) take a substantial step towards committing the substantive robbery, which logically includes taking a substantial step towards completing all of its elements, including the use of force. Accordingly, even if a defendant's substantial step does not itself involve the use of physical force, a defendant must necessarily intend to use physical force and take a substantial step towards using physical force, which constitutes "attempted ... use of physical force" within the meaning of § 924(c)(3)(A). *Accord* *United States v. Walker*, 990 F.3d 316, 325 (3d Cir. 2021); *United States v. Dominguez*, 954 F.3d 1251, 1262 (9th Cir. 2020), *petition for cert. filed*, No. 20-1000 (U.S. Jan. 26, 2021); *United States v. Ingram*, 947 F.3d 1021, 1026 (7th Cir.), *cert. denied*, ––– U.S. ––––, 141 S. Ct. 323, 208 L.Ed.2d 66 (2020); *United States v. St. Hubert*, 909 F.3d 335, 351-52 (11th Cir. 2018), *cert. denied*, ––– U.S. ––––, 139 S. Ct. 1394, 203 L.Ed.2d 625 (2019). *Cf.* *United States v. Hendricks*, 921 F.3d 320, 328-29 & n.40 (2d Cir. 2019) (holding that attempted bank robbery by intimidation in violation of § 2113(a) is a crime of violence because intimidation "means that the defendant did or said something that would make an ordinary reasonable person fear bodily harm" (internal quotation marks omitted)), *cert. denied*, ––– U.S. ––––, 140 S. Ct. 870, 205 L.Ed.2d 502 (2020).

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

However, even though it is theoretically possible that a defendant could be charged with Hobbs Act attempted robbery under such an attempt-to-threaten theory, we have made clear that "to show a predicate conviction is not a crime of violence 'requires more than the application ***57** of legal imagination to [the] ... statute's language' "; rather "there must be 'a realistic probability, not a theoretical possibility,' that the statute at issue could be applied to conduct that does not constitute a crime of violence." *Hill*, 890 F.3d at 56 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193, 127 S.Ct. 815, 166 L.Ed.2d 683 (2007)). To show such a "realistic probability," a defendant " 'must at least point to his own case or other cases in which the ... courts did in fact apply the statute in the ... manner for which he argues.' " *Hill*, 890 F.3d at 56 (quoting *Duenas-Alvarez*, 549 U.S. at 193, 127 S.Ct. 815).

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

Indeed, in *Thrower* we made a similar observation when considering whether the New York crime of attempted third-degree robbery involves the "attempted use ... of physical force" within the meaning of 18 U.S.C. § 924(e)(2)(B), since New York law defines robbery similarly to Hobbs Act robbery, *see* N.Y.Penal Law § 160.0 (defining "[r]obbery" as "us[ing] or threaten[ing] the immediate use of physical force" "in the course of committing a larceny"). We observed that "[t]hough Thrower posits that a defendant might be convicted of attempted robbery in New York *for an attempt to threaten* to use physical force--*as distinct from an attempt to use* physical force *or a threat to use* physical force--he fails to 'at least point to his own case or other cases in which the state courts did in fact apply the statute in the ... manner for which he argues.' " *Thrower*, 914 F.3d at 777 (quoting *Duenas-Alvarez*, 549 U.S. at 193, 127 S.Ct. 815 (emphases ours)).

In sum, we hold that Hobbs Act attempted robbery qualifies as a crime of violence under § 924(c) because an attempt to commit Hobbs Act robbery using force necessarily involves the "attempted use ... of force" under § 924(c)(3)(A), and because, even though a conviction for an inchoate attempt to threaten is theoretically possible, McCoy and Nix have not shown that there is a "realistic probability" that the statute will be applied in such a manner, *Duenas-Alvarez*, 549 U.S. at 193, 127 S.Ct. 815.

4. *Liability for Aiding-and-Abetting*

Finally, McCoy and Nix contend--for the first time on these appeals--that their § 924(c) firearm-brandishing convictions on Counts 4, 6, and 12 should be reversed for lack of a proper predicate because their convictions of the corresponding substantive Hobbs Act offenses (Counts 3 and 5 (attempted robbery) and Count 11 (robbery)) were based on an aiding-and-abetting theory of liability. Given evidence that they normally sat in nearby cars while their brothers and/or friends entered the targeted homes, threatened the victims, and stole or attempted to steal the victims' property, McCoy and Nix contend ***58** that aiding-and-abetting a substantive Hobbs Act offense is not a crime of violence. This contention need not detain us long.

Section 2 of Title 18 provides in part that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." 18 U.S.C. § 2(a). For the aiding-and-abetting theory of liability to apply, the underlying federal crime must have been committed by someone other than the defendant; and the defendant himself must either have acted, or have failed to act, with the specific intent of aiding the commission of that underlying crime. *See, e.g.*, *Rosemond v. United States*, 572 U.S. 65, 77, 134 S.Ct. 1240, 188 L.Ed.2d 248 (2014); *United States v. Smith*, 198 F.3d 377, 382-83 (2d Cir. 1999) ("*Smith*"), *cert. denied*, 531 U.S. 864, 121 S.Ct. 156, 148 L.Ed.2d 104 (2000). Section 2(a) makes an aider and abetter as guilty of the underlying crime as the person who committed it.

There is no culpable aiding and abetting without an underlying crime committed by some other person; and aiding and abetting itself is not the predicate 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*, ––– U.S. ––––, 139 S. Ct. 2713, 204 L.Ed.2d 1107 (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*, ––– U.S. ––––, 139 S. Ct. 647, 202 L.Ed.2d 506 (2018).

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

C. *Instructional and Sufficiency Challenges*

Defendants also make several other challenges to their convictions, principally contending that, in light of the Supreme Court's decision in *Rehaif*, their ***59** § 922(g)(1) convictions as felons in possession of firearms should be vacated because the district court failed to instruct the jury that the government was required to prove that when they possessed the firearms, they knew their status as felons. Nix also contends that the evidence was insufficient to support his convictions on Counts 3, 4, and 7, and that the court erred in giving the jury a *Pinkerton* instruction. We reject all of these challenges.

1. *The* Rehaif *Challenges*

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

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

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

In light of *Rehaif*, it was error not to instruct that the government was required to prove defendants' knowledge of their status as convicted felons at the time of their firearm possession; and that error is plain, *see*, *e.g.*, *Henderson v. United States*, 568 U.S. 266, 279, 133 S.Ct. 1121, 185 L.Ed.2d 85 (2013) ("it is enough that an error be 'plain' at the time of appellate consideration for [t]he second part of the [four-part] *Olano* test [to be] satisfied" (other internal quotation marks omitted)); *United States v. Balde*, 943 F.3d 73, 97 (2d Cir. 2019). Thus, the first two prongs of plain-error analysis have been met.

It is also arguable that the third prong of the plain-error test--an error affecting substantial rights--may have been met. The Supreme Court in *Rehaif*, while noting that, as to the relevant status element of § 922(g), the requisite "knowledge can be inferred from circumstantial evidence," 139 S. Ct. at 2198 (internal quotation marks omitted), also suggested that an inference of knowledge as to felony status with respect to the felon-in-possession subparagraph of § 922(g) might not be available if the "person ... was convicted of a prior crime but sentenced only to probation," and "d[id] not know that the crime ***60** [wa]s *punishable* by imprisonment for a term exceeding one year," *id.* (emphasis in original).

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

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

Accordingly, we concluded that the *Miller* trial court's failure to instruct the jury on the element of whether the defendant knew he was a convicted felon "did not rise to the level of reversible plain error" because it does no disservice to the judicial system to hold that a person who was sentenced to and served a prison term of more than one year must have been aware of both the extent of his sentence and the length of time he spent in prison. Id. We have reached the same result in other post-*Rehaif* cases in which the district court records revealed that the defendant had received, and had served, a prison sentence exceeding one year. *See*, *e.g.*, *United States v. Sandford*, 814 F. App'x 649, 652-53 (2d Cir. 2020); *United States v. Smith*, 814 F. App'x 634, 635-36 (2d Cir. 2020); *United States v. Goolsby*, 820 F. App'x 47, 50 (2d Cir. 2020); *United States v. Johnson*, 816 F. App'x 604, 607-08 (2d Cir. 2020); *United States v. Frye*, 826 F. App'x 19, 23-24 (2d Cir. 2020); *United States v. Feaster*, 833 F. App'x 494, 497 (2d Cir. 2020).

The district court record in the present case includes PSRs with similar details--unobjected to by McCoy or Nix--as to the sentences actually imposed on them for their prior felony convictions and the amounts of prison time they served for those convictions. McCoy, in 2001, was convicted in New York State court, following his plea of guilty, on two felony counts of criminal possession of controlled substances and was sentenced to a prison term of 54 months to nine years; as a result he was imprisoned for nearly six years. Nix, in 2008, was convicted in federal court, following his plea of guilty, of possession of narcotics with intent to distribute and possession of a firearm in furtherance ***61** of the drug offense; he was sentenced to 24 months' imprisonment for each offense, to be served consecutively. As a result, Nix spent some four years in prison.

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

2. *Nix's Sufficiency Challenges*

Nix contends that the evidence at trial was insufficient to convict him on Count 7 of the Indictment, which charged the narcotics distribution conspiracy, and on Counts 3 and 4, which concerned the attempted robbery and use of firearms at Hayward Avenue. In considering a challenge to the sufficiency of the evidence to support a conviction, we view the evidence, whether direct or circumstantial, in the light most favorable to the government, crediting every inference that could have been drawn in the government's favor, and deferring to the jury's assessments of witness credibility and the weight of the evidence. *See*, *e.g.*, *United States v. Lyle*, 919 F.3d 716, 737 (2d Cir. 2019), *cert. denied*, ––– U.S. ––––, 140 S. Ct. 846, 205 L.Ed.2d 470 (2020); *United States v. O'Brien*, 926 F.3d 57, 79 (2d Cir. 2019); *United States v. Praddy*, 725 F.3d 147, 152 (2d Cir. 2013). With the evidence at trial viewed in that light, and considered as a whole rather than piecemeal, *see*, *e.g.*, *United States v. Podlog*, 35 F.3d 699, 705 (2d Cir. 1994), *cert. denied*, 513 U.S. 1135, 115 S.Ct. 954, 130 L.Ed.2d 897 (1995); *United States v. Brown*, 776 F.2d 397, 403 (2d Cir. 1985), *cert. denied*, 475 U.S. 1141, 106 S.Ct. 1793, 90 L.Ed.2d 339 (1986), a conviction will be upheld so long as, "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (emphasis in original).

In a prosecution for conspiracy to possess with intent to distribute a prohibited substance, the element of intent to distribute--as contrasted with an intent to possess only for personal use--"may be inferred from the volume of drugs with which defendant was associated or that was in his actual or constructive possession." *United States v. Anderson*, 747 F.3d 51, 62 n.8 (2d Cir. 2014), *cert. denied*, 574 U.S. 850, 135 S.Ct. 122, 190 L.Ed.2d 93 (2014); *see*, *e.g.*, *United States v. Brockman*, 924 F.3d 988, 993 (8th Cir. 2019) (finding that the district court did not clearly err in determining that "eight ounces [of marijuana] exceeded a user quantity"); *United States v. Martinez*, 964 F.3d 1329, 1334 (11th Cir. 2020) ("A pound, whether it's cocaine, heroin, marijuana, or methamphetamine, is more than personal users typically buy."). And we have noted quantity is not always dispositive: "[A]ny amount of drugs, however small, will support a conviction when there is additional evidence of intent to distribute." *United States v. Martinez*, 54 F.3d 1040, 1043 (2d Cir. 1995).

Nix, in challenging the sufficiency of the evidence to support his Count 7 conviction of conspiracy to distribute narcotics, argues that there was no direct testimony that he engaged in narcotics distribution, and that Barnes testified that he never observed Nix engaging in such distribution. (*See* Nix brief on appeal at 55-56.) Given the record before us, and the fact ***62** that Count 7 charged conspiracy, rather than actual distribution, this challenge is meritless.

First, there was abundant proof of the existence of a robbery conspiracy whose principal members were McCoy, Barnes, Clarence and Gary Lambert, and Nix--who was called “Meech” (Tr. 1223). The evidence included, as described in Part I.A. above, the testimony of Barnes who admitted having engaged in 10-20 home invasions with Nix; and through Nix, Barnes met, and participated in home invasions with, Clarence, Gary, and McCoy. (*See* Tr. 1240, 1230-31.) Although Nix himself did not enter the invaded homes, he selected the persons to be robbed, conducted preliminary surveillance of targeted premises, planned the invasions, provided guns, and gave the men who would enter information as to what to expect and where to search (*see*, *e.g.*, *id*. at 1239 (Barnes: “Meech would tell me the location and take me there and I would go in the house with somebody else”)). And while his associates were inside, Nix would wait for them in the car “either down the street or around the corner” (*id*. at 1236); the men who had entered would phone Nix to report whether they were finding the expected trove of money and/or drugs (*see id*. at 1236-37). When the men who had entered emerged with stolen property, they turned it over to Nix who, with McCoy, decided how it would be divided. (*See*, *e.g., id*. at 1237-40, 2912.)

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

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

According to plan, Barnes and Clarence, armed with guns, entered the Maple Street house and, as predicted by Nix, found cash and drugs. Barnes phoned Nix from the house and said, “We hit the jackpot”; Nix told him to “Get everything and I'll be there ... I'm coming.” (Tr. 1321.) What they found in the Maple Street house included 10-12 “large” ziplock bags--an estimated eight inches by six or eight inches--“full of weed.” (*Id*. 1322-33.) Nix, McCoy, Barnes, and Clarence then went to Barnes's then-house, and Nix--who had taken possession of the $7-10,000 in cash that Barnes and Clarence had found--gave Barnes and Clarence each $1,000. “[Nix] took all of the drugs” (Tr. 1332); and McCoy and Barnes subsequently “bought capsules to package the” marijuana “[s]o we could sell it” (*id*.).

The jury could also infer that the amounts of narcotics stolen by the conspirators ***63** and appropriated by Nix as his share--especially given the large number of home invasions done by defendants and their crew seeking to obtain drugs, *see*, *e.g.*, *id.* at 2871-76 (Gary describing an earlier burglary that yielded 24 pounds of marijuana, of which Nix's share was more than 11 pounds)--were inconsistent with possession merely for Nix's personal use.

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

In challenging his conviction on Counts 3 and 4 with respect to the Hayward Avenue attempted robbery, Nix argues that the cellphone evidence that he was near that location at the time of that event was “dispute[d],” and that “mere presence at the scene of a crime, even when coupled with knowledge that at that moment a crime is being committed is insufficient to establish the defendant's participation in criminal activity.” (Nix brief on appeal at 56, 55 (internal quotation marks omitted).) This argument is meritless as well.

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

Thus, although Nix did not himself enter the home, the evidence was plainly sufficient to permit the jury to find him guilty of the Counts 3 and 4 substantive offenses of attempted robbery and firearm use on Hayward Avenue, either by aiding and abetting the attempted robbery (*see generally* Part II.B.4. above) or on the *Pinkerton* theory of conspiratorial vicarious liability, to which we now turn.

3. *Nix's* Pinkerton *Challenge*

Nix contends that it was error for the district court to give the jury a *Pinkerton* charge, which informs the jury that it may find a defendant guilty of a substantive offense that he did not personally commit if it was committed by a coconspirator in furtherance of the conspiracy, and if commission of that offense was a reasonably foreseeable consequence of the conspiratorial agreement, *see* *Pinkerton*, 328 U.S. at 646-48, 66 S.Ct. 1180. Nix argues that such an instruction was improper here, claiming that the evidence of conspiracy was "sufficiently thin that the charge invite[d] the jury" to "infer[ ] the conspiracy from the substantive offense." (Nix brief on appeal at 60.) This argument lacks any foundation in the evidentiary record or in the instructions as given.

To begin with, the court expressly instructed the jury that, in order to find a defendant guilty of a substantive offense committed by another person on this theory of conspiratorial vicarious liability, it must first find beyond a reasonable doubt that both the defendant and the person ***64** who actually committed the substantive offense were members of the charged conspiracy at the time the substantive offense was committed, that the substantive offense was committed pursuant to the common plan of the coconspirators, and that the commission of the substantive offense was reasonably foreseeable to the defendant. (*See* Tr. 3819-21.) The court then reiterated that the jury could not find a defendant guilty on this theory of liability if it had not made all of the described preliminary findings. (*See id.* at 3821-22.) The court in no way invited the jury to infer the existence of a conspiracy from the performance of the substantive acts.

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

D. *Resentencing*

When the district court sentenced McCoy and Nix in 2017, § 924(c)(1)(C) had been interpreted to require that a defendant convicted of multiple § 924(c) violations in a single prosecution be sentenced to consecutive 25-year minimum prison terms for the second violation and each subsequent violation. *See* *Deal v. United States*, 508 U.S. 129, 132-37, 113 S.Ct. 1993, 124 L.Ed.2d 44 (1993). In 2018, however, Congress adopted the First Step Act (or "FSA"), amending § 924(c)(1)(C) "to provide that only a second section 924(c) conviction 'that occurs after a prior conviction under [section 924(c)] has become final' requires the consecutive minimum 25-year sentence provided by subsection 924(c)(1)(C)(i)." *United States v. Brown*, 935 F.3d 43, 45 n.1 (2d Cir. 2019) ("*Brown*") (quoting First Step Act, Pub L. No. 115-391, § 403(a), 132 Stat. 5194, 5221-22).

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

While defendants' concept of finality is generally correct, its applicability here is unclear. With respect to the temporal applicability of its provisions, the First Step Act provides that its amendments to § 924(c) "shall *apply to any offense* that was committed before the date of enactment of this Act, *if a sentence for the offense* ***has not been imposed*** *as of such date of enactment*," FSA § 403(b) (emphases added). When an FSA reduction in sentence has been sought by a defendant who was sentenced before the FSA's date of enactment and who was not otherwise entitled to appellate relief on his § 924(c) convictions, courts have concluded that FSA relief was not available. *See*, *e.g.*, *United States v. Cruz-Rivera*, 954 F.3d 410, 413 (1st Cir.), *cert. denied*, 2020 –– U.S. ––––, 141 S. Ct. 601, 208 L.Ed.2d 192 (2020) (interpreting Congress's focus on the time at which a sentence was "imposed" as intending to deny eligibility for FSA relief to any defendant originally sentenced prior to the FSA's enactment, reflecting ***65** the customary understanding that a sentence is "imposed either when it is pronounced or entered in the trial court, regardless of subsequent appeals" (internal quotation marks omitted)); *United States v. Jordan*, 952 F.3d 160, 174 (4th Cir. 2020) ("Congress decided to extend the more lenient terms of § 403(a) of the First Step Act to some but not all pre-Act offenders, with the date of sentencing in the district court drawing the line between those who are covered and those who are not." (internal quotation marks omitted)), *cert. denied*, –– U.S. ––––, 141 S. Ct. 1051, 208 L.Ed.2d 521 (2021); *United States v. Gomez*, 960 F.3d 173, 177 (5th Cir. 2020) ("A sentence is 'imposed' when the district court pronounces it, not when the defendant exhausts his appeals."). However, at least one court has held that as to a defendant who was originally sentenced prior to the FSA's date of enactment and whose "sentences were remanded prior to the First Step Act's enactment but who were not ... resentenced" until after enactment, "both the text of the statute and Congress's purpose in enacting the legislation make clear that § 403 applies." *United States v. Henry*, 983 F.3d 214, 219 (6th Cir. 2020).

In *Davis*, the Supreme Court itself described Congress in the First Step Act as having "changed the law ... *going forward*." 139 S. Ct. at 2324 n.1 (emphasis added). However, a week before *Davis* was filed, the Supreme Court in *Richardson II* had granted certiorari and remanded, stating, without other substantive comment, "[j]udgment vacated, and case remanded to the United States Court of Appeals for the Sixth Circuit for the court to consider the First Step Act of 2018, Pub. L. No. 115-391 (2018)," 139 S. Ct. at 2713-14--in a case that had been the subject of appellate review in the court of appeals and the Supreme Court for several years with respect to a sentence originally imposed on the defendant in 2013 and reimposed in 2017, *see* *Richardson I*, 906 F.3d at 421-22. Nonetheless, the Supreme Court denied further review after the Sixth Circuit, following the *Richardson II* remand, concluded that retroactive FSA relief was unavailable to Richardson because "[i]n the general context of criminal sentencing, a sentence is 'imposed' when the trial court announces it, not when the defendant has exhausted his appeals from the trial court's judgment," *United States v. Richardson*, 948 F.3d 733, 748 (6th Cir.) ("*Richardson III*"), *cert. denied*, –– U.S. ––––, 141 S. Ct. 344, 208 L.Ed.2d 79 (2020) ("*Richardson IV*").

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

Here too, as we have reversed defendants' convictions on Count 2 and are remanding for resentencing, we leave it to the district court in the first instance to consider the applicability of the First Step Act to McCoy and Nix in light of the possible temporal limitation on retroactivity dictated by Congress's reference to the time when a sentence was "imposed." We also note that although Nix adopts without elaboration the arguments made by McCoy for First Step Act relief, the results might not be the same for both defendants because, leaving aside common questions as to the FSA's temporal applicability, differences in the criminal records of McCoy and Nix (*see* Part I.E. above) may dictate different outcomes.

CONCLUSION

We have considered all of defendants' arguments on these appeals and, except as ***66** indicated above, have found them to be without merit. Defendants' convictions on Count 2 are reversed; their convictions on all other counts are affirmed. The matter is remanded for dismissal of Count 2 and for resentencing, including consideration by the district court of the First Step Act.

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

All Citations

995 F.3d 32

Footnotes

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

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UNITED STATES of America,
v.
Matthew NIX and Earl McCoy, Defendants.

6:14-CR-06181 EAW
|
Signed 02/20/2018

Attorneys and Law Firms

Robert Marangola, Everardo A. Rodriguez, U.S. Attorney's Office, Rochester, NY, for United States of America.

Gary Muldoon, Muldoon and Getz, Rochester, NY, for Defendants.

DECISION AND ORDER

ELIZABETH A. WOLFORD, United States District Judge

I. Introduction

***1** Presently before the Court are two motions filed by defendants Earl McCoy ("McCoy") and Matthew Nix ("Nix") (collectively, "Defendants") seeking reconsideration of the Court's Decision and Order, dated August 24, 2017 ("Rule 33 Denial Order"), in which the Court denied Defendants' motions for a new trial pursuant to Federal Rule of Criminal Procedure 33 based on Juror No. 3's alleged bias. (*See* Dkt. 417; Dkt. 418). Through this second set of motions for reconsideration of the Rule 33 Denial Order, Defendants request vacatur of the judgment and a new trial, or, alternatively, a continuation of the evidentiary hearing regarding Juror No. 3's qualifications to sit on the jury. (*See* Dkt. 417 at 1; Dkt. 418 at 1). The Government opposes Defendants' motions. (Dkt. 425). For the reasons set forth below, the Court denies Defendants' motions in their entirety.

II. Background

The facts relevant to the issue of Juror No. 3's alleged bias are set forth in detail in the Rule 33 Denial Order, with which familiarity is assumed. (*See* Dkt. 382). The Court provides only a summary of those facts, as well as additional background information as relevant to this motion.

In brief, Juror No. 3, an African American male, was the sixth prospective juror called by the Court's deputy clerk during jury selection on February 13, 2017. (Dkt. 328 at 29). Juror No. 3 is a convicted felon, but he failed to disclose his criminal history during jury selection. Juror No. 3's felon status was discovered only after the verdict, which was returned on March 17, 2017. (Dkt. 266; Dkt. 267). Defendants both moved for a new trial pursuant to Rule 33 and argued, *inter alia,* that Juror No. 3's felon status destroyed the impartiality of the jury. (Dkt. 286; Dkt. 289).

On March 30, 2017, counsel for Nix made a Freedom of Information Law ("FOIL") request "for any and all criminal records and reports to the Monroe County District Attorney's Office concerning Juror #3 ... and only received one page which did not concern the incident, on or about June 7th, 2017." (Dkt. 417-1 at ¶ 19).

At an initial appearance regarding Defendants' post-verdict motions on May 15, 2017, the Court concluded that it must hold an evidentiary hearing concerning Juror No. 3's qualifications to serve on the jury. (*See* Dkt. 327). The Court held an evidentiary hearing on June 12 and 14, 2017, during which Juror No. 3 testified, confirmed his felon status, and was examined by the Court and counsel. (Dkt. 348; Dkt. 353). On the first day of the evidentiary hearing, Juror No. 3 was asked if he recalled being arrested for a burglary of a home in May of 1989, and he answered that he did not recall. (Dkt. 358 at 84). [1]

During the second day of the evidentiary hearing, Assistant District Attorney Stephen O'Brien ("ADA O'Brien") appeared in response to a subpoena that counsel for Nix had served upon the Monroe County District Attorney's Office ("MCDAO") on June 13, 2017, one day earlier. (Dkt. 359 at 144). The subpoena sought production of certain documents, including those related to a May 1989 burglary for which Juror No. 3 was allegedly charged but not convicted. ADA O'Brien moved to quash the subpoena, arguing that it was overbroad. (*Id.* at 144). ADA O'Brien also informed the Court that the MCDAO had been unable to locate any file pertaining to Juror No. 3 that would respond to the subpoena. (*Id.* at 144-47). [2] ADA O'Brien stated that the MCDAO employed a contractor to house older files, and the contractor was unable to locate the requested file pertaining to Juror No. 3. (*Id.* at 145). While there was a possibility that the file was misfiled, the MCDAO would have to pay a fee for the contractor to sift through thousands of individual boxes of files—with, of course, no guarantee that the file would be located. (*Id.* at

146-47). The Court quashed the subpoena, determining that it was overbroad, that the MCDAO's reasonable efforts to search for the requested records had yielded no results, and that it would be unnecessarily burdensome to require a search of each box that the contractor maintained. (*Id.* at 151). The evidentiary hearing concluded on June 14, 2017.

***2** On June 27, 2017, Nix filed a motion requesting the issuance of post-hearing subpoenas to the Monroe County Clerk and the Rochester City Court for records of the May 1989 burglary. (Dkt. 354). Nix stated that "the juror witness would not have to be recalled" if the subpoenas were issued. (*Id.* at ¶ 11). The Government opposed the motion. (Dkt. 361). At an appearance before the Court on July 6, 2017, the Court noted that the requested information was "probably outside the scope of a proper judicial subpoena" (Dkt. 421 at 11), and that "the application is untimely" (*id.* at 12). Nevertheless, the Court permitted the subpoenas to issue in order to allow the defense to explore whether there were any records concerning the May 1989 burglary. (*Id.* at 13).[3]

On August 24, 2017, after the parties had filed post-hearing submissions (Dkt. 363; Dkt. 369; Dkt. 370; Dkt. 371; Dkt. 372), the Court issued the Rule 33 Denial Order, which denied Defendants' Rule 33 motions to the extent that those motions were based upon Juror No. 3's alleged bias. (Dkt. 382). In the Rule 33 Denial Order, the Court concluded that Juror No. 3's criminal history—including the alleged arrest for burglary of a home—did not justify a finding that Juror No. 3 was biased against Defendants:

> Additionally, the information disclosed about Juror No. 3's criminal history does not support an inference of bias against Defendants. The fact that Juror No. 3 has been previously arrested and convicted of two prior felonies—including convicted for burglarizing a clothing store and *possibly arrested for burglarizing a home*—does not justify a finding of bias against Defendants, and Defendants cannot articulate any reasonable basis for concluding otherwise.

(*Id.* at 61-62 (emphasis added)). In so concluding, the Court specifically noted Juror No. 3's inability to recall the burglary arrest in May of 1989:

> There is some evidence in the record that Juror No. 3 may have been arrested for burglarizing a home in May of 1989 (when he was 19 years old). However, Juror No. 3 had no recollection of this alleged incident, and there is no evidence that he was convicted of this crime.

(*Id.* at 61 n.30 (citing Dkt. 358 at 84)).

On September 1, 2017, Defendants filed a motion that this Court construed as seeking reconsideration of the Rule 33 Denial Order. (Dkt. 385). Defendants took issue with the Court's observation, set forth in the Rule 33 Denial Order, that Juror No. 3 had left the courtroom during jury selection while the Court was informing the jurors about certain housekeeping matters. (Dkt. 382 at 55). This Court denied reconsideration in a Decision and Order dated September 25, 2017. (Dkt. 394).

On October 17, 2017, this Court sentenced Nix principally to 155 years' imprisonment and McCoy principally to 135 years' imprisonment. (Dkt. 405; Dkt. 406). Judgment was entered as to both Nix and McCoy on October 24, 2017 (Dkt. 405; Dkt. 406), and Defendants timely appealed their convictions and sentences (Dkt. 407; Dkt. 408). Defendants' appeals remain pending.

On October 25, 2017, counsel for Nix apparently sent a FOIL request to Monroe County, seeking Juror No. 3's criminal records. (Dkt. 417-2 (Letter Response to FOIL Request); Dkt. 418 at ¶ 6). On November 27, 2017, Monroe County produced the requested records. (Dkt. 417-2 (Letter Response to FOIL Request); Dkt. 418 at ¶ 6).

On December 15, 2018, Defendants filed the instant motions for reconsideration of the Court's Rule 33 Denial Order. (Dkt. 417; Dkt. 418). On January 5, 2018, the Government filed its response in opposition to Defendants' motions (Dkt. 425), and on January 12, 2018, Defendants filed their replies in support of their motions (Dkt. 443; Dkt. 443). The Court deemed the motion submitted without oral argument. (*See* Dkt. 419).

III. Jurisdiction

***3** Despite the pendency of Defendants' appeals, this Court may entertain and deny—but not grant—a Rule 33 motion or motion for reconsideration of a Rule 33 motion. *See* *United States v. Camacho,* 302 F.3d 35, 36-37 (2d Cir. 2002) (holding that a district court may entertain and *deny* a Rule 33 motion, or a motion for reconsideration of an order on a Rule 33 motion, during the pendency of an appeal); *see also* Fed. R. Crim. P. 33(b)(1) (providing that, "[i]f an appeal is pending, the court may not *grant* a motion for a new trial until the appellate court remands the case," but not limiting a court's ability to deny such a motion (emphasis added)).

IV. Standard of Review for Reconsideration

Defendants move for reconsideration of the Rule 33 Denial Order. (*See* Dkt. 417; Dkt. 418). Although the Federal Rules of Criminal Procedure do not specifically recognize motions for reconsideration, such motions "have traditionally been allowed within the Second Circuit." *United States v. Yannotti,* 457 F. Supp. 2d 385, 388 (S.D.N.Y. 2006). District courts "have applied the applicable civil standard to such motions in criminal cases." *United States v. Larson,* No. 07-CR-304S, 2013 WL 6196292, at *2 (W.D.N.Y. Nov. 27, 2013).

> The standard for granting ... a motion [for reconsideration] is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court.

Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995). Common grounds for reconsideration include "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.,* 956 F.2d 1245, 1255 (2d Cir. 1992) (citation omitted). "These criteria are strictly construed against the moving party so as to avoid repetitive arguments on issues that have been considered fully by the court." *Boyde v. Osborne,* No. 10-CV-6651, 2013 WL 6662862, at *1 (W.D.N.Y. Dec. 16, 2013) (quoting *Griffin Indus., Inc. v. Petrojam, Ltd.,* 72 F. Supp. 2d 365, 368 (S.D.N.Y. 1999)).

"[A] motion to reconsider should not be granted where the moving party seeks solely to relitigate an issue already decided." *Shrader,* 70 F.3d at 257; *see also* *Davidson v. Scully,* 172 F. Supp. 2d 458, 461 (S.D.N.Y. 2001) ("A motion for reconsideration may not be used to advance new facts, issues or arguments not previously presented to the Court, nor may it be used as a vehicle for relitigating issues already decided by the Court."). The decision to grant or deny a motion for reconsideration is within "the sound discretion of the district court...." *Aczel v. Labonia,* 584 F.3d 52, 61 (2d Cir. 2009) (citation omitted). Above all, "[r]econsideration of a court's previous order is an 'extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources.' " *Parrish v. Sollecito,* 253 F. Supp. 2d 713, 715 (S.D.N.Y. 2003) (quoting *In re Health Mgmt. Sys. Inc. Secs. Litig.,* 113 F. Supp. 2d 613, 614 (S.D.N.Y. 2000)).

V. Reconsideration is Not Warranted

A. Defendants' Proffered Evidence is Not Newly Discovered

Defendants argue that the Court should reconsider the Rule 33 Denial Order because of newly discovered evidence: police records of the May 1989 burglary, an incident that Juror No. 3 did not remember during the evidentiary hearing. (*See* Dkt. 417-2; Dkt. 417-3). Defendants argue that these records show that "Juror #3 did have some association with people who were involved in major drug dealing and dealers, and burglaries possibly involving the theft of jewelry and guns." (Dkt. 417-1 at ¶ 16). In Defendants' view, "it defies credulity to believe that Juror #3 would have no memory whatsoever concerning this burglary, or the very unusual manner in which he was arrested coming out of Court." (*Id.* at ¶ 12). Based on the evidence, Defendants ask the Court to vacate the judgment and order a new trial, or else reopen the evidentiary hearing regarding Juror No. 3's qualifications to serve on the jury. (*E.g.,* Dkt. 417 at 1).

***4** Defendants must make certain showings in order to justify reconsideration due to newly discovered evidence:

> To ground a motion for reconsideration on the basis of newly discovered evidence, "[t]he movant must demonstrate that (1) the newly discovered evidence was of facts that existed at the time of trial or other dispositive proceeding, (2) the movant must have been justifiably ignorant of them despite due diligence, (3) the evidence must be admissible and of such importance that it probably would have changed the outcome, and (4) the evidence must not be merely cumulative or impeaching."

Desarrolladora Farallon S. de R.L. de C. V. v. Cargill Fin. Servs. Int'l, Inc., 666 Fed.Appx. 17, 25 (2d Cir. 2016) (quoting *United States v. International Brotherhood of Teamsters,* 247 F.3d 370, 392 (2d Cir. 2001)).

Defendants' proffered evidence cannot be considered newly available because Defendants have not demonstrated that the evidence was unavailable despite their exercise of due diligence in obtaining the records. *See id.*; *see also United States v. Bohannon,* 247 F. Supp. 3d 189, 194 (D. Conn. 2017) ("The party moving for reconsideration based on the newly discovered evidence must show that the proffered evidence was unavailable despite the exercise of due diligence by the movant in procuring evidentiary support." (internal quotation marks and alterations omitted)); *United States v. Posada,* 206 F. Supp. 3d 866, 868 (S.D.N.Y. 2016) ("A motion to reconsider is not [an] opportunity to put forward evidence that [the party] could have, but failed, to provide the Court when the Court initially considered the motion." (internal quotation marks omitted)). Defendants' motions for reconsideration do not explain why they waited until October 25, 2017—more than five months after May 15, 2017, when the Court announced that a hearing was necessary (Dkt. 327), more than four months after June 14, 2017, when the hearing concluded (Dkt. 353), and after Defendants' sentencing proceedings on October 17, 2017 (Dkt. 405; Dkt. 406)—to submit a proper FOIL request for the records of the May 1989 burglary. (*See* Dkt. 417-1 at ¶¶ 7-8 (asserting, in conclusory manner, that the defense was diligent in procurement of records but failing to explain why FOIL request was made in October of 2017); Dkt. 418 at ¶¶ 3-7 (recounting timeline of efforts to procure the records but failing to explain delay); Dkt. 442 at 2-3 (asserting, without explanation, that "[i]t was certainly not through lack of effort on the part of the defense course [sic] that these records were not made available earlier"); Dkt. 443 (failing to address argument that Defendants did not exercise due diligence)).

In fact, Defendants have been consistently not diligent in their efforts to obtain the records relating to the May 1989 burglary. Even though Nix purportedly made a FOIL request to the MCDAO on March 30, 2017, and did not receive a response until June 7, 2017 (Dkt. 417-1 at ¶ 19), Defendants do not explain why they did not follow up during that time. Then, counsel for Nix served the MCDAO with a subpoena for the records relating to the May 1989 burglary in the middle of the two-day evidentiary hearing and set a return date for the next day, allowing the MCDAO just one day to produce the records. (*See* Dkt. 356 at 144). Defendants had no explanation then—and they have no explanation now—as to why they neglected to obtain the records in time for their use at the evidentiary hearing in June of 2017.

***5** Moreover, Defendants have not demonstrated that the proffered evidence is of "such importance that it probably would have changed the outcome" with respect to the Rule 33 Denial Order. *Desarrolladora Farallon S. de R.L. de C.V.,* 666 Fed.Appx. at 25. In rendering its decision, the Court was already aware that there was some evidence that Juror No. 3 was arrested for a home burglary in May of 1989, but as the Court observed, Juror No. 3 testified that he did not remember the arrest, and the incident did not justify a finding of bias against Defendants. (*See* Dkt. 382 at 61-62 & n.30). Now faced with actual evidence of that arrest, the Court would still conclude that Juror No. 3 was not biased against Defendants. The fact that Defendants now have evidence of the arrest does not change the fact that Juror No. 3 testified that he did not remember it. Moreover, even if Juror No. 3 testified inaccurately during the evidentiary hearing concerning this burglary, as he did with other parts of his criminal history, it would not change the result. As before when the Court denied Defendants' first motion for reconsideration:

> The record is devoid of any proof that Juror No. 3 had "actual bias" against Defendants or intentionally lied to smuggle his way onto the jury. There is still no fact in the record which, had it been elicited during jury selection, would have required the Court to automatically assume Juror No. 3's bias or prejudice against Defendants or in favor of the Government. And there is still no reason to infer Juror No. 3's bias, whether it be from his decades-old criminal history, being a victim

> of a home robbery 20 years ago, or his family members' alleged criminal records; the Court has rejected the notion that bias must be inferred from Juror No. 3's undisclosed background.

(Dkt. 394 at 12-13). Defendants have not demonstrated why the belatedly offered evidence of the May 1989 burglary justifies a different outcome or a reopening of the hearing, particularly when Defendants had previously submitted that "the juror witness would not have to be recalled" if certain subpoenas seeking records related to the May 1989 burglary were issued. (Dkt. 354 at ¶ 11). Whatever the details are of the May 1989 burglary, the fact remains that Juror No. 3 testified that he did not remember it, it did not result in any conviction, and it does not justify a finding of bias against Defendants. Having observed Juror No. 3 firsthand during the course of the trial and the two-day evidentiary hearing, this Court rejects the notion that Juror No. 3 lied during *voir dire* so as to secure a spot on the jury. Thus, the Court declines to grant the "extraordinary remedy" of reconsideration. *Parrish*, 253 F. Supp. 2d at 715 (citation omitted).

B. Defendants Otherwise Do Not Meet the Standard for Reconsideration

Otherwise, Defendants' motion for reconsideration fails to "point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Shrader,* 70 F.3d at 257. Once again, Defendants are not entitled to reconsideration merely because they disagree with the outcome of the Rule 33 Denial Order and the Court's determination as to Juror No. 3's alleged bias, as "[a] motion for reconsideration is not a substitute for appeal. Nor is it a second bite at the apple for a party dissatisfied with the court's ruling." *McBeth v. Gabrielli Truck Sales, Ltd.,* 768 F. Supp. 2d 392, 395 (E.D.N.Y. 2011) (citation and alterations omitted). Accordingly, reconsideration is not warranted.

VI. Conclusion

For the reasons set forth above, the Court denies Defendants' motions (Dkt. 417; Dkt. 418) in their entirety.

SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2018 WL 1009282

Footnotes

1 Citations to the transcripts of the evidentiary hearing are to the transcripts' pagination, not the pagination set forth in CM/ECF.

2 As noted by ADA O'Brien, the contractor was able to locate a file pertaining to another individual referenced in the subpoena. (*Id.* at 147). Those documents were produced after the hearing, and although unrelated to any charges involving Juror No. 3, counsel was afforded an opportunity to review the documents in Chambers.

3 In response to the subpoenas, the Rochester City Court Clerk had no responsive documents, and the Monroe County Clerk produced records that were duplicative of records previously obtained and unrelated to the May 1989 burglary.

275 F.Supp.3d 420
United States District Court, W.D. New York.

UNITED STATES of America,
v.
Matthew NIX and Earl McCoy, Defendants.

6:14–CR–06181 EAW
|
Signed 8/24/2017

Synopsis
Background: Following defendants' convictions on 12 counts of violations of the Hobbs Act and related firearms and narcotics charges, defendants moved for a new trial based on discovery that one of the jurors failed to disclose his status as a convicted felon.

Holdings: The District Court, Elizabeth A. Wolford, J., held that:

juror's false voir dire answers regarding his criminal history did not rise to the level of intentional falsehood necessary to satisfy first prong of *McDonough;*

juror's inaccurate responses to voir dire questions regarding his past jury service, criminal history of people he was close to, and being victim of home burglary would not have triggered a for-cause challenge to juror;

there was no evidence that juror was actually biased against defendants;

juror was not impliedly biased; and

juror's lies regarding criminal history did not evidence partiality sufficient to infer that he was biased against defendants.

Motion denied.

Attorneys and Law Firms

***423** Robert Marangola, U.S. Attorney's Office, Rochester, NYfor United States of America.

Mark D. Hosken, Federal Public Defender, Rochester, NY, for Defendants.

DECISION AND ORDER

ELIZABETH A. WOLFORD, United States District Judge

I. INTRODUCTION

Defendants Matthew Nix ("Nix") and Earl McCoy ("McCoy") (collectively, "Defendants") were charged in a Third Superseding Indictment returned on January 5, 2017, with 12 counts alleging violations of the Hobbs Act, 18 U.S.C. § 1951(a), and related firearms and narcotics charges, all in connection with a spree of violent home invasions during 2014. (Dkt. 165). Trial commenced on February 13, 2017, and concluded on March 17, 2017, with the jury convicting Defendants on all 12 counts. (Dkt. 229; Dkt. 266; Dkt. 267). Sentencing is presently scheduled for September 8, 2017. (Dkt. 350).

Nix and McCoy aggressively defended the case before and during trial, and the intensity of that defense only continued after the jury returned its verdict. [1] Defendants' post-verdict activities spawned further hearings, appearances, and motion practice, with Defendants attacking various aspects of the trial, from the jury selection to the jury instructions. Among the issues raised by Defendants was that one of the jurors in this case—" Juror No. 3" [2] —was a convicted felon who failed to ***424** disclose his criminal history during jury selection. Juror No. 3's felon status was not discovered until, post-verdict, counsel for Nix uncovered this information based on a "hunch." (Dkt. 327 at 6–9). Arguing that Juror No. 3's felon status tainted the impartiality of the jury, Defendants have filed motions pursuant to Fed. R. Crim. P. 33 seeking a new trial. (Dkt. 286; Dkt. 289).

Defendants had a fundamental constitutional right to a fair trial, and this Court is responsible for ensuring that they were afforded that right. Central to that right is the Sixth Amendment's guarantee to a trial by an impartial jury. *See also* *United States v. Nelson*, 277 F.3d 164, 206 (2d Cir. 2002) ("[Q]uite apart from offending the Sixth Amendment, trying an accused before a jury that is actually biased violates even the most minimal standards of due process."). "An impartial jury is one in which all of its members, not just most of them, are free of interest and bias." *United States v. Parse*, 789 F.3d 83, 111 (2d Cir. 2015).

However, in the words of the Supreme Court, Defendants were "entitled to a fair trial but not a perfect one, for there are no perfect trials." *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 553, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984) (internal quotation marks and citation omitted). In other words, although Defendants were unquestionably entitled to an impartial jury, they may not, post-verdict, challenge the selection of jurors who, in hindsight and with additional information, Defendants wished had not been selected. After a thorough consideration of the evidence and the parties' arguments, the Court concludes that the presence of Juror No. 3 did not destroy the impartiality of the jury in this case. Juror No. 3, a convicted felon who was not qualified to serve, admittedly blundered his way onto the jury—but he did not smuggle his way onto the jury through intentional deceit. As a result, Defendants are not entitled to a new trial, and, for the reasons discussed below, the motions pursuant to Fed. R. Crim. P. 33 (Dkt. 286; Dkt. 289) based upon Juror No. 3's alleged bias are denied. [3]

II. BACKGROUND

A. Jury Selection—February 13, 2017

Jury selection occurred on February 13, 2017. (*See* Dkt. 328). From a venire of 83, the Court sat a panel of 36 prospective jurors for the proposed 16–member jury (12 jurors and 4 alternates). Prospective jurors were excused for cause and replaced from the venire as the Court questioned the panel of prospective jurors. Each prospective juror had completed a questionnaire mailed to him or her in advance by the Clerk's Office. The questionnaire ***425** asked, among other things, for information about prior felony convictions. [4]

Juror No. 3, an African American male, was the sixth prospective juror called by the Court's deputy clerk, and he was seated in the sixth seat of the panel of 36. (*Id.* at 29). After all prospective jurors were placed under oath (*id.* at 30), the Court proceeded to ask questions of the panel.

Juror No. 3 responded to the Court's questions shortly after the questioning began, when the Court questioned the prospective jurors about their availability to sit for the trial that was estimated to last five weeks:

JUROR NO. 3: Hello, my name is [J.B.]. I'm self employed.

...

THE COURT: What do you do [J.B.]?

JUROR NO. 3: I have my own cleaning business. Right now it's covered because I'm working at night. I don't know if I can do that for five weeks.

THE COURT: You tell me what you would be able to do.

JUROR NO. 3: I don't know. I have contracted and these people rely on me to clean the businesses.

THE COURT: Do you typically clean during the day[?]

JUROR NO. 3: No, at nighttime. And I have a couple of contracts during the daytime, too.

THE COURT: Only you know whether or not you can manage it. We're going to be in session typically from 9 to 1. You would have the afternoons, typically, would be free and there would be some days where we'll be going full days. Obviously we're not meeting on the weekends. You tell me whether or not you think you could do it.

JUROR NO. 3: I have a contract that gets Tuesday and Friday morning. I don't know if she will allow me not to do it for five weeks.

THE COURT: During the break, would you be able to contact the person.

JUROR NO. 3: Not really, I don't have my phone. It's in the car.

THE COURT: If during the lunch break—

JUROR NO. 3: Yes.

THE COURT: We'll have about an hour lunch break, would you be able to make a call to see if it would work.

JUROR NO. 3: Yes.

(*Id.* at 40–42). [5]

After the first break, Juror No. 3 revealed that he had been able to "switch everything around" and, therefore, he would be able to serve if selected. (*Id.* at 86–87). Juror No. 3 did not speak for the rest of the day in response to the Court's *voir dire* questions, until the Court asked for biographical information from each juror at the end of the *voir dire.* (*See id.* at 245).

As a result, Juror No. 3 did not ***426** respond to any of the following questions that were asked of the entire panel: [6]

(1) "Has anyone ever been the victim of a home robbery?" (*id.* at 97);

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

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

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

(5) "Has anyone had anyone close to them, other than what we already discussed, I know we covered this, anyone close to them convicted of a crime?" (*id.* at 239).

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

Juror No. 3 was one of two African American males seated in the panel of 36 prospective jurors. [7] Like Juror No. 3, prospective juror "T.P." was also called by the Court's deputy clerk during the initial seating. (*Id.* at 30). T.P was seated in seat 26 of the panel of 36. (*Id.*). And like Juror No. 3, T.P. remained quiet throughout much of the *voir dire* until the Court asked each prospective juror at the end of jury selection to provide biographical information. [8] (*See id.* at 252). Also like Juror No. 3, T.P. was a convicted felon and failed to disclose that information either when completing the questionnaire mailed by the Clerk's Office or in response to the Court's *voir dire* questions. (*See* Court Ex. 3A). However, unlike Juror No. 3, T.P.'s felon status was discovered during jury selection when, prior to exercising peremptory challenges, the Government disclosed that it had run a background check on T.P. and discovered his undisclosed criminal history. (Dkt. 328 at 269–75; *see also* Court Ex. 3B; Court Ex. 3C).

When the Government brought to the attention of the Court and defense counsel its discovery of T.P.'s criminal history, counsel for McCoy accused the Government of targeting the racial minorities on the jury. (Dkt. 328 at 270 ("I'm concerned if an African American comes in and the FBI is running record checks on him, they ***427** probably did that with the other one, too.")). The Government denied defense counsel's accusations, and ultimately the issue was resolved with the Government agreeing to use one of its peremptory challenges to strike T.P. (*Id.* at 270–75).

As it turns out, the Government had not run a background check on any other prospective juror, including Juror No. 3 (Dkt. 308 at ¶ 3(A)), and Juror No. 3's criminal history was not discovered until after the return of the verdict. One of the issues Nix raises in his post-verdict motion is the Government's background check on T.P. (Dkt. 289 at ¶ ¶83–84). [9] Thus, Defendants seek a new trial both because an African American prospective juror who failed to disclose his criminal history was excused from the jury, and because an African American prospective juror who failed to disclose his criminal history was *not* excused from the jury.

B. Discovery of Juror No. 3's Felon Status

Post-verdict, Defendants filed motions pursuant to Fed. R. Crim. P. 29(c) and 33 raising a number of issues, including the discovery that Juror No. 3 may be a convicted felon. (Dkt. 286–1 at ¶¶ 8–22; Dkt. 289 at ¶¶ 36–50). [10] The Government filed papers in opposition to the motions, and, among other things, indicated that it was unaware of Juror No. 3's felon status until the issue was raised in Defendants' post-trial filings. (Dkt. 296 at 5–11). Defendants filed reply papers (Dkt. 299; Dkt. 300), and, due to the competing allegations about the background checks on the jurors in the case, the Court directed each counsel to disclose, by affidavit, information about any background checks conducted on jurors or prospective jurors. (Dkt. 302). Counsel for each party filed affidavits (Dkt. 306; Dkt. 308; Dkt. 309), and a hearing was conducted on May 15, 2017 (*see* Dkt. 327).

At the appearance on May 15, 2017, counsel for Nix indicated that he performed the criminal background check post-verdict on Juror No. 3 based on "a hunch." (*Id.* at 6–9). The Court determined that it would hold an evidentiary hearing concerning Juror No. 3 (*id.* at 25–27), and the Court scheduled a further appearance for May 25, 2017 (*id.* at 28–29). At the Court's direction, the United States Marshals Service served Juror No. 3 with an Order directing his appearance on May 25, 2017. (Dkt. 315; Dkt. 317).

On May 25, 2017, Juror No. 3 appeared in Court, was advised of his rights, and, at his request, counsel was appointed to represent him. (Dkt. 329 at 5–7). The Court set a date to conduct an evidentiary hearing: June 12, 2017. (*Id.* at 11). The Court also heard argument from counsel on the scope of the hearing, and it reserved decision on whether it would allow counsel to question Juror No. 3, indicating that the Court was going to initiate the questions and any questions that the parties wanted asked needed to be submitted to the Court in advance. (*Id.* at 37–41; *see, e.g.*, Dkt. 312). [11] On June 9, 2017, the U.S. Attorney's ***428** Office provided an immunity letter to Juror No. 3. (*See* Dkt. 358 at 70 [12]).

C. The Evidentiary Hearing

The evidentiary hearing commenced on June 12, 2017, and continued on June 14, 2017 (Dkt. 358; Dkt. 359). Only the Court asked questions on the first day of the hearing, but counsel were permitted to ask questions during the second day of the hearing. (*See* Dkt. 358; Dkt. 359).

Juror No. 3, a 47–year-old African American male (*see* Dkt. 358 at 76; *see, e.g.*, Court Ex. 14), testified that he did not have a high school diploma or G.E.D., but had been educated up until the 11th grade (Dkt. 358 at 71). He has five children (*id.* at 71–72) and is self-employed as a cleaner (*id.* at 71; *see, e.g.*, Court Ex. 14). He described his marital status as single (Dkt. 358 at 72), although when questioned further about his marital status, it was revealed that he is separated but not legally divorced (*id.* at 94–95).

Juror No. 3 acknowledged that he completed the Court's juror questionnaire online (*id.* at 73), and he inaccurately answered "No" in response to Question No. 6, which asked: "Have you ever been convicted either by your guilty or nolo contendere plea or by a court or jury trial, of a state or federal crime for which punishment could have been more than one year in prison?" (*id.* at 74; *see* Court Ex. 14; Court Ex. 15).

Juror No. 3 explained his reasoning for answering inaccurately as follows: "At the time, I thought that it meant 21 and over." (Dkt. 358 at 74). Juror No. 3 offered a similar explanation as to why he had not offered this information during the Court's questions during *voir dire* (*id.* at 86–88), but he acknowledged that his answers were not accurate:

Q But I never said 21 and up, did I?

A No, you did not.

Q And the questionnaire didn't say 21 and up, did it?

A No, it did not.

Q And as you sit here now, would you agree with me that you did not answer those questions truthfully?

A Yes.

(*Id.* at 89).

While admitting that he had been convicted of at least one felony, Juror No. 3 displayed a hazy memory concerning the number of prior felony convictions and arrests.

Q Can you tell me how many crimes punishable by more than one year in prison or felonies have you been convicted of?

A Truthfully, I don't remember, your Honor.

(*Id.* at 75). Juror No. 3 did offer that he could recall being convicted of a felony where he "was accused of breaking into a clothing store" when he was 17 or 18 years old. (*Id.* at 76). He testified that he was sentenced to two to four years in prison, but that sentence was satisfied by serving six months in "shock camp." (*Id.* at 78). However, Juror No. 3 did not recall several facts surrounding this conviction, such as: if the charge was resolved through a plea or trial (*id.* at 76); where the shock camp was located (*id.* at 78); the name of one of his co-defendants (*id.* at 77); if he was prosecuted in federal or state court ***429** (*id.* at 79); and the name of the judge who sentenced him (*id.*).

Initially, Juror No. 3 testified that he did not know if he had been convicted of any other felonies other than the one involving the clothing store:

Q Other than that felony conviction [involving the burglary of the clothing store], do you know if you were convicted of any other prior felonies?

A No, I don't.

(*Id.* at 80). He testified that he had been arrested, although the only arrest that he was initially able to recall involved a stolen car when he was 17 or 18 years old, and he testified that he could not recall how it was resolved. (*Id.*). However, later during the first day of the hearing, Juror No. 3 testified that he was convicted of the incident involving the stolen car:

Q How did the—I may have asked you this, I'm not sure—how did the stolen motor vehicle charge get resolved?

A I'm not sure.

Q In other words, do you know if you were convicted or not?

A Yes.

Q You were convicted?

A Yes.

Q But you don't know if you were convicted by a plea or by a trial?

A No, I don't.

Q And as you sit here now, you don't know if you served—you don't recall serving any time for that conviction—

A No, I—

Q—is that fair to state?

A Yes, your Honor.

(*Id.* at 87–88).

Juror No. 3 testified that he was falsely accused of both the clothing store burglary and the stolen car crime:

Q So, you were falsely accused of this crime [involving the clothing store burglary]?

A Yes.

(*Id.* at 79).

Q And if I understand correctly, you did not actually engage in the burglary of the clothing store, correct?

A Yes.

Q What about the stolen vehicle, did you actually steal a vehicle?

A No.

(*Id.* at 84–85). However, during the second day of the hearing, when confronted with his signed confession about the burglary of the clothing store, Juror No. 3 ultimately admitted his involvement and that he provided the Court false testimony on the subject. (Dkt. 359 at 181–84). When the Court confronted him about why he failed to testify accurately, Juror No. 3 had no explanation:

Q So, why did you not answer my question accurately when I first asked it of you?

A Don't know.

Q You don't know?

A No.

Q Isn't it fair to state that you'd prefer not to be honest about your prior criminal history?

A Truthfully, I don't think about my prior history, to tell you the truth. I don't think about it.

Q Well, we're here on it right now.

A Yes, we are.

Q So we're talking about it right now.

Isn't it fair to state that you'd prefer not to be honest about your prior criminal history?

A No.

(*Id.* at 183; *see id.* at 231 (admitting that Juror No. 3 provided false testimony during first day of the hearing about his involvement ***430** in the clothing store burglary)). In response to Nix's counsel's questions, Juror No. 3 also admitted that he remembered stealing a car and switching the license plates. (*Id.* at 225).

A number of additional arrests were reflected in the records obtained by the parties in preparation for the evidentiary hearing. Juror No. 3 appeared to have no memory of those arrests:

Q Do you recall being arrested in 1986 for assault in the second degree?

A No, I don't.

Q Do you recall being arrested in March of 1987 for petit larceny?

A No.

Q And in connection with that arrest, do you recall you were convicted and were sentenced to two work Saturdays; do you have any recollection of that?

A No.

Q What about a conviction in November 1987 for petit larceny where you served 14 days in the Monroe County Jail; does that sound familiar to you?

A Truthfully, your Honor, I don't remember none of this stuff. That was 28 years ago.

(Dkt. 358 at 81–82).

Q Do you recall being arrested in July of 1989 for burglary in the second degree for illegal entry of a dwelling?

A No, I do not.

...

Q Do you recall burglarizing a home in May of 1989?

A No, I do not.

(*Id.* at 84). In addition, during the second day of the hearing, Juror No. 3 was questioned by the Court about reports concerning two separate alleged domestic violence incidents (one in 1993 and the other in 1999)—one of which he recalled but for which he denied being arrested, and the other of which he had no recollection. (Dkt. 359 at 176–77). During questioning by Nix's counsel, Juror No. 3 appeared to have some recollection of a petit larceny conviction on March 10, 1987 (*id.* at 215–16), and possibly an assault charge when he was 16 (*id.* at 214–15), although it was impossible to distinguish at that point whether Juror No. 3 was testifying based on his memory or his review of records.

In addition, other than his six-month stint at shock camp for the clothing store burglary, Juror No. 3 indicated he had no memory of being incarcerated for any other period of time, other than possibly overnight for the stolen vehicle charge:

Q Do you recall ever serving any time in the Monroe County Jail?

A Not at all, no, I don't.

Q I mean, as you sit here right now, can you tell me whether or not you've been to the Monroe County Jail?

A Yes, I've been there.

Q And tell me in connection with why you've been there.

A For the stolen car.

Q Okay. And, so, tell me about the time—I mean, were you kept overnight for the stolen car?

A Yes.

Q So, how long were you kept overnight for the stolen car, do you recall?

A I don't remember how long. I think I got out the next day on my own recognizance, I think. I'm not sure.

....

Q Do you recall being sentenced for that case [the stolen car case] in April of 1988, does that sound as though it may be correct?

A It sounds like it's correct, the year, yes.

***431** Q If records indicated that you served six months in the Monroe County Jail for that, would those be accurate?

A All I remember is shock camp, six months in shock camp. I don't remember doing six months in jail.

Q So if I understand correctly, you recall possibly spending a night in jail in connection the stolen car arrest, correct?

A Yes.

Q And you recall six months in shock camp correct?

A Yes.

Q But is there any other time that you recall of serving time either in prison or jail in any capacity?

A Don't remember.

Q Is there anything that would refresh your recollection?

A Not really.

(Dkt. 358 at 82–83). When confronted during the second day of the hearing with the certified copy of his conviction involving the stolen vehicle, which indicated that he served six months in the Monroe County Jail in 1988, Juror No. 3 continued to insist that he had no recollection of serving that time. (Dkt. 359 at 185–86). In response to questioning by McCoy's counsel, Juror No. 3 indicated that he did not share information about his prior sentences because "[s]he [referencing the Court] said visited a jail. I assume she meant visiting somebody else, not me actually going to jail. That's why I didn't tell her." (*Id.* at 197). Juror No. 3 also responded to the Court's questions during the first day of the hearing that with respect to his actual time in jail, as with the convictions, he assumed the questions applied to incidents only when he was 21 or older. (Dkt. 358 at 88–89).

In response to the Court's questions, Juror No. 3 expressed his belief that his civil rights had been restored because of the age of his criminal convictions, and he also denied knowing that his criminal history would have disqualified him from jury service:

Q As far as you know, were your civil rights ever restored?

A I thought they were.

Q And why did you think they were?

A Because it happened 20 years ago. I assumed that they were.

Q Are you able to vote?

A Yes.

Q Did you know that a prior felony conviction, without having your civil rights restored, would have disqualified you from jury service in this case?

A No, I did not.

...

Q Would you agree with me, as you sit here now, that you did not answer this questionnaire correctly, this question number six?

A Yes.

Q And can you tell me, at the time that you answered it, did you know that you were answering that question inaccurately?

A No, I did not.

Q And what was your understanding of what the question was seeking, what information?

A Like I said, I thought it meant from 21 and up. I assumed that. That's what I assumed.

Q Why did you assume that?

A Because I thought everything that I did back then was expunged or whatever. I didn't know that it was a felony still on there.

Q And you thought it was expunged because of your age?

***432** A Yes.

(*Id.* at 85–86).

Juror No. 3 denied that his prior criminal history impacted his ability to be fair and impartial, and he denied being biased in favor of either Defendants or the Government. (*Id.* at 90; *see also id.* at 93; Dkt. 359 at 170). He also denied sympathizing or identifying with the cooperating witnesses in this case because of his criminal history. (Dkt. 358 at 91–92; Dkt. 359 at 170–71). Similarly, he denied working with law enforcement or prosecuting agencies as a cooperating witness and he had no recollection of cooperating against his co-defendants in the clothing store burglary case. (Dkt. 358 at 95). [13]

Juror No. 3 testified that he was aware at the time of the hearing of the fact that his son had been convicted of a crime (*id.* at 93), but *at the time of jury selection* he had not spoken to his son in three or four years, and, as a result, he was not aware of his son's conviction during jury selection. (*Id.* at 93–94; Dkt. 359 at 167). Juror No. 3 denied knowing of anyone else who was close to him who had been convicted of a crime (Dkt. 358 at 94–95; Dkt. 359 at 212–13), and he similarly denied visiting any family member or close friend in jail (Dkt. 358 at 95).

Juror No. 3 testified that he had been previously called for two other juries, and in one of those cases he was selected, but the jury never reached a verdict because the defendant pleaded guilty. [14] (Dkt. 358 at 100–01; Dkt. 359 at 169). Juror No. 3 testified that he answered other juror questionnaires the same way he did in this case because he assumed the convictions were not part of his record if they occurred before the age of 21. (Dkt. 358 at 101). In response to questioning by McCoy's counsel, Juror No. 3 denied any recollection of being asked during *voir dire* about his prior jury service, but then appeared to recall the question but could not recall if he had answered it:

Q And do you recall being asked if you'd ever sat on a jury before?

A No, I don't. It was a long day.

...

***433** Q And do you recall her [referencing the Court] asking if anybody had ever sat on a jury before?

A Yes.

Q And do you recall whether or not you answered that question?

A No, I don't.

Q Did you tell her that you had sat on a jury before?

A I don't know if I told her yes or no.

(Dkt. 359 at 193–94).

During the second day of the hearing, Juror No. 3 was questioned about an incident in October 1999, in which his home was broken into and various items were stolen, including jewelry and his wife's checkbook. (*Id.* at 172). The records regarding this incident were produced on June 13, 2017, in response to a subpoena served by counsel for Nix (and, thus, were not available on the first day of the hearing). Juror No. 3 testified that he did not share this information in response to the Court's questions during *voir dire* because "truthfully, it slipped my mind, forgot all about it." (*Id.* at 173). Juror No. 3 testified that he had remembered the burglary only when the documents were produced in response to the subpoena. (*Id.*). Juror No. 3 denied having any recollection of the event at *voir dire* or during the trial, and testified that he recalled the incident only after being presented with the subpoenaed documents:

Q When did you remember it?

A When I saw the documents.

Q So within the last 24 hours?

A Yes.

Q On Monday, before you had seen those documents, did you have any memory of this incident?

A No, I did not.

Q ... Were there any other occasions where you were living in a home and it was burglarized or robbed?

A Nope.

Q Is this the only time?

A It's the only time.

Q Well, wasn't it a pretty significant event in your life?

A Not really because we weren't there. Just came home and the house was broken into.

Q ... [D]id your memory at all get refreshed about that sitting through a five-week trial dealing with home invasion?

A No, it did not.

Q I mean, that never once occurred to you?

A No, it did not.

Q And it wasn't until you saw the actual police report in this case that I provided to counsel yesterday that this—hat you remember this?

A Yes.

(*Id.* at 173–74). The records from this incident indicate that Juror No. 3's wife was the primary point of contact with law enforcement after the incident (Court Ex. 17), which was consistent with Juror No. 3's testimony that his wife handled the matter. (Dkt. 359 at 201).

D. Certified Certificates of Conviction

Based on the certified certificates of conviction procured by McCoy's counsel and introduced at the evidentiary hearing as Court Exhibits 21 and 22, the fact of the prior felony convictions is plainly established.

On March 9, 1988, Juror No. 3 pleaded guilty to criminal possession of stolen property in the fourth degree (a class E felony). (Court Ex. 21). The certificate of conviction reflected the imposition of a sentence on April 6, 1988, of six months in the Monroe County Jail. (*Id.*). This conviction involved the stolen car. Juror No. 3 ***434** was 18 years old at the time of this conviction and sentence.

On September 26, 1989, Juror No. 3 pleaded guilty to burglary in the third degree (a class D felony), and he was sentenced to two to four years in the New York State Department of Corrections on January 11, 1990. (Court Ex. 22). Juror No. 3 testified that in lieu of serving two to four years in prison, he spent six months in shock camp. (Dkt. 358 at 78). This conviction involved the clothing store burglary. Juror No. 3 was 19 years old at the time of this conviction and sentence.

E. Post–Hearins Submissions

In accordance with the schedule set by the Court, McCoy filed his post-hearing memorandum on July 7, 2017. (Dkt. 363). In that submission, McCoy argues that Juror No. 3's felony conviction alone warrants the granting of a new trial, without any showing of bias. (*Id.* at 8–10). Alternatively, McCoy argues that both prongs of the *McDonough* test [15] have been satisfied (*id.* at 10–17), contending that Juror No. 3 was involved in conduct similar to the conduct at issue in this case so as "raise the possibility that an inferred bias exists" and the "potential for substantial emotional involvement" (*id.* at 15), and as a result, Juror No. 3 would have been excused for cause if he gave honest answers during *voir dire.* McCoy concedes in his submission that it "is unknown ... why [Juror No. 3] lied during *voir dire*" (*id.* at 17; *see also id.* at 19), but contends that the material and repeated lies by Juror No. 3 make his presence on the jury "incompatible with our truth-seeking process...." (*Id.* at 18). McCoy does not specify any actual bias that has been demonstrated on the part of Juror No. 3, but rather contends that the Court should infer bias and order a new trial as a result. (*See id.* at 17–23).

On July 8, 2017, counsel for Nix emailed his post-hearing submission to the Court and counsel, and then filed that submission on July 19, 2017. (Dkt. 369). In that submission, among other things, Nix refers to alleged prior drug convictions related to alleged siblings of Juror No. 3. (*Id.* at 11). [16] Nix also argues that one of the Government's potential law enforcement witnesses in this case was involved in the investigation of Juror No. 3's clothing store burglary, and since Juror No. 3 was convicted based on that law enforcement witness' efforts, "[h]e would remember him." (*Id.* at 13). He also argues that another Government witness was involved in the investigation related to Juror No. 3's son. (*Id.*). Indeed, Nix contends that Juror No. 3 has "had bad experiences with law enforcement." (*Id.* at 12). However, the thrust of Nix's post-hearing submission is that Juror No. 3 necessarily identified with the cooperating witnesses in this case, and, therefore, he must have been biased against Defendants. (*See id.* at 22).

In accordance with the schedule set by the Court, the Government filed its post-hearing memorandum of law on July 21, 2017. (Dkt. 370). The Government argued ***435** that Juror No. 3's non-responsive answers and demeanor during the hearing demonstrated that he had difficulty understanding questions put to him by the Court and counsel. (*Id.* at 2 ("He appeared nervous and uncomfortable and, at times, defensive, which is understandable (in additional to his lack of comprehension) considering he was ordered to appear in court, read his rights in open court as if he were under arrest, assigned an attorney, and publicly questioned under oath by a federal judge, two criminal defense lawyers, and a federal prosecutor.")). The Government argues that the evidentiary hearing did not reflect a " 'searching inquiry' by the defense to vindicate a constitutional right" but rather it reflected "an all-out attack with the singular focus of trying to make the juror look like a liar at every turn, for the sole purpose of getting out from under the consequences of the constitutionally valid guilty verdicts after a full, fair and impartial trial by a jury they chose." (*Id.* at 2–3). The Government challenges the nature of the questioning by defense counsel, contending that it was "done in a sarcastic, condescending and goading manner" and that before the hearing, those same counsel "had already publicly vilified [Juror No. 3] as a liar and unfairly blamed him for the plight of their clients." (*Id.* at 4). The Government contends that Defendants have failed to establish that Juror No. 3 intentionally lied during jury selection, nor have they demonstrated that honest answers would have required the Court to excuse Juror No. 3 because of actual or implied bias, or justified his excusal due to inferred bias against Defendants or in favor of the Government. (*Id.* at 4–5). In short, the Government submits that Defendants have failed to meet their burden under the *McDonough* test.

Defendants filed their post-hearing reply memoranda on July 28, 2017. (Dkt. 371; Dkt. 372). Nix argues that the "prosecution is very tolerable of perjury in a federal courtroom when it suits them" and that, contrary to the Government's arguments, every response from Juror No. 3 at the hearing "was more deceitful and mendacious than the next." (Dkt. 371 at 2). McCoy challenges the Government's description of the hearing as "pure invention" and "especially outlandish" given the plans that the Court put in place with respect to the conduct of the hearing. (Dkt. 372 at 2). McCoy continues that "lying at voir dire because of embarrassment or some other benign reason might be understandable, [but] multiple lying at the hearing and indeed committing perjury is another thing altogether." (*Id.* at 4). McCoy submits that "perhaps Juror # 3's inability to accept his past led to the same pattern of false answers." (*Id.* at 8). McCoy argues that a challenge for cause by the Government would have been granted if Juror No. 3 had disclosed his criminal history. (*Id.* at 9). McCoy also argues that Defendants would have raised a successful cause challenge if they had known about the burglary involving Juror No. 3 's home. (*Id.*).

III. LEGAL STANDARD

Pursuant to the Jury Selection and Service Act of 1968, 28 U.S.C. § § 1861 *et seq.* ("JSSA"), Juror No. 3's prior felony convictions made him statutorily ineligible to serve on the jury in this case. *See* 28 U.S.C. § 1865(b)(5) (disqualifying from jury service any person who "has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored"). However, this information was never disclosed during *voir dire*, and it is too late for any statute-based challenge to Juror No. 3's service. *See id.* § 1867(a), (e) (providing ***436** that the procedures under the JSSA are exclusive means to challenge jury not selected in conformity with the provisions of the JSSA, and setting final deadline to challenge as before the *voir dire* examination begins); Dkt. 381 at 3–6 (discussing the untimeliness of any challenge by Defendants to jury under JSSA); *see also* *United States v. Silverman*, 449 F.2d 1341, 1344 (2d Cir. 1971) (finding where there was a substantial failure to comply with § 1865(b)(2), but the challenge was not raised until after the return of the verdict, the defendant's "attack on that conviction cannot be founded on [the juror's] disqualification under the statute"); *United States v. Harmon*, 21 F.Supp.3d 1042, 1049 (N.D. Cal. 2014) (finding § 1865(b)(5) "is a statutory bar as applied to prospective jurors, not a constitutional requirement required under due process principles"); *cf.* *United States v. Boney*, 977 F.2d 624, 633 (D.C. Cir. 1992) (finding that the provisions set forth in § 1865(b)(5) apply to the procedures utilized by a district court to administer the jury selection process—not to a situation where a juror fails to disclose his felon status on the jury qualification form).

As a result, Defendants base their challenge to Juror No. 3's selection for this jury on the Sixth Amendment's guarantee of the right to an impartial jury. However, the "Sixth Amendment right to an impartial jury ... does not require an *absolute bar* on felon-jurors." *Boney*, 977 F.2d at 633. As explained by the D.C. Circuit in *Boney*:

> A *per se* rule would be appropriate ... only if one could reasonably conclude that felons are always biased against one party or another. But felon status, alone, does not necessarily imply bias. In fact, as the dissent suggests, Congress' purpose in restricting felons' jury service may stem from considerations other than a concern for biased jurors. More important, a *per se* rule requiring a new trial whenever it turns out that a felon served on a jury seems inconsistent with *McDonough*'s hostility to unnecessary new trials, and the oft-repeated axiom that "a defendant is entitled to a fair trial but not a perfect one." We think, therefore, that the Sixth Amendment guarantee of an impartial trial does not mandate a *per se* invalidation of every conviction reached by a jury that included a felon.

Id. at 633 (citations omitted); *see also* *United States v. Langford*, 990 F.2d 65, 69 (2d Cir. 1993) (rejecting the argument that a juror's intentionally false response during *voir dire* is automatic grounds for a new trial). [17]

***437** Thus, the question as to whether Defendants' Sixth Amendment rights were violated by virtue of Juror No. 3's selection to the jury necessarily centers on whether his presence destroyed the impartiality of the jury; in other words, was Juror No. 3 biased? Based upon the Supreme Court's decision in *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984), the Second Circuit has adopted a two-part test that a defendant must establish in order to justify granting a new trial based upon incorrect responses by a juror during *voir dire*: (1) the defendant must first demonstrate that the juror "failed to answer honestly a material question on *voir dire*"; and (2) the defendant then must also demonstrate that "a correct response would have provided a valid basis for a challenge for cause"—in other words, the juror would have been excused for bias based on the correct *voir dire* response. *Langford*, 990 F.2d at 68–69 (quoting *McDonough*, 464 U.S. at 556–58, 104 S.Ct. 845); *see also* *United States v. Stewart*, 433 F.3d 273, 303 (2d Cir. 2006) ("[A] party alleging unfairness based on undisclosed juror bias must demonstrate first, that the juror's *voir dire* response was false and second, that the correct response would have provided a valid basis for a challenge for cause."); *United States v. Shaoul*, 41 F.3d 811, 816 (2d Cir. 1994) ("We reiterate that, in order to obtain a new trial, a defendant must show *both* that a juror gave a dishonest answer, *and* that the correct answer would have provided a basis for the defendant to challenge the juror for cause.").

The first part of the test entails a threshold requirement to show juror dishonesty. *Shaoul*, 41 F.3d at 815. In other words, the Court must assess whether Juror No. 3 deliberately lied or consciously deceived the Court, as opposed to providing inaccurate responses as a result of a mistake, misunderstanding or embarrassment. *See* *McDonough*, 464 U.S. at 555, 104 S.Ct. 845; *Langford*, 990 F.2d at 69–70 (finding where a juror's intentionally false statements at *voir dire* were caused by embarrassment, and there was no evidence "that she gave false answers because of any desire to sit on the jury," it was proper for the district court to deny the defendant's motion for a new trial (emphasis ***438** added)); *see, e.g.*, *United States v. Escalera*, 536 Fed.Appx. 27, 35 (2d Cir. 2013) ("[The defendant] points to no record evidence that the juror intentionally failed to disclose [material information during voir dire], much less that the reason for the non-disclosure was to avoid excusal (as opposed to embarrassment) or to conceal some bias that could have prejudiced the trial."); *Dyer v. Calderon*, 151 F.3d 970, 984 (9th Cir. 1998) ("Not all jurors may walk a perfectly straight line. A distracted juror might fail to mention a magazine he subscribes to. An embarrassed juror might exaggerate the importance of his job. Few voir dires are impeccable, and most irregularities can be shrugged off as immaterial to the fairness of the trial.").

With respect to the second part of the test, the Court must determine if it would have granted a hypothetical cause challenge if Juror No. 3 had responded accurately to the Court's questions. *Stewart*, 433 F.3d at 304 (citing *United States v. Greer*, 285 F.3d 158, 171 (2d Cir. 2002)); *see* *United States v. Blackwell*, 436 Fed.Appx. 192, 196 (4th Cir. 2011) ("[A] '*McDonough* claim necessarily fails unless the court would have committed reversible error—that is, abused its discretion—in failing to dismiss a juror.' " (citation omitted)).

This second part of the test is really the most crucial. *Stewart*, 433 F.3d at 305 ("The significant factor, however, is that the District Court found that even if it were established that [the juror's] responses were false as alleged, none of the correct answers would have supported an inference that he was biased or prejudiced against [the defendants] or had prejudged the evidence."). The critical determination is not simply whether the lies in question are deliberate, but rather whether "*the deliberateness of the particular lies evidenced partiality*." *Id.* (quoting *Greer*, 285 F.3d at 172–73); *see also* *Greer*, 285 F.3d at 170–71 (finding it unnecessary to determine whether juror dishonestly answered questions at *voir dire* because "the District Court did not exceed its allowable discretion in finding that those omissions and misstatements did not satisfy *McDonough*'s prong two").

A juror's dishonesty under the first part of the test "is among the 'factors to be considered' in the ultimate determination of bias ... [but] an analysis of bias is required even if the juror's erroneous response was deliberate." *Greer*, 285 F.3d at 173. It is important to consider the dishonesty in the second part of the test because it can show "a personal interest in this particular case that was so powerful as to cause the juror to commit a serious crime [by lying during *voir dire*]." *United States v. Colombo*, 869 F.2d 149, 151 (2d Cir. 1989). In other words, a bright line does not divide the two prongs of the test, and there is some blurring of the factors to be considered under each prong. "Challenges for cause are generally based on actual bias, implied bias, or inferable bias." *Greer*, 285 F.3d at 171 (citing *United States v. Torres*, 128 F.3d 38, 43 (2d Cir. 1997)). As explained by the Second Circuit:

> Actual bias is bias in fact. Implied bias, by contrast, is bias presumed as a matter of law. Finally, inferred bias is available when actual or implied bias does not apply. "Bias may be inferred when a juror discloses a fact that bespeaks a risk of partiality sufficiently significant to warrant granting the trial judge discretion to excuse the juror for cause, but not so great as to make mandatory a presumption of bias."

Id. (citations omitted). At least in the Second Circuit, it is unsettled whether either implied or inferred bias may serve as the basis for a post-trial allegation of jury partiality. *See* *id.* at 172.

***439** There is only one instance where the Second Circuit [18] has found a reason to overturn a verdict on the basis of juror nondisclosure under *McDonough*—in the case of *United States v. Parse*, 789 F.3d 83 (2d Cir. 2015). *Cf.* *Stewart*, 433 F.3d at 303 (observing, pre–*Parse*, that this "Court has never found reason to overturn a verdict on the basis of juror nondisclosure under *McDonough* and only once, ... has remanded for an evidentiary hearing on the matter"); *United States v. Colombo*, 909 F.2d 711 (2d Cir. 1990) (having previously remanded to the district court to conduct post-trial hearing regarding allegations that juror deliberately lied during *voir dire*, finding upon appeal after remand that district court's finding that juror had not intentionally withheld information was not clearly erroneous).

Parse involved a situation where, after a verdict was returned in favor of the Government, a juror sent a letter to the Government praising its performance but lamenting the acquittals on some of the counts as to one of the defendants (Parse). 789 F.3d at 90. That letter prompted further investigation by defense counsel and a revelation that the juror had lied extensively during *voir dire* about her criminal history, her background, and a host of other information, including the fact that she was an attorney facing disciplinary action. *Id.* at 91. The district court ordered an evidentiary hearing to go forward, and the juror initially refused to appear, prompting an arrest warrant to be issued. *Id.* The hearing ultimately went forward, and the juror admitted lying during *voir dire* "to make herself more 'marketable' as a juror...." *Id.* In other words, the juror admitted that she created a fictional profile to make herself more attractive as a juror. *Id.* at 91–92. The district court concluded that the juror's false answers "were attributable neither to a desire to avoid embarrassment nor to honest mistakes," *id.* at 92, but rather were "premeditated and deliberate," *id.* at 93 (quoting *United States v. Daugerdas*, 867 F.Supp.2d 445, 469 (S.D.N.Y. 2012)). The district court further concluded that the juror "was 'a pathological liar and utterly untrustworthy,' " describing the lies as "breathtaking" and "calculated to prevent the Court and the parties from learning her true identity, which would have prevented her from serving on the jury." *Id.* at 92 (quoting *Daugerdas*, 867 F.Supp.2d at 468–70). The juror lied in response to clear and unambiguous *voir dire* questions, and the district court rejected any contention that the juror was somehow confused by the questions, particularly given her status as an attorney. *Id.* Moreover, the events about which the juror lied were "recent, personally significant, and directly affected her qualifications to serve as a juror." *Id.* (quoting *Daugerdas*, 867 F.Supp.2d at 469).

> Her arrests and suspensions from the practice of law were not the result of youthful indiscretions or errors on the part of police or courts.... There is no dispute that [the juror] was aware of her prior convictions, her attorney disciplinary problems, and her personal injury suit at the time she answered the Court's questions under oath. There is also no question that she made a conscious decision to hide them from the Court.

***440** *Id.* at 92 (quoting *Daugerdas*, 867 F.Supp.2d at 469). As a result, the district court concluded that the juror was actually biased against the defendants, but with respect to the defendant Parse, the district court concluded that his counsel was aware of these issues during the trial and failed to raise the issue until after the verdict, thus waiving any claim. *Id.* at 93, 101–02.

On appeal, the Second Circuit explained that a new trial was required where "the juror's false responses 'obstructed the *voir dire* and indicated an impermissible partiality on the juror's part.' " *Id.* at 110 (quoting *Colombo*, 869 F.2d at 151).

> Where the juror has lied for the purpose of securing a seat on the jury—a mission apparently "so powerful as to cause the juror to commit a serious crime"—it "reflect[s] an impermissible partiality on the juror's part." Such conduct not only suggests a view on the merits and/or knowledge of evidentiary facts but is also quite inconsistent with an expectation that a prospective juror will give truthful answers concerning her or his ability to weigh the evidence fairly and obey the instructions of the court.... [C]ertainly when possible non-objectivity is secreted and compounded by the deliberate untruthfulness of a potential juror's answer on *voir dire*, the result is deprivation of the defendant's rights to a fair trial. Where the juror has deliberately concealed information, "bias" is to be "presume[d]."

Id. at 111 (citations omitted). The Second Circuit concluded that the district court appropriately determined that the juror's presence caused the jury not to be impartial, and furthermore, that the record did not support the conclusion that Parse had waived his challenge.

> In these circumstances—in which a juror aligned herself with the government, lied pervasively in voir dire for the purpose of avoiding dismissal for cause, believed prior to the presentation of any evidence that the defendants were " 'crooks' " and expressly mentioned [the defendant] as a target of her efforts to persuade the other jurors to convict—a refusal to order a new trial for Parse would seriously affect the fairness, integrity, and public reputation of judicial proceedings.

Id. at 120. Thus, the Second Circuit reversed the district court's denial of the motion for a new trial as to Parse. *Id.*

IV. FIRST PRONG OF *McDONOUGH*–FAILURE TO ANSWER HONESTLY MATERIAL QUESTION ON VOIR DIRE

A. General Assessment of Juror No. 3

Defendants contend that, like the juror in *Parse*, Juror No. 3 deliberately lied during *voir dire* and continued his lies during the evidentiary hearing before this Court. (*See, e.g.*, Dkt. 363 at 17; Dkt. 369 at 53). The Government contends that Juror No. 3 was tricked and attacked by defense counsel, and, at most, displayed a lack of recall and comprehension that resulted in the inaccurate answers during *voir dire* and confusion during the evidentiary hearing. (Dkt. 370 at 1–2).

An analysis of Juror No. 3's credibility under the first prong of the *McDonough* test is a more nuanced inquiry than posited by either the Government or Defendants. Having observed Juror No. 3's facial expressions, demeanor, and intonation while he testified during the two-day evidentiary hearing, including when he responded to the Court's questions, it was apparent that Juror No. 3 had problems understanding the questions and expressing himself clearly. In part, this appeared attributable to nervousness. Juror No. 3 was questioned in open court before Defendants and their counsel, Government ***441** counsel, and a large number of spectators. The courtroom was significantly more crowded during the evidentiary hearing involving Juror No. 3 than it had been at any point during the five-week trial.[19]

The testimony must also be viewed through the lens of one with Juror No. 3's educational background. Juror No. 3 appeared neither sophisticated nor bright. He exhibited poor comprehension during the evidentiary hearing and difficulties providing understandable and clear answers. As an example, the following answers were elicited during the Court's questions:

Q Do you recall being asked by me during jury selection whether you had ever been a defendant in a criminal case?

A Yes.

Q And you didn't *respond* to that question, correct?

A No.

Q And can you tell me why you didn't *respond* to that question?

A Because I didn't think it *responded* to me at the time.

Q What?

A I didn't think it *responded* to me at the time.

...

Q But my question was had you ever been a defendant in a criminal case. You had been a *defendant* in a criminal case, correct?

A I don't understand what you mean, your Honor.

Q So you don't know what I mean when I'm saying *defendant*–

A Yes.

(Dkt. 358 at 86–87 (emphasis added)).

The above exchange plainly depicts Juror No. 3's vocabulary challenges. He repeatedly utilizes the Court's reference to "respond" in its questions to provide his answers, even though answering the question with reference to that word is plainly an incorrect use of the word "respond." Similarly, he exhibits difficulty understanding the meaning of the word "defendant." The Court did not view this testimony as intentionally deceptive. Juror No. 3 did not display attributes of cleverness. Rather, Juror No. 3 displayed vocabulary and comprehension issues that the Court interpreted as impacting the substance of his testimony. In the Court's view, Juror No. 3 was what he seemed: a relatively simple individual with a lack of education and sophistication who had difficulty comprehending certain areas of inquiry. [20]

Thus, in assessing Juror No. 3's credibility, the Court must exercise caution against viewing Juror No. 3's testimony from the Court's own educational or socio-economic ***442** background. As recognized by the Supreme Court, "jurors are not necessarily experts in English usage. Called as they are from all walks of life, many may be uncertain as to the meaning of terms which are relatively easily understood by lawyers and judges." *McDonough*, 464 U.S. at 555, 104 S.Ct. 845.

In addition, as discussed below, the Court finds that Juror No. 3 provided false testimony at the evidentiary hearing concerning his criminal record. However, based upon the Court's observations of Juror No. 3 during the evidentiary hearing, including his demeanor, tone, and facial expressions, along with the substance of his testimony, the Court does not discredit the entirety of his testimony even though some parts of it were plainly false. *See Van Buren v. Cargill, Inc.*, 10–CV–701S, 2016 WL 231399, at *7 & n.5 (W.D.N.Y. Jan. 19, 2016) ("[*F*]*alsus in uno* merely permits, but does not require, a finder of fact to disregard the entirety of the testimony." (citing *United States v. Weinstein*, 452 F.2d 704, 713 (2d Cir. 1971) ("The maxim '*Falsus in uno, falsus in omnibus*' has been well said to be itself 'absolutely false as a maxim of life.' " (citation omitted)).

B. Deliberate Lies

Against this backdrop, the Court must assess whether Juror No. 3 intentionally gave false answers during *voir dire.* The Court will first address the information supplied that was unrelated to the criminal background of Juror No. 3. [21]

1. Answers Unrelated to Juror No. 3's Criminal Background

a. Burglary of Juror No. 3's Home

It was revealed at the evidentiary hearing that Juror No. 3 had his home burglarized in October 1999, but he never shared that information in response to the Court's question: "Has anyone ever been the victim of a home robbery?" (Dkt. 328 at 97). The Government argues that Juror No. 3 was the victim of a home "burglary," not a "robbery," and he was never asked during *voir dire* about being the victim of a burglary. (Dkt. 370 at 16). Although technically correct, the Court does not find the Government's argument persuasive, particularly in view of the burglaries described by other prospective jurors in response to the Court's question about a "home robbery." (*See* Dkt. 328 at 97–101).

However, based on Juror No. 3's demeanor, tone, and appearance when questioned at the evidentiary hearing about the home burglary—which occurred almost 20 years ago—the Court is convinced that the incident had completely slipped his mind. Moreover, the Court agrees with the Government's argument that no correlation exists between the violent home invasions described during the trial and the burglary of Juror No. 3's home, such that the trial testimony should have been expected to ***443** trigger Juror No. 3's recollection about the burglary. When he was questioned about the home burglary and his failure to disclose the information, Juror No. 3 appeared genuinely surprised that he had not earlier recalled the burglary. Moreover, the documentary evidence involving the burglary suggests that Juror No. 3's wife was the primary point of contact with law enforcement following the incident. Thus, the Court easily concludes that Juror No. 3 did not intentionally fail to disclose information about this burglary from 1999. *See, e.g.*, *Harmon*, 21 F.Supp.3d at 1052 ("[C]ourts 'must be tolerant, as jurors may forget incidents long buried in their minds, misunderstand a question or bend the truth a bit to avoid embarrassment. The Supreme Court has held that an honest yet mistaken answer to a voir dire question rarely amounts to a constitutional violation.' " (quoting *Dyer*, 151 F.3d at 973)).

b. Criminal Convictions of Individuals "Close" to Juror No. 3

Defendants also contend that Juror No. 3 failed to disclose the criminal convictions related to his brother "Gary," his sister "Cynthia," his son, and his wife "Tracey." (Dkt. 369 at 15). The Court asked during *voir dire* whether "anyone close to" the prospective jurors had been convicted of a crime. (Dkt. 328 at 239). Juror No. 3 did not reveal any information in response to this question.

At the evidentiary hearing, in response to Nix's counsel's questions, Juror No. 3 testified that he had not seen his brother "Gary" in three or four years, and he was unaware of his brother's criminal convictions for multiple drug offenses. (Dkt. 359 at 212). Similarly, Juror No. 3 testified that he was unaware of his son's criminal convictions at the time of jury selection, and he had not seen him in about three or four years. (Dkt. 358 at 93–94; Dkt. 359 at 167, 212). Juror No. 3 also was unaware of any arrests of his wife from whom he is separated (but not legally divorced). (Dkt. 359 at 213). Juror No. 3 was not asked any questions about his knowledge of the criminal record of his sister "Cynthia," or when he last saw her.

Thus, there is no basis for the Court to conclude that Juror No. 3 failed to provide material information on this subject during *voir dire* because the record indicates that Juror No. 3 was not aware of the convictions and Juror No. 3 did not view himself as close to the individuals in question. *See, e.g.*, *United States v. Stewart*, 317 F.Supp.2d 432, 438 (S.D.N.Y. 2004) (recognizing ambiguity in questions as to whether somebody "close" to juror had been victim of crime, and finding that defendants could not "demand a new trial because a juror failed to place the broadest possible construction on those questions"), *aff'd*, 433 F.3d 273 (2d Cir. 2006).

c. Prior Jury Service

During *voir dire*, the Court questioned the prospective jurors about their prior jury service by asking: "Has anyone ever *served* on a jury before?" (Dkt. 328 at 205 (emphasis added)). In the Court's view, the question was straightforward, and in response a number of prospective jurors provided information regarding their prior jury experience. (*Id.* at 205–13). In addition to providing the parties with information that may be utilized during peremptory challenges, the primary purpose of the Court's questions on this topic was to ensure that nothing about that prior jury service would impact a prospective juror's ability to be fair and impartial. In other words, prior jury service does not, in and of itself, normally constitute a basis for a cause challenge.

Juror No. 3 did not respond to the question during *voir dire.* This topic was addressed during both days of the evidentiary hearing. During the first day of the ***444** hearing, the Court elicited the following testimony:

Q Have you ever *served* on any other juries?

A I was called for two but they took the plea, so I didn't have to.

(Dkt. 358 at 100–01 (emphasis added)). In other words, Juror No. 3 suggested that he "didn't have to" serve on any prior juries because the cases were resolved through pleas. No follow-up questions were asked during the first day of the hearing.

During the second day of the hearing, the Court again addressed the topic during its questioning:

Q Now, you had mentioned, I believe, that there were other occasions where you were summoned for jury duty?

A Yes.

Q And this was in state court, not federal court–

A Yes.

Q—correct? Did you ever, like, actually *get selected* or did you get put in the box?

A I was selected.

...

Q On how many occasions were you selected?

A Once.

Q And do you remember the type of case?

A No, I don't.

Q Was it civil or criminal?

A I believe it was criminal.

Q But the case, the jury did not ultimately deliberate in that case?

A No, the person took the plea.

...

Q How long ago was this where you were _selected to serve_ on a jury?

A A few years ago.

...

Q And is that the only other time that you've been called for jury service, other than this incident?

A There was one other time before that, too.

Q And were you _selected_ in that case?

A Nope.

Q Did you ever get put into the box and asked questions?

A No.

Q And this was before the other time that you just mentioned?

A Yes.

Q Do you know how long ago that was?

A Probably about a year before that.

(Dkt. 359 at 168–70 (emphasis added)).

When questioned by counsel for McCoy, Juror No. 3 initially denied any recollection of being asked about prior jury service during *voir dire*, responding "[i]t was a long day." (*Id.* at 193). Counsel for McCoy then asked the questions again:

Q And do you recall her [the Court] asking if anybody had ever _sat on a jury_ before?

A Yes.

Q And do you recall whether or not you answered that question?

A No, I don't.

Q Did you tell her that you sat on a jury before?

A I don't know if I told her yes or no.

(*Id.* at 193–94 (emphasis added)).

The Court believes the questions about prior jury service were straightforward, particularly in light of the responses of the other prospective jurors, including one prospective juror who indicated that, like Juror No. 3, he had been selected for a jury but "about halfway through the case the defendant copped a plea." (*See* Dkt. 328 at 211). As a result, Juror No. 3 should ***445** have disclosed his prior selection to serve on a jury in response to the Court's *voir dire* questions, even though that jury ultimately did not deliberate.

However, the Court is hard-pressed to conclude that Juror No. 3 intentionally withheld this information in response to the Court's questions, or somehow tried to deliberately mislead the Court and the parties by not revealing this information. There is no conceivable reason for Juror No. 3 not wanting to disclose this information. The explanation for Juror No. 3's non-disclosure could be his misunderstanding of the scope of the question—equating prior "service" as requiring actual deliberation—and again, the Court must assess Juror No. 3's responses in view of his educational background and perceived comprehension issues as noted above. Alternatively, the explanation could simply be attributed to Juror No. 3 being distracted and not paying close enough attention to the questions that were being asked at that point during *voir dire* (which was later in the day). Under any scenario, the Court does not believe that Juror No. 3 intentionally withheld this information or intentionally lied about this topic during *voir dire.* Moreover, even if Juror No. 3 intentionally lied about his prior jury service, the Court has difficulty concluding that that the subject dealt with a "material" issue as required under the *McDonough* test.

*d. _Summary of Findings_*

For the reasons set forth above, the Court concludes that Juror No. 3 did not deliberately fail to honestly answer the *voir dire* questions related to the home burglary in 1999 and the criminal history of anyone "close" to him. The Court's assessment of Juror No. 3's answers (or lack thereof) concerning prior jury service is a closer call, but on balance, the Court concludes that Juror No. 3 did not intentionally fail to reveal information during *voir dire* about that prior jury service, and even if he had, the information about Juror No. 3's prior jury service would not, in and of itself, rise to the level of materiality required under the first prong of the *McDonough* test.

2. *Answers Related to Juror No. 3's Criminal Background*

Whether Juror No. 3 deliberately lied about his criminal background during *voir dire* is a more difficult question. The questions related to Juror No. 3's criminal background were included in the questionnaire mailed in advance to prospective jurors, which asked:

> "Have you ever been convicted, either by your guilty or nolo contendere plea or by a court or jury trial, of a state or federal crime for which punishment could have been more than one year in prison?"

(Court Ex. 15). Juror No. 3 incorrectly answered this question by checking "No." (*Id.*). In addition, Juror No. 3 did not respond to the following *voir dire* questions asked of the panel as whole: "Has anyone ever been a defendant in a criminal case?" (Dkt. 328 at 214) and, "Has anyone ever visited a jail of correctional facility other than in connection with ... your educational curriculum?" (*id.* at 229).

In assessing whether Juror No. 3 deliberately lied in responding to these questions (or in not responding), the Court must recognize that two jurors (Juror No. 3 and T.P.) failed to accurately respond to the Court's questions on these topics. Certainly, the Court could justifiably conclude that these two individuals intentionally attempted to mislead the Court and the parties about their criminal background. However, it is at least arguable that more direct questioning during *voir dire* on this topic may have elicited the information. In ***446** other words, the information may have been disclosed if the Court had directly asked each juror whether he or she had been "arrested" (a question that was not asked), "convicted" of "any crime" (again, a question that was not asked), or ever "been to a jail" (as opposed to a "visit" to a jail, as was asked).

Although the Court accepts full responsibility for the framing of the questions, Defendants never requested any follow-up on these issues during *voir dire. See* Fed. R. Crim. P. 24(a)(2)(B) ("If the court examines the jurors, it must permit the attorneys for the parties to submit further questions that the court may ask if it considers them proper."). In fact, it was the Government that wanted these issues explored further during the *voir dire.* (*See* Dkt. 328 at 227 (asking that the Court ask whether "anyone close to you" had been a defendant in a criminal case, and whether any prospective juror had "visited a jail")). Moreover, neither Defendant proposed questions regarding the prospective jurors' criminal background as part of their requested *voir dire* questions. (*See* Dkt. 173 (McCoy proposed *voir dire*); Dkt. 178 (Nix proposed *voir dire*)). Again, it was the Government that requested questions on this topic as part of its proposed *voir dire* questions. (*See* Dkt. 170 at 6).

Juror No. 3 unquestionably failed to reveal his criminal record in response to the juror questionnaire and the Court's *voir dire* questions. By all accounts, the convictions at issue occurred before Juror No. 3 reached the age of 21, and that was the explanation offered by Juror No. 3 as to why he did not reveal the convictions: he did not believe that they counted because of their age (approximately 30 years old). (*See* Dkt. 358 at 74, 85–87).[22] Juror No. 3 also told the Court that that was the reason he did not respond affirmatively to the question about visiting a jail (*id.* at 88–89), and he also told McCoy's counsel that he assumed the question was directed at "visiting" another individual as opposed to serving time in jail himself (Dkt. 359 at 197).

The problem with accepting Juror No. 3's explanation is that he plainly provided false testimony at the evidentiary hearing regarding his criminal record. In other words, although it is at least debatable whether Juror No. 3 lied about his criminal history during *voir dire*, there is no question that he lied about his criminal history during the evidentiary hearing. Juror No. 3 initially denied any recollection of a felony conviction other than the one related to the clothing store burglary, but then, upon further questioning, he did admit to the felony conviction involving the stolen vehicle. (Dkt. 358 at 75–76, 80, 87–88).

Juror No. 3 exhibited a hazy recollection of his criminal record, including the two felony convictions. Although Juror No. 3's poor recollection is understandable in view of the convictions' temporal remoteness, the age of the convictions cannot explain ***447** Juror No. 3's false testimony that he was wrongly accused of both the clothing store burglary and stolen vehicle incident. (*Id.* at 79, 84–85). Juror No. 3 first claimed that he did not actually burglarize the clothing store or know the criminal purpose of the visit to the clothing store. (*Id.* at 84–85; Dkt. 359 at 180). Similarly, Juror No. 3 denied stealing a vehicle. (Dkt. 358 at 85).

However, during the second day of the hearing, when confronted with his signed confessions regarding these two incidents, Juror No. 3 admitted that he was involved in the clothing store burglary and that he had earlier testified falsely regarding the event. (Dkt. 359 at 179–84, 231). Juror No.

3 also admitted, in response to Nix's counsel's questions, to stealing a vehicle and switching the license plates. (*Id.* at 225).

Additionally, although Juror No. 3 denied any recollection of spending time in jail other than the six months spent in shock camp, the documentary evidence in this case suggests that Juror No. 3 spent six months in the Monroe County Jail for the stolen vehicle conviction in 1988. (Court Ex. 21). In addition, although the Court agrees with the Government that, to some extent, the so-called admissions that defense counsel—particularly Nix's counsel—procured during the evidentiary hearing are not particularly helpful to any credibility assessment given the tone and nature of the questioning, [24] the fact is that Juror No. 3 lied during the evidentiary hearing in response to *the Court's questions.* Juror No. 3 was not tricked—he deliberately offered false testimony at the evidentiary hearing regarding his criminal history.

The Court does not doubt that Juror No. 3's inaccurate testimony regarding his criminal record was due, in part, to the age of the convictions. However, given Juror No. 3's false testimony during the evidentiary hearing about his culpability for the two felony convictions, the Court does not credit Juror No. 3's explanation that he was confused by the *voir dire* questions or thought that the questions applied to criminal convictions only after the age of 21. Based on Juror No. 3's continued refusal to disclose the full extent of his criminal history during the evidentiary hearing—until faced with documentary evidence of the same—the Court concludes that Juror No. 3 failed to respond truthfully to the juror questionnaire and the Court's *voir* ***448** *dire* questions as they pertained to both his criminal convictions and his exposure to a jail.

However, this finding does not mean that the Court concludes that Juror No. 3 provided false information about his criminal record in an effort to intentionally deceive the Court so as to be selected to serve on the jury. Here, Juror No. 3 did not lie "for the purpose of securing a seat on the jury," *Parse*, 789 F.3d at 111, nor can his lies be characterized as "premeditated and deliberate" so as to hide his true identity and ensure his selection on the jury, *id.* at 92–93. Rather, as revealed by Juror No. 3's continued lies at the evidentiary hearing, his motives had nothing to do with securing a seat on this jury. The Government granted Juror No. 3 immunity for his testimony at the evidentiary hearing *except for any perjured testimony*, and yet Juror No. 3 refused to be honest about his criminal past at the hearing until confronted with documentary evidence. Juror No. 3 repeatedly testified at the evidentiary hearing that he does think about or focus on his criminal record. A more sophisticated witness may have been able to articulate a reason for his refusal to be honest about his criminal past—whether it be embarrassment, concern that the criminal record could impact his job as a cleaner, or a desire to simply block that part of his distant past. Instead, Juror No. 3 testified that he did not believe the convictions counted because they occurred before he was 21 years old. Juror No. 3 has applied a similar interpretation when answering juror questionnaires in the past.

The Court is not persuaded that Juror No. 3 misunderstood the scope of the questions as only applying to convictions at the age of 21 and older, when responding to either this Court or other courts in the past. However, the Court is convinced that the reason for Juror No. 3's inaccurate responses is not some nefarious motive; rather, the reason more likely originates from the simple fact that, at 47 years old, Juror No. 3 would prefer to shut out any recollection of his criminal history—the most recent of which (if the domestic violence incident from 1999 is included) was about 20 years ago, and most of which occurred when he was a teenager. *Cf. Parse*, 789 F.3d at 111 ("Where the juror has lied for the purpose of securing a seat on the jury—a mission apparently 'so powerful as to cause the juror to commit a serious crime'—it 'reflect[s] an impermissible partiality on the juror's part....' In the present case, the record amply supports the findings of the district court that [the juror] repeatedly lied during voir dire ... and that she did so in order to be chosen as a juror." (quoting *Colombo*, 869 F.2d at 151) (emphasis added)); *Langford*, 990 F.2d at 69 ("[A] juror who ... has deliberately responded falsely to a material question on voir dire precisely because she wanted to sit on the case, should be presumed not to be impartial." (emphasis added)).

Thus, although the Court finds that Juror No. 3 testified falsely about certain information during the hearing that was conducted on June 12 and 14, 2017, it rejects the notion that Juror No. 3 testified falsely about *all* matters that were covered during that hearing, and it further rejects the notion that Juror No. 3 intentionally deceived the Court during *voir dire* as to his criminal history so as to gain a seat on the jury. Although Juror No. 3's *voir dire* answers regarding his criminal history were inaccurate, the Court cannot conclude that they rise to the level of intentional falsehood necessary to satisfy the first prong of the *McDonough* test.

V. SECOND PRONG OF *McDONOUGH*—BIAS

The Court concedes that the issues at play concerning the inaccuracy of Juror ***449** No. 3's disclosed criminal history with respect to the first prong of the *McDonough* test present a close question. Moreover, as noted above, the second prong of the *McDonough* test is the most critical. Thus, the Court will proceed to consider whether a correct response to the Court's *voir dire* questions would have required excusing Juror No. 3 for cause—in other words, whether the Court would have granted a hypothetical challenge if Juror No. 3 had responded accurately to the Court's questions. Unlike the first prong, resolution of the second prong is not a close question. The Court concludes that Juror No. 3's lies, even if deliberate, did not evidence partiality so as to violate the Sixth Amendment.

As an initial matter, with the exception of Juror No. 3's prior criminal record, none of the other alleged inaccurate *voir dire* responses from Juror No. 3 would have even triggered a challenge for cause. Other jurors responded by disclosing prior jury service, being close to those who had been convicted of a crime, and being the victims of home burglaries (including suffering the theft of jewelry and other items of value (*see* Dkt. 328 at 97–101)). Yet none of those prospective jurors were challenged for cause, nor could they have been appropriately challenged for cause.

In addition, in many respects, the Court does not need to analyze how it would have handled a hypothetical challenge for cause due to Juror No. 3's criminal record, because, in the Court's view, based on Defendants' reaction to the disclosure of T.P.'s criminal history, Defendants would *not* have made a cause challenge. The Court is hard-pressed to credit Defendants' newfound aversion to jury service by a convicted felon given their reaction to the disclosure that T.P. was a convicted felon, and particularly when (at least Nix) continues to press the issue related to T.P. in post-verdict motion practice. *Defendants* would not have challenged Juror No. 3 for cause if he had revealed the full extent of his criminal history during *voir dire*—rather, the *Government* would have likely claimed bias and sought to excuse Juror No. 3. [26]

Notwithstanding the above, the Court will examine whether actual bias, implied bias or inferred bias is properly attributable to Juror No. 3.

A. Actual Bias

The Second Circuit has described actual bias as follows:

> Actual bias is "bias in fact"—the existence of a state of mind that leads to an inference that the person will not act with entire impartiality. A juror is found by the judge to be partial either because the juror admits partiality, or the judge finds actual partiality based upon the juror's voir dire answers.

Torres, 128 F.3d at 43 (citations omitted). "[A] finding of actual bias 'is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province.' " *Id.* at 44 (quoting *Wainwright v. Witt*, 469 U.S. 412, 428, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)).

The record in this case is barren of any evidence of actual bias on the part of Juror No. 3 against Defendants. Indeed, although Defendants argue in a conclusory manner that the convictions should be set aside because of actual bias, they make no real attempt to demonstrate actual bias. ***450** (*See, e.g.*, Dkt. 363 at 17 (merely listing that "[t]he testimony of Juror # 3 demonstrated actual, implied or inferred bias")).

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

Moreover, the Court's observations of Juror No. 3—both during *voir dire* and throughout the trial—led to the inescapable conclusion that Juror No. 3 was by no means an overzealous or enthusiastic juror. Juror No. 3 had expressive features that the Court interpreted as reflecting his displeasure with being selected to sit on a 5–week trial. Juror No. 3 did his duty, but his body language did not depict somebody who was relishing the experience.

McCoy contends that Juror No. 3's expressed displeasure with the lateness of the proceedings on the day of jury selection should not be taken to infer that he was not enthusiastic about serving on the jury. (Dkt. 363 at 19). However, that is not the only basis for the Court's conclusion that Juror No. 3 was not pleased about being selected to serve on the jury. His facial expressions and body language throughout the trial caused the Court to conclude that, if he had a choice, Juror No. 3 would have elected not to sit on the jury. This included rolling his eyes at the Court when the jury had to be repeatedly excused from the courtroom during the defense presentation of the case, and appearing displeased when the court was in session for full days.

Given the fact that Juror No. 3 was working at nights to keep up with his cleaning business (Dkt. 358 at 98 (Juror No. 3 testifying that he worked until 1:00 AM after serving on the jury)), it is certainly understandable that he was not savoring the experience of sitting on this case. Indeed, it was a long trial, and perhaps each of the jurors would have elected to be someplace else if given the choice. Regardless, this Court had the definite and firm impression that Juror No. 3 was less than pleased when selected to serve on the jury.

As a result, the Court was quite surprised when, during the hearing, Juror No. 3 initially testified that, in fact, he wanted to serve "[b]ecause I was picked. It's my right, I'm assuming." (Dkt. 358 at 44). Ultimately, Juror No. 3 gave varying responses about his interest in serving, and the Court believes that Juror No. 3 was initially confused by the Court's questioning. (*See id.* at 96–100). Yet, given Juror No. 3's varying statements about his interest in serving on the jury, the Court cannot rely on the substance of Juror No. 3's testimony in assessing this issue—what Juror No. 3 said on this topic is of little or no value. However, the Court has considered its observations of Juror No. 3 throughout the trial. It also believes Juror No. 3's reaction in the form of tone, facial expression, and demeanor, to a particular line of questioning by the Government at the hearing, was revealing:

Q ... did you have in your mind, I'm not going to say anything about my 27–year-old felony conviction because that way I can wind up on this jury?

A (Laughing.)

Q Is that what happened?

A No, it's not.

***451** Q You laughed when I said that. Does that seem ridiculous in your mind?

A Yes, it does.

Q Why is that ridiculous to you?

A Because I have better things to do than to sit here for five weeks. If I knew that, I would have told her then and I wouldn't have been on the jury at all.

(Dkt. 359 at 236–37).

There is no evidence that Juror No. 3 knew that disclosure of his criminal record would have disqualified him from jury service. The Court believes that if Juror No. 3 had known this information, his reluctance to be honest about his criminal history would have likely been overcome by a desire to avoid jury service. In sum, the Court finds that there is no evidence of actual bias on the part of Juror No. 3, in favor of or against either the Government or Defendants. Even evaluating the facts in the light most favorable to Defendants (which is not the standard), no actual bias has been shown in this case. There is just no proof that Juror No. 3 intentionally lied to smuggle his way onto the jury.

B. Implied Bias

Implied bias is reserved for "extreme situations," *Greer*, 285 F.3d at 172 (quoting *Smith v. Phillips*, 455 U.S. 209, 222, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982)), and " 'deals mainly with jurors who are related to the parties or who were victims of the alleged crime itself,' " *id.* (quoting *Torres*, 128 F.3d at 45). As explained by the Second Circuit:

> Implied or presumed bias is "bias conclusively presumed as a matter of law." It is attributed to a prospective juror regardless of actual partiality. In contrast to the inquiry for actual bias, which focuses on whether the record at voir dire supports a finding that the juror was in fact partial, the issue for implied basis is whether an average person in the position of the juror in controversy would be prejudiced. And in determining whether a prospective juror is impliedly biased, "his statements upon voir dire [about his ability to be impartial] are totally irrelevant."

Torres, 128 F.3d at 45 (citations omitted). It is unsettled in the Second Circuit whether implied bias may serve as the basis for a post-trial allegation of jury partiality. *See* Greer, 285 F.3d at 172.

This is not a case of implied bias. There is no fact in the record which, had it been elicited during jury selection, would have required the Court to automatically assume bias on the part of Juror No. 3 or that Juror No. 3 was prejudiced against Defendants or in favor of the Government. Juror No. 3 is not related to any of the parties, victims, witnesses, attorneys, and he was not a victim of the charged crimes. Moreover, as discussed above, Juror No. 3's felon status does not justify a *per se* finding of bias as a matter of law. At best, Defendants cite to Juror No. 3's potential knowledge of one of the identified law enforcement witnesses in the case (who never ultimately testified) because he is the same individual who investigated Juror No. 3's clothing store burglary. Yet, even if Juror No. 3 recalled the name of the investigator (and there is no evidence that he did), this would not support a finding of implied bias against Defendants.

C. Inferred Bias

From a review of Defendants' submissions, it is apparent that the central focus of their argument is that it should be inferred, from Juror No. 3's inaccurate answers and undisclosed information, that he was biased against Defendants. "[A] finding of inferred bias is, by definition, within the discretion of the trial court." *Id.* ***452** As explained by the Second Circuit in *Torres*:

> Bias may be inferred when a juror discloses a fact that bespeaks a risk of partiality sufficiently significant to warrant granting the trial judge discretion to excuse the juror for cause, but not so great as to make mandatory a presumption of bias. There is no *actual* bias because there is no finding of partiality based upon either the juror's own admission or the judge's evaluation of the juror's demeanor and credibility following voir dire questioning as to bias. And there is no *implied* bias because the disclosed fact does not establish the kind of relationship between the juror and the parties or issues in the case that mandates the juror's excusal for cause.
>
> Nonetheless, inferable bias is closely linked to both of these traditional categories. Just as the trial court's finding of actual bias must derive from voir dire questioning, so the court is allowed to dismiss a juror on the ground of inferable bias only after having received responses from the juror that permit an inference that the juror in question would not be able to decide the matter objectively.... [O]nce facts are elicited that permit a finding of inferable bias, then, just as in the situation of implied bias, the juror's statements as to his or her ability to be impartial become irrelevant....
>
> [C]ases in which a juror has engaged in activities that closely approximate those of the defendant on trial are particularly apt [for an inference of bias].

128 F.3d at 47.[27] Like implied bias, it is unsettled in the Second Circuit whether inferred bias may serve as the basis for a post-trial challenge based on jury partiality. *See* *Greer,* 285 F.3d at 172.

As an initial matter, the Court must assess any claim of inferred bias in light of Defendants' attitude about Juror No. 3 before they were convicted. Defendants wanted Juror No. 3—the only African American male remaining after the removal of T.P.—on the jury. During the first day of the trial, the Court raised an issue after opening statements as to whether Juror No. 3 had dozed off during the Government's opening statement.[29] The Court observed that Juror No. 3 had made a noise that could have been a snore, and the Government observed that his eyes were closed and then opened after making the noise. In response, defense counsel denied that Juror No. 3 had his eyes closed or was sleeping, and objected to the Court making any further inquiry. The Court indicated that it would continue to observe Juror No. 3 (as well as the rest of the jurors), and, ultimately, no further inquiry was required. However, defense counsels' objections demonstrate that they perceived Juror No. 3 as an individual who was potentially in their corner, not the opposite. Indeed, Defendants' attitude in this ***453** regard is only further reinforced by their reaction to the removal of the other African American male (T.P.) because of his undisclosed felony convictions. *See* Stewart, 317 F.Supp.2d at 439 (rejecting defendants' argument that nondisclosures by juror would have provided sufficient basis for a challenge for cause, citing to defendants' "vigorous[ ]" argument against the Government's challenge to another prospective juror who failed to disclose similar information).

Additionally, the information disclosed about Juror No. 3's criminal history does not support an inference of bias against Defendants. The fact that Juror No. 3 has been previously arrested and convicted of two prior felonies—including convicted for burglarizing a clothing store and possibly arrested for burglarizing a home [30] —does not justify a finding of bias against Defendants, and Defendants cannot articulate any reasonable basis for concluding otherwise. The fact that neither Defendant requested that any issue about prospective jurors' criminal histories be explored during *voir dire*, necessarily reflects Defendants' lack of concern with having criminals serve on the jury. Rather, this was the Government's concern, and in fact, McCoy even admits that it would have been the Government who challenged Juror No. 3 for cause if his criminal history had been revealed. (Dkt. 372 at 9). *See Stewart*, 317 F.Supp.2d at 442 ("[D]efendants have still failed to demonstrate how that information would have supported a for-cause challenge of [the juror]. It is difficult to see how information concerning [the juror's] son's conviction for an attempted robbery—a crime unrelated to the crimes charged in this case—could justify an inference that [the juror] would be biased against these defendants. If anything, a prospective juror with a family member who had been convicted of a crime would more likely be considered biased in *favor* of criminal defendants.").

Similarly, Nix contends that Juror No. 3 is biased because he "had bad experiences with law enforcement." (Dkt. 369 at 12). Not only is there no evidence of this in the record, but even if that was correct, any potential bias would be more likely directed at the Government, not Defendants. Again, to support this point, one need only review the focus of Defendants' and the Government's requested *voir dire.* (*See* Dkt. 170 at 5; Dkt. 173 at 2–3; Dkt. 178 at 2–5).

The primary thrust of Defendants' claimed inferred bias is the contention that Juror No. 3 must have been biased against Defendants because he would have necessarily identified with the cooperators in this case. However, just because Juror No. 3 was a defendant in the criminal justice system with co-defendants does not mean that he actively cooperated with law enforcement. There is no evidence that Juror No. 3 was offered some benefit in exchange for cooperation against any co-defendant or that he testified against co-defendants. At best, there is evidence that Juror No. 3 confessed to his crimes and implicated his co-defendants. There is just no evidence in the record to support the inference that, because of his criminal past, Juror No. 3 sympathized with the cooperating witnesses in this case, and thus was biased against Defendants.

More to the point, Juror No. 3's criminal history is from some 30 years ago. That criminal history is just too remote to support ***454** a finding of inferred bias. There is nothing in the record to suggest that Juror No. 3's criminal past reflected bias against Defendants, let alone that it even came into his thought processes when sitting on this jury. In fact, by all accounts, Juror No. 3 went to great lengths to avoid any thoughts about his criminal past.

Moreover, this Court genuinely believes that Juror No. 3 had no recollection of being the victim of a home burglary, but, even if he did recall that incident, the remoteness and lack of similarity to the crimes at issue in this case again negates any finding of inferred bias. In other words, the Court has necessarily taken into account not just its findings about Juror No. 3's failure to respond accurately during *voir dire* concerning his criminal history, but also the other claims made by Defendants as to Juror No. 3's alleged false answers, including the fact that Juror No. 3 was a victim of a home burglary about 20 years ago and his various family members' alleged criminal records. Even crediting Defendants' allegations about Juror No. 3's false answers, the Court cannot conclude that this supports an inference of bias against Defendants on the part of Juror No. 3. The incidents are just too remote and, on balance, do not support a finding of bias against Defendants.

In sum, the record does not provide a basis to infer bias. Even if the first prong of the *McDonough* test was satisfied, there is no evidence of extreme deceit (such as in *Parse*) that would support the showing required under *McDonough*'s second prong. Put simply, the Court does not believe that the "deliberateness of [Juror No. 3's] particular lies evidenced partiality," *Stewart*, 433 F.3d at 305 (citation omitted); and even if Juror No. 3 did intentionally attempt to deceive the Court, the deliberateness of his lies is not sufficiently intentional or premeditated so as to, in and of themselves, establish bias under the second prong. *Cf. Colombo*, 869 F.2d at 151 (if juror deliberately provided false information by not disclosing that brother-in-law was a lawyer for the government so that she could sit on the case, then both prongs of *McDonough* would be satisfied).

VI. CONCLUSION

For the reasons set forth above, the Court denies Defendants' motions pursuant to Fed. R. Crim. P. 33 (Dkt. 286; Dkt. 289) to the extent the motions are based upon Juror No. 3's alleged bias.

SO ORDERED.

All Citations

275 F.Supp.3d 420

Footnotes

1 To illustrate, even though this case has been pending since October 2014, approximately 30% of the docket entries have been generated in the few months following the verdict.

2 This District's Jury Plan as amended on October 31, 2016 ("the Jury Plan"), adopted pursuant to the Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861 *et seq.,* and approved by the Judges of the Western District of New York and the Reviewing Panel of the Judicial Council for the United States Court of Appeals for the Second Circuit, provides for a general rule that the names and personal information concerning jurors and prospective jurors should not be publicly disclosed. *See* United States District Court, Western District of New York, *Jury Plan*, at 9–10 (Oct. 2016), www.nywd.uscourts.gov/sites/default/files/2016% 20Jury% 20Plan% 20–% 20FINAL–WebVersion.pdf. Consistent with the Jury Plan, and based on the nature of the allegations directed at Juror No. 3, this Court determined that publicly revealing Juror No. 3's name would not be in the interests of justice (Dkt. 332), and, accordingly, the juror in question will be referred to herein as "Juror No. 3" or "J.B."

3 Defendants' post-verdict motions also raise a number of other issues in an effort to obtain an acquittal or new trial pursuant to Fed. R. Crim. P. 29(c) or 33. (*See* Dkt. 286; Dkt. 289). The Court will address those issues in a separate Decision and Order.

4 The questionnaire asked each prospective juror: "Have you ever been convicted, either by your guilty or nolo contendere plea or by a court or jury trial, of a state or federal crime for which punishment could have been more than one year in prison?" (*See* Court Ex. 15 at 7). If that question was answered in the affirmative, the individual was prompted to answer additional questions.

5 The transcript filed at Docket 328, as well as other transcripts referenced in this Decision and Order, were filed under seal in order to protect the identity and personal information of jurors and prospective jurors, including Juror No. 3, from public disclosure consistent with the Court's Jury Plan. *See* note 2, *supra.* The portions that are quoted in this Decision and Order have been redacted, where necessary, to avoid public disclosure of the identity of jurors and prospective jurors.

6 To be clear, the questions asked by the Court that are relevant to these post-verdict motions are the ones set forth above. In various parts of their submissions, as well as during the evidentiary hearing, Defendants argue that Juror No. 3 failed to provide accurate answers to certain questions that, in fact, were never asked by the Court during *voir dire.* (*See, e.g.*, Dkt. 363 at 11 ("Have you ever been convicted of a felony? If so, have your civil rights been restored?" and "Have you ever been the victim of a home robbery or burglary?"); Dkt. 340 at 2 (criticizing Juror No. 3 for falsely responding to the questions "[H]ave you ever been convicted of a felony?" and "[H]ave you ever been to a correctional facility ... ?"); Dkt. 359 at 156 (defense counsel stating, at the evidentiary hearing, "I know the jurors were asked about prostitution"), 160–61 (the Court clarifying that the only reference to prostitution occurred during a sidebar, and the panel of prospective jurors was not asked about prostitution)).

7 Both Defendants are African American males.

8 The only time that T.P. spoke before providing biographical information was when another prospective juror, A.B., an African American female who was ultimately seated on the jury as Juror No. 6, indicated in response to the Court's questions that she knew T.P. as the son of her former pastor. T.P. denied knowing Juror No. 6. (*See id.* at 218–19).

9 Again, the Court will address the issue involving T.P., along with the other issues Defendants raise in their motions filed pursuant to Fed. R. Crim. P. 29(c) and 33, in a separate Decision and Order.

10 Juror No. 3 was mistakenly referenced as Juror No. 4 in some of the earlier post-verdict filings and transcripts, including by the Court. At the appearance on May 15, 2017, it was clarified that the juror in question is Juror No. 3. (*See* Dkt. 327 at 23; *see also* Dkt. 344 at 2 n.1).

11 The legal support for the Court having broad discretion to control the means and manner of any inquiry of Juror No. 3 in these post-verdict proceedings is discussed in detail in the Decision and Order filed on June 9, 2017, and will not be repeated here. (*See* Dkt. 344 at 16–22).

12 References to the page numbers for the transcripts filed at Dockets 358 and 359 are to the actual page numbers of the transcript, not to the electronically-designated pages from CM/ECF.

13 When questioned by Nix's counsel during the second day of the hearing, Juror No. 3 was asked whether he cooperated with law enforcement when he confessed to crimes and named his co-defendants, to which Juror No. 3 responded "I guess so." (Dkt. 359 at 222). The Court did not find this line of questioning particularly illuminating given counsel's tone and the leading nature of the questions. Indeed, at the conclusion of the first day of the hearing, the Court indicated to counsel that it would allow them to ask questions and not prohibit them from asking leading questions. However, the Court also gave fair warning that due to perceived comprehension issues on the part of Juror No. 3, eliciting admissions from Juror No. 3 with leading questions was not going to be particularly helpful in aiding the Court's credibility assessment. (Dkt. 358 at 138). Thus, although the Court overruled various objections by the Government during this line of questioning by Nix's counsel because the Court believed that counsel generally should have been permitted to pursue their questioning in the manner that they deemed appropriate, the Court did not find that means of questioning —leading questions in a confrontational tone—helpful in reaching a credibility assessment of Juror No. 3. Moreover, and in any event, there is no evidence that Juror No. 3 received a benefit in exchange for his confession or naming of co-defendants, nor is there any evidence that he testified at a trial against any co-defendant, like the cooperating witnesses in this case.

14 Counsel for Nix makes reference in his post-hearing submission to Juror No. 3's prior jury service occurring on July 6, 2015 (Dkt. 369 at 14), although nothing in the record supports that information. It appears as though counsel for Nix may have spoken to "counsel for OCA" about Juror No. 3's state court jury service (*id.*), although, again, nothing in the record supports this conclusion other than this passing reference in Nix's post-hearing memorandum.

15 As discussed further below, the "*McDonough* test" is a two-prong test to evaluate a motion for a new trial based on incorrect responses by a juror during *voir dire*, based on the Supreme Court's decision in *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984).

16 Nix's post-hearing submission refers to various exhibits, such as Exhibits 5 and 6 allegedly pertaining to Juror No. 3's siblings' criminal history—but there are no exhibits attached to the post-hearing submission. (*See* Dkt.

369). Nix may be referencing the documents filed at Docket 366, which was mistakenly filed as a "motion" but consisted of only exhibits and, thus, was terminated as a motion by the Court. (*See* Dkt. 367).

17 McCoy argues that because a convicted felon such as Juror No. 3 is *per se* disqualified pursuant to 28 U.S.C. § 1865(b)(5), the verdict must be set aside without any inquiry into Juror No. 3's reasons for not disclosing his criminal record and without any finding of bias. (Dkt. 363 at 8–10). This argument has been rejected by every circuit court to have considered the issue. *See* *Hanna v. Ishee*, 694 F.3d 596, 616 (6th Cir. 2012) ("[I]t is inappropriate to invalidate, as a matter of law, any conviction simply because it was reached by a jury that mistakenly included a convicted felon."); *United States v. Bishop*, 264 F.3d 535, 554 (5th Cir. 2001) ("[O]nce the trial is complete, a felon's serving as a juror is not an automatic basis for a new trial."); *Coughlin v. Tailhook Ass'n*, 112 F.3d 1052, 1059 (9th Cir. 1997) (holding that the participation of a felon-juror who is

statutorily disqualified from serving "is not an automatic basis for a new trial" and the defendant must still show that the juror's participation resulted in "actual bias" to one of the parties); *United States v. Humphreys*, 982 F.2d 254, 261 (8th Cir. 1992) (holding that the participation of felon juror, who mistakenly believed that civil rights had been restored, did not justify new trial, and finding that "[i]n an effort to obtain a new trial, it is incumbent upon the defendant to clearly demonstrate that the juror's lack of qualifications presented actual bias or prejudice, affecting the juror's impartiality and impacting the fairness of the trial. A challenge after the verdict without such a showing comes too late."); *United States v. Boney*, 977 F.2d 624, 633 (D.C. Cir. 1992) (holding that felon status alone does not imply bias); *United States v. Uribe*, 890 F.2d 554, 562 (1st Cir. 1989) (holding that the fact that a felon juror technically should have been disqualified under statute does not automatically require a new trial).

McCoy contends that he is relying on the dissenting opinion in *Boney* (Dkt. 363 at 9), but a *per se* rule was rejected by the *Boney* dissent. *See* *Boney*, 977 F.2d at 639 (Randolph, J., dissenting) ("I would therefore reject the defendants' argument that the Sixth Amendment itself bars felons from serving on juries and requires reversal *per se* where one slips through."). McCoy also contends that he is relying on the Eleventh Circuit's decision in *Jackson v. Alabama State Tenure Commission*, 405 F.3d 1276 (11th Cir. 2005), (Dkt. 363 at 9), but *Jackson* did not adopt a *per se* rule as advocated by McCoy. Rather, *Jackson* determined that the first prong of the *McDonough* test must be satisfied—in other words, there must be a finding that the juror intentionally failed to disclose the prior felony conviction. 405 F.3d at 1288–89 (finding no reasonable possibility that juror could have forgotten three years spent in prison for murder). Moreover, to the extent *Jackson* dispensed with the second prong of the *McDonough* test, this Court finds that reasoning unpersuasive, especially in view of the other circuit courts that have rejected the *per se* rule, *and* because satisfaction of the second prong of the *McDonough* test was apparently undisputed in *Jackson*. *See* *id.* at 1288 ("It is undisputed that a question about prior felony convictions is material to jury service and that an honest answer from this juror would have provided a basis to challenge her for cause.").

18 Defendants have relied heavily on the case of *United States v. Eubanks*, 591 F.2d 513 (9th Cir. 1979). (*See* Dkt. 363 at 15–16). Not only is *Eubanks* from outside the Second Circuit, but it was decided prior to *McDonough* and does not employ the two-part test. While the Court has reviewed *Eubanks*, as well as

other cases outside the Circuit dealing with this issue, the Court has relied, as it must, on the decisions from the Second Circuit Court of Appeals addressing the issue post–McDonough.

19 Of course, a way to avoid this would have been for the Court to examine Juror No. 3 in chambers outside the presence of the public and without the parties being present. The Second Circuit appears to have approved this process in *United States v. Shakur*, 888 F.2d 234 (2d Cir. 1989), *aff'g* 723 F.Supp. 925 (S.D.N.Y. 1988). Here, the Court ultimately adopted a process that attempted to balance the various competing interests at play, including Defendants' very real and legitimate interests in being present during any questioning of Juror No. 3 and the public's critically important right to access court proceedings. However, a downside to the process employed in this case is that, in the Court's view, it ultimately impacted Juror No. 3's testimony because of his nervousness and discomfort.

20 The Court's impression of Juror No. 3 in this regard is supported by numerous exchanges that occurred throughout the two-day hearing, including, for example, the exchange concerning Juror No. 3's name and the naming of Juror No. 3's son that occurred during a sidebar discussion during the second day of the hearing. (*See* Dkt. 359 at 202–05)

21 Defendant Nix contends that Juror No. 3 intentionally misstated his marital status as "single" during *voir dire*, when in fact he is still legally married. (Dkt. 369 at 15). The Court disagrees. At the evidentiary hearing, Juror No. 3 also testified that he was "single," but then when asked follow-up questions, he revealed that he is separated but not legally divorced. (Dkt. 358 at 72, 94–95). It was also revealed at the evidentiary hearing that although Juror No. 3 saw his wife at his daughter's graduation in the prior month, before that time, he had not seen her for about three or four years. (Dkt. 359 at 213). At the *voir dire*, follow-up questions about the marital status of Juror No. 3 were not asked.

Defendant Nix also contends that Juror No. 3 failed to reveal that his brother "Derrick" was murdered in a stabbing and the accused was acquitted at trial (Dkt. 369 at 15), but no questions during *voir dire* would have elicited this information, and furthermore, Juror No. 3 was not asked questions about this at the evidentiary hearing. (*See* Dkt. 359 at 157–58).

22 Although there was evidence of two domestic violence incidents after Juror No. 3 reached the age of 21 (*see* Court Ex. 16 (incident from 1999) and Court Ex. 18 (incident from 1993)), Juror No. 3 could not recall one of the incidents, and he denied being arrested in connection with the incident that he did recall. (Dkt. 359 at 176–177). The documents reflecting these incidents do not plainly indicate that an arrest was made (*see* Court Ex. 18 (indicating that a "warrant" is "advised"), nor is there any information in the record about the disposition with respect to these incidents (*see* Gov't Ex. 900 (criminal history printout run on the NYSID database for Juror No. 3, which does not contain any reference to arrests for these domestic violence incidents)). Thus, based on the record before the Court, it does not appear that Juror No. 3 would have needed to disclose this information in response to either the questionnaire or the *voir dire* questions.

24 For example, at the end of the second day of the hearing, when being questioned by Nix's counsel, the following exchange occurred:

> Q How many times have you been to jail?
>
> A I don't know. I don't think about how many time I been to jail. I don't know. I don't look at my record. I don't think about it so I don't know.
>
> Q Does seven sound right?
>
> A I don't know.... I don't know. You tell me. I don't know.

Q So you would need someone to tell you how many times you've been to jail?

A Like I said, I don't think about it. It's not something I get up in the morning and think about. I don't think about that stuff.

...

Q Do you think you've been to jail more than five times?

A Probably.

(Dkt. 359 at 217–18). Although the Court allowed this line of questioning and overruled the Government's objections, it was apparent to the Court that Juror No. 3 was extremely frustrated at this point, and the exchange quoted above is not helpful to the Court in assessing Juror No. 3's credibility or discovering the truth about his times in jail. In other words, although Juror No. 3 likely was incarcerated for more than just the six months in shock camp, and although the documentary evidence in the form of the certified certificate of conviction marked as Court Exhibit 21 at least suggests that he also spent six months in the Monroe County Jail, the reality is that the record is unclear as to the exact amount of incarceration served by Juror No. 3.

26 Of course, if Juror No. 3's criminal history was revealed during *voir dire,* he would have been statutorily disqualified pursuant to the JSSA, as opposed to any common-law based cause challenge. However, as discussed above, given the procedural posture of this case, it is too late to launch a challenge pursuant to the JSSA.

27 It should be noted that *Torres* is factually distinguishable from the instant case, in that it dealt with a trial court's exercise of discretion during *voir dire* to excuse a prospective juror who had engaged in criminal conduct similar to the crimes on trial—as opposed to a challenge to a juror post-verdict. In any event, *Torres* simply stands for the proposition that the trial judge "acted within her discretion in finding that the 'inquiries made of [Juror No. 7] revealed a sufficient factual basis' to allow the court to draw the inference—especially given the hypertechnical nature of the offense of structuring—that that the juror would be unable to divorce her consideration of this case from her own structuring experience." 128 F.3d at 48.

29 The Court's recitation of this part of the trial is based upon its notes, since a transcript has not yet been prepared for this part of the trial.

30 There is some evidence in the record that Juror No. 3 may have been arrested for burglarizing a home in May of 1989 (when he was 19 years old). However, Juror No. 3 had no recollection of this alleged incident, and there is no evidence that he was convicted of this crime. (*See* Dkt. 358 at 84).

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UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 8th day of May, two thousand twenty-six.

United States of America,

Appellee,

v.

Jecovious Barnes, AKA Bubba, AKA Bubbs, AKA Bub, Clarence Lambert

Defendants,

Earl McCoy, AKA P, Matthew Nix, AKA Meech, AKA Mack, AKA Mackey,

Defendants Appellants.

ORDER

Docket No: 23-7841(L)
23-7910 (Con)

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

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

Catherine O'Hagan Wolfe