UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 21-2849 Caption [use short title] PANNELL v. USA

Motion for: Certificate of Appealability

Set forth below precise, complete statement of relief sought:

Petitioner-Appellant Derrek Pannell seeks a certificate of appealability in order to appeal the district court's denial of his second-or-successive petitions for relief under 28 U.S.C. § 2255. Pannell asserts that his conviction for violating § 924(c) is invalid because postal robbery is no longer a crime of violence as defined in that statute.

MOVING PARTY: Derrek Pannell **OPPOSING PARTY:** USA

- ☐ Plaintiff ☐ Defendant
- ☑ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Kyle Singhal **OPPOSING ATTORNEY:** John J. Durham

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Court- Judge/ Agency appealed from: SDNY/Gershon

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☐ Opposed ☑ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUCTIONS PENDING APPEAL:

Has this request for relief been made below? ☐ Yes ☐ No
Has this relief been previously sought in this court? ☐ Yes ☐ No
Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:

/s/ Kyle Singhal **Date:** 12/14/2021 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

No. 21-2849

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DERREK PANNELL,	)	
Petitioner-Appellant,	)	**On Appeal from the**
	)	**United States District Court**
v.	)	**Eastern District of New York**
	)	
UNITED STATES OF AMERICA,	)	**Hon. Nina Gershon**
Respondent-Appellee.	)	

PETITIONER-APPELLANT DERREK PANNELL'S MOTION FOR CERTIFICATE OF APPEALABILITY

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PRIOR RELATED APPEALS

This case comes to this Court following this Court's remand in Appeal No. 20-3034 (granting Pannell's motion for leave to file a successive § 2255 petition and transferring the case to the district court).

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 2255. This court has jurisdiction to issue a certificate of appealability ("COA") under 28 U.S.C. § 2253(c). This Court has jurisdiction to review the district court's denial of Pannell's § 2255 motion under 28 U.S.C. § 2253(a). This motion is timely filed within 28 days of the docketing of Pannell's Notice of Appeal, which was docketed on November 16, 2021.

ISSUE PRESENTED FOR REVIEW

Pannell seeks this Court's leave to appeal the following issue: Whether postal robbery under 18 U.S.C. § 2114(a) is a "crime of violence" as defined in 18 U.S.C. § 924(c)(3)(A) when the defendant's role as a co-conspirator was sufficient to form the basis for the postal-robbery conviction?

PROCEDURAL HISTORY

Following a jury trial in September 2007, Pannell was convicted of (1) conspiracy to rob a post office, in violation of 18 U.S.C. § 371 ("Count One"); (2) robbery of a post office, in violation of 18 U.S.C. § 2114(a) ("Count Two"); and

(3) brandishing a firearm in furtherance of that robbery, in violation of 18 U.S.C. § 924(c)(1)(A)(ii) ("Count Three").

Pannell was sentenced to five years imprisonment on Count One, eighteen years on Count Two (to run concurrently with the five-year sentence), and a mandatory consecutive seven years on Count Three, for a total of twenty-five years imprisonment. This Court affirmed the conviction and sentence. *United States v. Pannell*, 321 F. App'x 51 (2d Cir. 2009), *cert. denied*, 558 U.S. 1019. Pannell later filed a petition to vacate his sentence under 28 U.S.C. § 2255, alleging ineffective assistance of counsel. The district court denied that petition, and this Court denied a COA. *Pannell v. United States*, No. 14-4223 (2d Cir. April 15, 2015).

In June 2016, Pannell filed a second petition for relief under 28 U.S.C. § 2255, this time seeking relief in light of *Johnson v. United States*, 576 U.S. 591 (2015). Pannell argued that his § 924(c) conviction for brandishing a firearm was no longer valid because neither Count One nor Count Two could serve as a predicate "crime of violence" under § 924(c)(3). The district court stayed the petition pending this Court's resolution of *United States v. Barrett*, 903 F.3d 166 (2d Cir. 2018), which was then overruled by the Supreme Court's subsequent decision in *United States v. Davis*, 139 S. Ct. 2319 (2019). This Court subsequently adopted *Davis* in *United States v. Barrett*, 937 F.3d 126 (2d Cir. 2019) (recognizing that conspiracy to commit Hobbs Act robbery is not a crime of violence under § 924(c)(3)), after which the

district court resumed consideration of Pannell's second petition.

In 2020, both Pannell's counsel and Pannell himself, acting *pro se*, submitted supplemental briefing to the district court. *See* Dist. Ct. Docket Entry ("D.E.") 228, 232, 233. Pannell, observing that his counsel had not fully developed his *Davis*-based amendment to his *Johnson* claim, then attempted to file his own additional § 2255 petition in this Court, *pro se*, which this Court received on June 29, 2020, and then transferred to the district court. D.E. 234. Pannell then filed a supplemental letter brief in the district court in support of the transferred *pro se* petition. D.E. 235.

On September 4, 2020, the district court consolidated both the counsel-filed petition and the transferred *pro se* petition, determined that it lacked jurisdiction to adjudicate them, and transferred them both to this Court for a decision authorizing Pannell's second or successive § 2255 petitions. D.E. 236. On April 12, 2021, Pannell filed a motion in this Court for leave to file his second or successive § 2255 petition. *See* 2d Cir. No. 20-3034, doc. 34. On May 3, 2021, this Court granted Pannell leave to file his second or successive § 2255 petition. *See* 2d Cir. No. 20-3034, doc. 43 (5/3/2021 order); *also reproduced in* Dist. Ct. D.E. 237. This Court then transferred both petitions back to the district court to—

> determine in the first instance, according to the modified categorical approach, *see Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016), whether substantive § 2114 postal robbery is a "crime of violence," 18 U.S.C. § 924(c)(3)(A); that is, whether the least culpable conduct punishable under § 2114 (or, if it is divisible, its relevant component)

> involves "the use, attempted use, or threatened use of physical force," *id.*; *see, e.g.*, *Board v. United States*, 2d Cir. 16-2031, doc. 48 (3/15/2021 order).

2d Cir. No. 20-3034, doc. 43 (5/3/2021 order).

On remand, the district court considered both Pannell's counsel-filed petition and his *pro se* petition and denied relief. *See* Dist. Ct. Opinion, D.E. 239, at 11. A copy of the district court's opinion is appended hereto as Attachment A. The district court simultaneously denied a COA. *See id.* at 11. This motion for a COA follows.

RELEVANT FACTS

In September 2007, Pannell proceeded to trial on all three counts. At trial, the jury heard testimony from Pannell's co-conspirator Darren Rucker (who cooperated with the government and testified against Pannell). Rucker testified that, during the robbery, it was Rucker—not Pannell—who brandished a firearm against a victim during the robbery. *See, e.g.*, D.E. 208, Trial Tr. 9/18/2007, at 146:2-5 (Rucker Direct Examination) ("Q: What did you do? A: I took the manager to the safe. Q: Put a gun to his head? A: Yes, sir.").

On September 24, 2007, the district court charged the jury. *See* D.E. 138; *see also* Jury Charge, appended hereto as Attachment B. The court first instructed the jury on Count Two, explaining the elements of substantive postal robbery. *See* Jury Charge, Attachment B, at 17-22. The court then instructed the jury on Count One, the conspiracy charge. *See id.* at 23-31. The instruction on conspiracy made clear

that the only elements required in order for the jury to convict Pannell of that count were (1) two or more persons' unlawful agreement to commit the robbery, (2) Pannell's knowing and intentional agreement to become a member of the conspiracy, and (3) an "overt act" knowingly committed by *one* of the members in furtherance of the robbery. *See id.* at 24, 29. The only overt acts charged in the indictment were that Pannell met with his co-conspirators at a house in Queens to plan the robbery and that Pannell and his co-conspirators conducted surveillance of the post office that was robbed. *See id.* at 29. Next, the court instructed the jury on Count Three, the § 924(c) charge. *See id.* at 32-36. The court explained that, under the law in effect at the time, in order to find Pannell guilty of Count Three, the jury must first have found him guilty of either Count One or Count two as a predicate offense. *See id.* at 32.

Then, crucially, the court instructed the jury on co-conspirator liability. *See id.* at 36-37. The court explained that the jury could convict Pannell of *substantive* postal robbery (Count Two), based on his role as a co-conspirator (Count One), even if Pannell "did not . . . participate in the acts constituting the" robbery:

> For Counts Two and Three, if you do not find that the government has satisfied its burden of proving that the defendant is guilty as an aider and abettor or as a principal, there is another method by which you may evaluate the defendant's possible guilt on these counts.

> If you find, beyond a reasonable doubt, that the defendant was a member of the robbery conspiracy charged in Count One of the indictment, then you may also, but you are not required to, find him guilty of the substantive crimes charged in Count Two and Three, provided you find, beyond a reasonable doubt, each of the following elements:
>
> > First, that the substantive crime charged in the count you are considering was committed by someone else;
> >
> > Second, that the person or persons who committed that substantive crime were members of the conspiracy charged in Count One;
> >
> > Third, that the substantive crime charged in the count you are considering was committed pursuant to a common plan and understanding you found to exist among the conspirators and in furtherance of that conspiracy;
> >
> > Fourth, that the defendant was a member of that conspiracy at the time the substantive crime was committed; and
> >
> > Fifth, that the defendant could reasonably have foreseen that the substantive crime charged either in Count Two or Three might be committed by his co-conspirators.
>
> If the government has proven all five of these elements beyond a reasonable doubt, then you may find the defendant guilty of the substantive crimes charged against him in Counts Two and Three, even if he did not have actual knowledge of or participate in the acts constituting the crimes.

See id.

The next day, the jury returned its verdict, finding Pannell guilty of all three counts. *See* D.E. 140, Verdict Sheet. The jury indicated on the verdict sheet that

Pannell's conviction for substantive robbery (Count Two) was the predicate offense for his § 924(c) conviction (Count Three). *Id.* But the verdict sheet did not require the jury to indicate whether its finding of guilt on Count Two was based on Pannell's liability as a principal or, instead, based on his co-conspirator liability.

ARGUMENT

THIS COURT SHOULD ISSUE A CERTIFICATE OF APPEALABILITY BECAUSE PANNELL HAS MADE A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT.

"To obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under *Barefoot*, includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893, 893 n.4 (1983)).

Here, as discussed below, Pannell substantially shows that the district court denied his constitutional right to have his conviction for Count Three (brandishing a firearm under § 924(c)) vacated under *Johnson v. United States*, 576 U.S. 591 (2015), and *United States v. Davis*, 139 S. Ct. 2319 (2019). This denial affected Pannell's substantial rights because Pannell's conviction for Count Three resulted in an additional mandatory seven-year penalty that runs consecutively with the

eighteen-year sentence that Pannell would otherwise be serving. That seven-year penalty is constitutionally infirm. This Court should thus grant the COA to permit Pannell to seek reversal of the district court's order denying habeas relief.

A. A conviction for postal robbery under 18 U.S.C. § 2114(a) is not a crime of violence under § 924(c)(3)'s elements clause when the defendant's liability as a co-conspirator, rather than a principal, is sufficient to sustain the conviction.

A conviction for brandishing a firearm in furtherance of a crime of violence under § 924(c) is valid only if the predicate offense meets the definition of a "crime of violence" in § 924(c)(3). That definition includes an "elements clause" and a "residual clause." Under the elements clause, a felony is a crime of violence if it "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). Under the residual clause, a felony is a crime of violence if it, "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." *Id.* § 924(c)(3)(B). The Supreme Court invalidated the residual clause as unconstitutionally vague in *Davis*, 139 S. Ct. at 2336, piggybacking off of its previous decision invalidating the similarly worded residual clause of the Armed Career Criminal Act in *Johnson*. That means an offense can be a crime of violence for § 924(c)'s purposes only if it qualifies under the elements clause.

1. Categorical and Modified Categorical Approaches

In determining whether an offense qualifies as a crime of violence, a court must use the categorical approach. "[T]he categorical approach requires [the court] to consider the ***minimum conduct*** necessary for a conviction of the predicate offense . . . and then to consider whether such conduct amounts to a crime of violence under § 924(c)(3)(A)." *United States v. Hill*, 890 F.3d 51, 56 (2d Cir. 2018) (emphasis added); *see also United States v. Heyward*, 3 F.4th 75, 81 (2d Cir. 2021) ("'[T]he minimum criminal conduct necessary for [a qualifying] conviction under' § 924(c) must include actual, attempted, or threatened physical force against a person or his property." (quoting *Hill*, 890 F.3d at 55-56)).

If the statute of conviction is "'divisible'—*i.e.*, it defines multiple separate crimes—we apply the 'modified categorical' approach and look at 'a limited class of documents' from the record of conviction to 'determine what crime, with what elements, a defendant was convicted of.'" *Gray v. United States*, 980 F.3d 264, 266 (2d Cir. 2020) (quoting *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016)). This limited class of so-called *Shepard* documents includes, "for example, the indictment, jury instructions, or plea agreement and colloquy." *Mathis*, 136 S. Ct. at 2249 (citing *Shepard v. United States*, 544 U.S. 13, 26 (2005)).

Once the court determines the elements of the predicate crime of conviction, the court is then free to look beyond the *Shepard* documents—even to its own

hypotheticals—to determine whether it is a crime of violence, that is, to determine whether even the least culpable conduct that suffices for a conviction requires actual, attempted, or threatened use of physical force. Of course, "the Supreme Court has made clear in employing the categorical approach that to show a predicate conviction is not a crime of violence 'requires more than the application of legal imagination to [the] . . . statute's language.'" *Hill*, 890 F.3d at 56 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). But the only limitation on this determination is that "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." *Id.* (emphasis added). "To show that a particular reading of the statute is realistic, a defendant 'must at least point to his own case or other cases in which the . . . courts in fact did apply the statute in the . . . manner for which he argues.'" *Id.*

2. The Supreme Court's Ruling in Davis *and Its Consequences*

The Supreme Court's ruling in *Davis* affirmed the Fifth Circuit's determination that conspiracy to commit Hobbs Act robbery is not, categorically, a crime of violence for purposes of § 924(c). 139 S. Ct. at 2336; *see also United States v. Martinez*, 991 F.3d 347, 354 (2d Cir. 2021) ("We can assume that the conspiracy violation is not a crime of violence under the [elements] clause because, as the Supreme Court's decision in *Davis* reasoned, a conspiracy offense cannot

categorically involve the use of force, since its key element is simply an agreement to commit a crime. . . . In other words, because no violent act (and under some conspiracy statutes no overt act at all) must be committed in order to be guilty of the offense, conspiracy offenses are not categorically violent crimes."). This Court has reversed other § 924(c) convictions where the least culpable conduct sufficient to sustain the defendant's predicate conviction did not meet the elements-clause definition of a crime of violence. *See, e.g.*, *United States v. Biba*, F. App'x 70, 72 (2d Cir. 2019) (reversing § 924(c) conviction where *Shepard* documents, including defendant's plea allocution for the predicate attempted-robbery conviction, revealed that the defendant allocuted only to participating in a "robbery conspiracy" as a getaway driver and not "that he took any step towards the commission of the robbery"). Even a conspiracy to commit "violent robbery culminating in murder" cannot support a § 924(c) conviction under the elements clause. *Heyward*, 3 F.4th at 81.

This Court has not yet determined whether Pannell's predicate offense of conviction, postal robbery under 18 U.S.C. § 2114(a), is a crime of violence. That is why this Court, in remanding Pannell's petitions in 2d Cir. No. 20-3034, directed the district court to make that determination. Notably, consistent with the caselaw set forth above, this Court asked the district court to determine whether "the ***least culpable conduct*** punishable under § 2114" involved actual, attempted, or

threatened use of physical force. 2d Cir. No. 20-3034, doc. 43 (5/3/2021 order), at 2 (emphasis added). This Court has issued similar remand orders in at least two other cases: *Board v. United States*, 2d Cir. No. 16-2031, doc. 48 (3/15/2021 order), and *Campbell v. United States*, 2d Cir. No. 16-2017, doc. 43 (4/26/2021 order); both of those cases are still pending in the district court and have not yet returned to this Court. Pannell's case thus presents a matter of first impression for this Court.

3. Postal Robbery Is Not a Crime of Violence

Here, the least culpable conduct punishable by Pannell's substantive postal-robbery offense is *not* a crime of violence under the elements clause.

Pannell does not dispute that postal robbery is a divisible offense: the statute plainly sets out at least two distinct crimes, a "base" assault-or-robbery offense carrying a maximum of ten years imprisonment, and an "aggravated" offense, carrying a maximum of twenty-five years imprisonment "if in effecting or attempting to effect [a postal] robbery [the defendant] wounds the [victim], or puts his life in jeopardy by the use of a dangerous weapon." 18 U.S.C. § 2114(a). Applying the modified categorical approach, it is clear from the indictment, the jury charge, and the verdict sheet that Pannell was charged and convicted of the aggravated offense.

The question then is: What is the least culpable conduct punishable by that aggravated postal-robbery offense? Because co-conspirator liability alone is a

sufficient basis for conviction, the least culpable conduct punishable under the postal-robbery statute is the minimum conduct necessary to sustain a conviction for postal robbery based on co-conspirator liability. As made clear by the jury charge in this case, that conduct requires satisfying elements of conspiracy plus the elements of co-conspirator liability. The elements of conspiracy are (1) two or more persons' unlawful agreement to commit the robbery, (2) the defendant's knowing and intentional agreement to become a member of the conspiracy, and (3) an "overt act" knowingly committed by *one* of the members in furtherance of the robbery. *See* Jury Charge, Attachment B, at 24. And the elements of co-conspirator liability are that (1) someone committed the substantive robbery, (2) that person was a member of the conspiracy, (3) the substantive robbery was committed pursuant to a common plan that existed among the conspirators and in furtherance of the conspiracy, (4) the defendant was a member of the conspiracy when the substantive crime was committed, and (5) the defendant could reasonably have foreseen that a co-conspirator might commit the robbery. *See* Jury Charge, Attachment B, at 29.

As is plain from Pannell's jury charge, it is possible for a defendant to be convicted of substantive postal robbery even if the defendant never committed any overt act himself, let alone used (or attempted or threatened to use) physical force against another. Even the overt act need not involve any force: here, the only overt acts charged against Pannell were that he met with his co-conspirators at a house in

Queens to plan the robbery and that he and his co-conspirators conducted surveillance of the post office that was robbed. *See id.* at 29. Thus, the least culpable conduct, in a nutshell, is intentionally *agreeing* to carry out a robbery and remaining a part of the conspiracy long enough for another conspirator to carry it out. None of that comes even close to requiring the defendant to use, attempt to use, or threaten to use force against anyone.

Nor is it "legal imagination," *Hill*, 890 F.3d at 56, to determine that the least culpable conduct punishable as postal robbery is not a crime of violence: the district court's instructions here permitted the jury to convict Pannell of postal robbery based *solely* on Pannell's role as a co-conspirator, even if Pannell "did not . . . participate in the acts constituting the" robbery. Jury Charge, Attachment B, at 37. And the jury heard testimony that it was Pannell's co-conspirator Darren Rucker—and not Pannell—who put a victim's life in jeopardy during the robbery by pointing a gun to a post office manager's head. *See* D.E. 208, Trial Tr. 9/18/2007, at 146:2-5 (Rucker Direct Examination). The verdict sheet does not indicate whether the jury convicted Pannell of postal robbery based on his own fulfillment of the elements in § 2114(a) or based on his co-conspirator liability. *See* D.E. 140, Verdict Sheet. But the records from Pannell's case make clear that the jury *plausibly could have* convicted Pannell for postal robbery based solely on his co-conspirator liability.

Under the categorical approach and the logic of *Davis*, Pannell's § 924(c) conviction cannot stand. *Davis* holds that a conviction for conspiring to commit robbery is not a crime of violence, which is logically indistinguishable from a conviction for substantive robbery *based on* the same type of co-conspirator liability. The minimum criminal conduct for each offense does not involve any use, attempted use, or threatened use of force. Because postal robbery here permits conviction based solely on co-conspirator liability, it cannot stand as a crime of violence. At the very least, jurists of reason would debate whether it can. And for that reason, this Court should grant the COA.

B. The opinion below is incorrect.

The district court spent just one paragraph disposing of Pannell's claim, and in doing so it incorrectly claimed that this Court had "recently rejected Mr. Pannell's exact argument." *See* Dist. Ct. Opinion, D.E. 239, at 10-11. In support of that claim, the district court cited *United States v. Blanco*, 811 F. App'x 696, 701 n.2 (2d Cir. 2020) (summary order) (affirming defendant Blanco's convictions for conspiracy to commit bank robbery, substantive bank robbery, and using a firearm in furtherance of a crime of violence). But *Blanco* did not decide the issue presented here: rather, Blanco argued on appeal, *inter alia*, that (1) the district court had erred in charging the jury only with the language of § 924(c)'s residual clause and not with the language of the elements clause at all and (2) her § 924(c) conviction was invalid

because the residual clause was invalid. *See* Appellant's Brief in *United States v. Blanco*, 2d Cir. No. 19-1680, Docket Entry 21, at 43-45 (jury charge issue) and 22-24 (residual clause issue).

It was not until oral argument, as this Court observed in a footnote, that Blanco even adverted to an argument that her substantive robbery conviction may have been based on co-conspirator liability and thus should not count as a § 924(c) predicate under the *elements* clause. *See Blanco*, 811 F. App'x at 701 n.2. The Court took her argument to be that a substantive conviction based on co-conspirator liability was somehow transformed into a conspiracy count. *See id.* That is not the question presented here, and that is not the argument that Pannell advances. The relevant question is not whether a substantive robbery count has been transformed into a conspiracy count, but rather whether the minimum criminal conduct to commit the substantive count satisfies the elements clause when the substantive count could have been based on co-conspirator liability.[1] At no point did this Court's summary

[1] Pannell acknowledges that a conviction for substantive postal robbery may validly be based on co-conspirator liability and that co-conspirator liability produces substantive liability punishable to the same extent as a principal; Pannell does not dispute the validity of the robbery conviction itself. But that in no way impacts the determination of whether the robbery conviction counts as a crime of violence under the categorical approach, which looks simply to the ***minimum criminal conduct*** punishable as the predicate offense. Because the conviction could have been based on co-conspirator liability, co-conspirator liability establishes the minimum criminal conduct for the substantive conviction.

order address what the least culpable conduct is under a robbery statute that permits conviction by way of co-conspirator liability, let alone whether that conduct requires actual, attempted, or threatened use of force. It is thus incorrect—and at the very least debatable among "reasonable jurists," *Slack*, 529 U.S. at 483-84—to state that this Court has already rejected Pannell's "exact argument."

Moreover, the district court did not supplement its reliance upon *Blanco* with any of its own analysis on Pannell's real issue, which—as this Court directed in its order reinstating Pannell's petitions—is "whether the least culpable conduct punishable under § 2114 (or, if it is divisible, its relevant component) involves the use, attempted use, or threatened use of physical force." 2d Cir. No. 20-3034, doc. 43 (5/3/2021 order), at 2. The district court never engaged in an analysis of the least culpable conduct, and the district court never made a determination that such conduct requires actual, attempted, or threatened use of force. In short, the district court summarily relied only on an inapposite summary order. It is at least debatable among reasonable jurists that the district court's analysis was incorrect.

C. Jurists of reason would either agree or find it debatable that the opinion below is incorrect.

Reasonable jurists have already voiced agreement with Pannell's position that a substantive crime cannot be a crime of violence where co-conspirator liability (i.e., *Pinkerton* liability) is sufficient to convict. *See United States v. Rodriguez*, No. 94-

Cr-313, 2020 U.S. Dist. LEXIS 66715, at *46-49 (S.D.N.Y. Apr. 15, 2020). In *Rodriguez*, the district court held that the defendants' substantive RICO convictions for murder could not categorically be crimes of violence because "it is entirely plausible to think that the jury might have convicted [the defendants] on the substantive counts in response to, and reliance upon, the trial judge's *Pinkerton* instruction." *Rodriguez* at *48. The court continued: "*Davis* eliminates conspiracy as a valid predicate for a § 924(c) conviction, and its retroactive application renders unconstitutional guilty verdicts the jury might have returned . . . on the basis of *Pinkerton*. I say 'might have returned' because the forms of the verdicts leave the question uncertain, but that uncertainty requires vacatur of the firearms verdicts in this case.'" *Id.* at *48-49. The uncertainty of whether the jurors in *Rodriguez* based their verdict on *Pinkerton* liability mirrors the uncertainty in Pannell's case. Whether or not this Court adopts the *Rodriguez* Court's reasoning, it is clear that reasonable jurists would at least debate, if not agree with, its correctness. That alone is sufficient to warrant granting Pannell's COA.

Finally, Pannell observes that a pending case in the United States Supreme Court raises an analogous issue. *See United States v. Taylor*, 979 F.3d 203, 210 (4th Cir. 2020) (vacating § 924(c) conviction based on attempted Hobbs Act robbery, on the grounds that "attempted Hobbs Act robbery is not 'categorically' a 'crime of violence'"), *cert. granted*, 141 S. Ct. 2882 (U.S. July 2, 2021). In *Taylor*, the issue

was whether the conduct required to commit an attempted robbery necessarily involves the use, attempted use, or threatened use of physical force. *Taylor*, 979 F.3d at 208. The Fourth Circuit held that it did not, because a defendant might take a "nonviolent substantial step" towards a threatened use of force, which is sufficient for an attempt conviction but insufficient for a crime of violence. *Id.* In one sense, the defendant's position in *Taylor* is even less persuasive than Pannell's: after all, the text of § 924(c)(3)(A)'s definition of a crime of violence includes crimes with an "attempted" use of force, so a colorable position is that Congress thereby intended to include any attempt crime wherein the underlying substantive crime is a crime of violence. *See* Pet'r's Br. in *United States v. Taylor*, No. 20-1459, at 12, 25 (U.S. Sep. 7, 2021).

Even assuming Congress intended that result for attempt crimes (a question that the Supreme Court will resolve in *Taylor*), Congress did not include *any* such language that would allow co-conspirator liability to suffice under the elements clause just because the underlying offense (in the absence of co-conspirator liability) may be a crime of violence. Denying Pannell relief in this case would implicitly require the Court to read such language into the statute where it does not: the statute permits an offense to qualify only if the conduct punished actually involves the use, attempted use, or threatened use of physical force. Pannell's substantive robbery count did not. In any event, the Supreme Court's grant of *certiorari* in *Taylor* is yet

another indicator that the issue presented herein is, at the very least, debatable among reasonable jurists.

CONCLUSION

For the foregoing reasons, Pannell respectfully asks this Court to grant a certificate of appealability, so that he may appeal the district court's denial of his petitions for relief under 28 U.S.C. § 2255.

Date: December 14, 2021

Respectfully submitted,

/s/ Kyle Singhal
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CERTIFICATE OF SERVICE

I certify that the foregoing document was electronically filed on December 14, 2021. Notice of this filing was sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. A paper copy of this filing was sent to Appellant by U.S. Mail on December 14, 2021.

Respectfully submitted,

/s/ Kyle Singhal
Kyle Singhal
Counsel for Petitioner-Appellant
Derrek Pannell

CERTIFICATE OF COMPLIANCE

I certify that the foregoing motion complies with Fed. R. App. P. 27 and 32 because it contains 4,854 words and was typed in 14-point Times New Roman font.

/s/ Kyle Singhal
Kyle Singhal
Counsel for Petitioner-Appellant
Derrek Pannell

APPENDIX

Appended to this motion are two attachments:

1. **Attachment A,** the district court's order denying a certificate of appealability, which is also filed electronically in the district court's docket at Docket Entry No. 239.

2. **Attachment B,** Pannell's copy of the jury charge. (The district court's electronic docket appears to include the transcripts of only three days of the jury trial: September 18, 19, and 20, 2007. *See* Dist. Ct. Docket Entry Nos. 208, 209, 210. The jury was charged on September 24, 2007. *See* Dist. Ct. Docket Entry No. 138, Minute Entry. Thus, counsel attaches a copy of the paper jury charge that Pannell provided to counsel.)

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ATTACHMENT A

District Court's
Opinion & Order

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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DERREK PANNELL,

Petitioner,

-against-

UNITED STATES,

Respondent.

OPINION & ORDER

06-cr-578 (NG)
16-cv-3496 (NG)

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GERSHON, United States District Judge:

Petitioner Derrek Pannell seeks relief under 28 U.S.C. § 2255, through two separate motions, from his September 25, 2007 conviction, following a jury trial, of conspiracy to assault and rob employees of the United States Postal Service by use of a dangerous weapon in violation of 18 U.S.C. § 371 (Count One), armed postal robbery in violation of 18 U.S.C. § 2114(a) (Count Two), and an associated count of unlawful use of a firearm in connection with a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii), in furtherance of Count Two (Count Three). For the reasons that follow, the motions are denied.

I. Procedural Background

On April 7, 2009, the Second Circuit affirmed petitioner's conviction and sentence. *United States v. Pannell*, 321 F. App'x 51 (2d Cir. 2009), *cert. denied*, 558 U.S. 1019. He later filed his first motion under 28 U.S.C. § 2255 alleging that his attorneys at trial and sentencing were ineffective. I denied that motion on April 15, 2014. *Pannell v. United States*, 2014 WL 1478847 (E.D.N.Y. Apr. 15, 2014). The Second Circuit denied Mr. Pannell's motion for a certificate of appealability. *Pannell v. United States*, No. 14-4223 (2d Cir. Apr 15, 2015).

On June 24, 2016, counsel from the Federal Defenders of New York appeared on behalf of petitioner and filed a motion pursuant to § 2255, arguing that, after *Johnson v. United States*, 576 U.S. 591 (2015), petitioner's conviction under 18 U.S.C. § 924(c) could not stand because neither Count One nor Count Two qualified as a "crime of violence." I stayed the motion pending the Second Circuit's decisions in two cases addressing the definition of a "crime of violence" under 18 U.S.C. § 924(c): *United States v. Hill*, 890 F.3d 351 (2d Cir. 2018) (amended opinion) and *United States v. Barrett*, 903 F.3d 166 (2d Cir. 2018) ("*Barrett I*"), *rev'd in relevant part by United States v. Barrett*, 937 F.3d 126 (2d Cir. 2019) ("*Barrett II*").

Following the Second Circuit's decisions in *Hill* and *Barrett II*, petitioner's counsel filed supplemental briefing on February 5, 2020. Mr. Pannell later filed a supplemental brief on his own behalf on June 4, 2020 but moved to withdraw it on June 22, 2020. Petitioner, proceeding *pro se*, submitted another § 2255 motion dated June 18, 2020 to the Second Circuit Court of Appeals, seeking permission to file a successive petition. The Circuit forwarded that motion to this court under Fed. R. App. P. 4(d) on July 9, 2020.[1] On August 10, 2020, petitioner filed further briefing in this court in support of his *pro se* motion. In both the counseled and *pro se* § 2255 motions, Mr. Pannell argues that his conviction under § 924(c) was unconstitutional and must be vacated.

On September 4, 2020, I found, *sua sponte*, that I lacked jurisdiction to adjudicate the motions absent authorization from the Circuit. I therefore transferred them to the Second Circuit pursuant to 28 U.S.C. § 1631 and § 2244(b)(3). *See United States v. Larkins*, 670 F. App'x 1 (2d

[1] Federal Rule of Appellate Procedure 4(d) addresses when notices of appeal are mistakenly filed in the circuit court as opposed to the district court. As a result, in forwarding the petition to the district court, the Second Circuit did not authorize a successive petition.

Cir. 2016), *as amended* (Nov. 8, 2016) (summary order); *Torres v. Senkowski*, 316 F.3d 147, 151–52 (2d Cir. 2003).

On May 3, 2021, a panel of the Second Circuit certified, as required under 28 U.S.C. § 2244, that petitioner had made a *prima facie* showing that the proposed § 2255 motions satisfy the requirements of 28 U.S.C. § 2255(h)(2), in that they address a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. *Pannell v. United States*, No. 20-3034 (2d Cir. May 3, 2021). As a result, the Circuit granted petitioner's motion for leave to file a successive § 2255 motion and transferred the petitions to me for adjudication, with instructions to

> determine in the first instance, according to the modified categorical approach, *see Mathis v. United States*, 136 S.Ct. 2243, 2249 (2016), whether substantive § 2114 postal robbery is a "crime of violence," 18 U.S.C. § 924(c)(3)(A); that is, whether the least culpable conduct punishable under § 2114 (or, if it is divisible, its relevant component) involves "the use, attempted use, or threatened use of physical force," *id.*; *see, e.g.*, *Board v. United States*, 2d Cir. 16-2031, doc. 48 (3/15/2021 order). . . . As a consequence of this order, the district court will have the preliminary task of determining whether the claims in Petitioner's § 2255 motion—as to which we have only concluded that a prima facie showing has been made—satisfy the threshold requirements governing successive § 2255 motions, including those set forth in 28 U.S.C. §§ 2244(a), 2244(b)(3)-(4), and 2255(h). *See Massey v. United States*, 895 F.3d 248, 251 (2d Cir. 2018) (per curiam).

Id.

II. Petitioner's Convictions

At trial, petitioner was convicted of three offenses: conspiracy, armed postal robbery, and unlawful use of a firearm. The first count charged petitioner, together with others, under 18 U.S.C. § 371, with

> knowingly and willfully conspir[ing] to assault and rob persons having lawful charge, control and custody of property of the United States, to wit: a quantity of money and mail matter, which property belonged to the United States Postal

> Service, and put such persons' lives in jeopardy by the use of a dangerous weapon.

Petitioner was sentenced to five years' imprisonment on the conspiracy conviction. The second count charged petitioner, under 18 U.S.C. § 2114(a), with

> knowingly and intentionally assault[ing] and rob[bing] persons having lawful charge, custody and control of property of the United States, to wit: a quantity of money and mail matter, which property belonged to the United States Postal Service, and put such persons' lives in jeopardy by the use of a dangerous weapon.

Petitioner was sentenced to 18 years' imprisonment on the armed postal robbery conviction, to run concurrently with the conspiracy sentence.

Petitioner was also charged with and convicted of violating § 924(c)(1)(A)(ii), which requires the imposition of an additional term of imprisonment of no less than seven years for a defendant who, "during and in relation to any crime of violence . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm . . . if the firearm is brandished. . . ." The phrase "crime of violence" is separately defined in the statute through two provisions: an elements clause and a residual clause. Under the elements clause, a crime of violence is defined as a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," whereas the residual clause defines a crime of violence as a felony "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the crime." 18 U.S.C. § 924(c)(3)(A)–(B). Petitioner was sentenced to a mandatory seven years' imprisonment for his conviction on Count Three, to run consecutively to the sentences on the conspiracy and armed postal robbery convictions.

III. Recent History of 18 U.S.C. § 924(c)

In *Johnson*, the Supreme Court found unconstitutionally vague the residual clause of the Armed Career Criminal Act ("ACCA"), which subjects repeat offenders to enhanced sentences for any "violent felony" that "involves conduct that presents a serious potential risk of physical injury to another," a provision that closely tracks the language in the residual clause of § 924(c). *Johnson*, 576 U.S. at 593; *compare* 18 U.S.C. § 924(e)(2)(B)(ii) *with* 18 U.S.C. § 924(c)(3)(B). The Court found that the ACCA did not adequately put defendants on notice of behavior that could subject them to enhanced penalties. *Id.* at 597. While the residual clause was stricken, the ACCA's elements clause, which mirrors the elements clause of § 924(c), survived. *Johnson*, 576 U.S. at 606; *see also Stokeling v. United State*s, 586 U.S. ___, 139 S.Ct. 544, 550 (2019); *compare* 18 U.S.C. § 924(e)(2)(B)(i) *with* 18 U.S.C. § 924(c)(3)(A).

In assessing whether the elements of an offense qualify as a "crime of violence" under § 924(c)(3), the Second Circuit utilizes the "categorical approach" set forth in *Taylor v. United States*, 495 U.S. 575 (1990). *Hill*, 890 F.3d at 55. Under the categorical approach, courts must look only to the statutory definition of an offense—not to the particular underlying facts—in order to determine whether the offense qualifies as a crime of violence. *Id.*; *Taylor*, 495 U.S. at 600. To determine what the elements underlying a petitioner's conviction are, a court must first determine whether the statute is divisible. A statute is considered divisible if it sets out one or more crimes in the alternative. *Descamps v. United States*, 570 U.S. 254 (2013). "If statutory alternatives carry different punishments, then . . . they must be elements." *Mathis v. United States*, 579 U.S. __, 136 S.Ct. 2243, 2256 (2016). Under this "modified categorical approach," a court may review "a limited class of documents, such as indictments and jury instructions, to

determine which alternative formed the basis of the defendant's prior conviction." *Descamps*, 570 U.S. at 257.

A wave of litigation followed the Supreme Court's decision in *Johnson* to determine the scope of the decision's application, and the Second Circuit was soon called upon to interpret *Johnson* in the context of a robbery under 18 U.S.C. § 1951(b)(1) ("Hobbs Act robbery"), in *United States v. Hill*. In *Hill*, the Second Circuit found that, applying the categorial approach, a substantive Hobbs Act robbery satisfies § 924(c)(3)(A)'s elements clause and is a "crime of violence." *Hill*, 890 F.3d at 53, 60; *see also Barrett II*, 937 F.3d at 128. That same year, in *Barrett I*, the Second Circuit found that conspiracy to commit a Hobbs Act robbery was a crime of violence under both the elements and the residual clauses of § 924(c)(3). *Barrett I*, 903 F.3d at 174–84. A year later, in *Barrett II*, the Second Circuit was compelled by the Supreme Court's intervening decision in *United States v. Davis*, 588 U.S. ___, 139 S.Ct. 2319 (2019), to reconsider and reverse its opinion in *Barrett I*. Relying on *Davis*, the *Barrett II* Court held that conspiracy to commit a Hobbs Act robbery is not a qualifying predicate for a conviction under § 924(c) and confirmed that the definition of a crime of violence in the § 924(c)(3)(B) residual clause is "unconstitutionally vague." *Barrett II*, 937 F.3d at 127–29 (quoting *Davis*, 139 S.Ct. at 2336).

IV. Discussion

As already found by the Second Circuit in *Board v. United States*, No. 16-2031 (2d Cir. Mar. 15, 2021), section 2114, the postal robbery statute of which petitioner was convicted, is divisible into at least two distinct offenses: the base offense and a separate aggravated offense. The base offense provides as follows:

> A person who assaults any person having lawful charge, control, or custody of any mail matter or of any money or other property of

> the United States, with intent to rob, steal, or purloin such mail matter, money, or other property of the United States, or robs or attempts to rob any such person of mail matter, or of any money, or other property of the United States, shall, for the first offense, be imprisoned not more than ten years. . . .

18 U.S.C. § 2114(a). I begin my analysis by finding that the base offense is itself divisible as it lists multiple elements disjunctively and, thus, may be violated (1) by an assault with an intent to rob, steal, or purloin or (2) by an attempted or completed robbery. The aggravated offense applies "if in effecting or attempting to effect such robbery [a defendant] wounds the person having custody of such mail, money, or other property of the United States, or puts his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense" and carries with it an increased maximum punishment of twenty-five years' imprisonment. *Id.* Because it lists three elements in the alternative, thereby defining multiple crimes, I find that the aggravated offense is further divisible. *See Williams v. United States*, 794 F. App'x 612, 614 (9th Cir. 2019). Based upon the superseding indictment, the jury charge, and the verdict sheet, I find that petitioner was convicted, under Count Two, of the aggravated offense of armed postal robbery which placed the victim's life in jeopardy by the use of a dangerous weapon.

Having found that the "life in jeopardy" element of the aggravated offense applies, I must next "determine whether that clause (in conjunction with the required assault or robbery) may be satisfied without 'the use, attempted use, or threatened use of physical force.'" *Board*, No. 16-2031 (2d Cir. Mar. 15, 2021) (quoting 18 U.S.C. § 924(c)(3)(A)). I find that it may not. Physical force is defined by the Supreme Court as "force capable of causing physical pain or injury." *Johnson*, 559 U.S. at 140. As to the base offense, the Supreme Court has relied on an analysis of the statutory history and the common law in a case addressing a Hobbs Act robbery to find that robbery has "long required force or violence." *Stokeling*, 139 S.Ct. at 550; *see*

United States v. Knight, 936 F.3d 495, 500 (6th Cir. 2019). After *Stokeling*, which held that *Johnson* "does not require any particular degree of likelihood or probability that the force used will cause physical pain or injury; only potentiality[,]" there can be no doubt that armed postal robbery under § 2114(a) qualifies as a predicate crime of violence under § 924(c). *Stokeling*, 139 S.Ct. at 544.

As for the aggravated offense, of which petitioner was convicted, section 2114(a) provides that, according to the least of the elements required, during such a robbery, a defendant use a dangerous weapon to put a victim's life in jeopardy. Jeopardy in this context refers to "an objective state of danger, not to a subjective feeling of fear." *United States v. Donovan*, 242 F.2d 61, 63 (2d Cir. 1957). The *use* of a dangerous weapon to place a victim's life into an objective state of danger in the course of a robbery thus requires the intentional use, attempted use, or threatened use of physical force. *E.g.*, *Williams v. United States*, 794 F. App'x 612, 614 (9th Cir. 2019); *Knight v. United States*, 936 F.3d 495, 501 (6th Cir. 2019); *United States v. Thomas*, 703 F. App'x 72, 78 (3d Cir. 2017); *United States v. Enoch*, 865 F.3d 575, 581 (7th Cir. 2017); *United States v. Lloyd*, 2020 WL 4750241, at *11 (E.D.N.Y. Aug. 17, 2020); *see also United States v. Bryant*, 949 F.3d 168, 182 (4th Cir. 2020); *In re Watt*, 829 F.3d 1287, 1290 (11th Cir. 2016).

The Seventh Circuit's decision in *United States v. Rodriguez*, 925 F.2d 1049, 1052 (7th Cir. 1991), upon which the petitioner relies, does not alter this conclusion. The Second Circuit in *Board* referred the district court in that case to *Rodriguez* and directed it to address whether "a concealed gun permits conviction for the aggravated § 2114 offense in this Circuit," and, if so, to further determine "if that satisfies the § 924(c)(3)(A) force clause." *Board*, No. 16-2031 (2d Cir. Mar. 15, 2021). *Rodriguez* has been described there, and in other cases, as involving the

carrying of a concealed gun or a mere gun possession case.[2] *See, e.g.*, *Board*, No. 16-2031 (2d Cir. Mar. 15, 2021); *Enoch*, 865 F.3d at 582; *Knight*, 936 F.3d at 501. So treated, I would find that the defendant's conviction of the aggravated offense would not be found sufficient in the Second Circuit, and it could not serve as a predicate under § 924(c)'s force clause. However, as found by the Sixth Circuit in *Knight*,

> *Rodriguez*'s conclusion that mere possession suffices as "use of a dangerous weapon" to put the victim's life in danger under the statute, even if accepted, does not negate the statutory requirement that in effecting the crime, the victim's life is put in jeopardy by use of the gun.

Knight, 936 F.3d at 501 (footnote omitted); *accord Enoch*, 865 F.3d at 581–82. In sum, the Seventh Circuit's opinion in *Rodriguez* does not alter my opinion that armed postal robbery is a categorical crime of violence under § 924(c) in the Second Circuit, comporting with the Supreme Court's opinion in *Johnson*.

Finally, while petitioner's counsel does not dispute that petitioner's conviction on Count Three was for actions committed in furtherance of Count Two, petitioner, in his *pro se* submissions, does.[3] Petitioner argues that it is not clear that the jury's § 924(c) conviction was based on Count Two and, therefore, it is plausible that the jury found him guilty of § 924(c) based on the conspiracy charge, which would be impermissible under *Davis* because conspiracy

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[2] The Seventh Circuit in *Rodriguez* does not describe the crime there as the mere carrying of a concealed weapon or as mere gun possession. As described by the *Rodriguez* court, "Mr. Rodriguez had brought the weapon to the scene and given it to his confederate to carry in the confrontation with [the victim]." *Rodriguez*, 925 F.2d at 1052. The confederate then took the gun out of his sweater pocket after Rodriguez ripped the mail carrier's keys from his belt loop, and the confederate "threatened [the mail carrier] with the gun in a successful effort to escape." *Rodriguez*, 925 F.2d at 1051–52.

[3] By authorizing petitioner's § 2255 motion pursuant to 28 U.S.C. § 2244(b)(3) based on the holdings of *Johnson* and *Davis*, the Second Circuit conferred jurisdiction on this court over the entire application—not merely those topics specifically mentioned in the Mandate. *See United States v. MacDonald*, 641 F.3d 596, 615 (4th Cir. 2011). I therefore consider all issues raised in the counseled and *pro se* motions.

does not require the use, attempted use, or threatened use of physical force. Petitioner asserts that, "without a detailed verdict sheet [it is] impossible to extricate the conspiracy charged in count one, 18 U.S.C. § 371, from the other charged predicate offense in count two, 18 U.S.C. § 2114. . . ."

In fact, the verdict sheet in this case required the jurors to indicate "which of the underlying Counts were furthered by the use of a firearm." The jury checked the box for "Count Two only," and did not check the boxes for "Count One only" or "Both." It is not plausible that the jury misunderstood the jury instructions and actually convicted petitioner of the enhancement based only on the Count One conspiracy charge.

Petitioner's second *pro se* argument fares no better. Mr. Pannell argues that because the jury could have found him guilty of Count Two based on aiding and abetting liability, he was improperly convicted of a 924(c) offense based solely on conspiracy under a *Pinkerton*[4] theory of liability. Indeed, the Second Circuit recently rejected Mr. Pannell's exact argument. In *United States v. Blanco*, 811 Fed. App'x 696 (2d Cir. 2020), the Second Circuit concluded that a conviction for bank robbery could serve as a § 924(c) predicate where the jury had been instructed that it could find the defendant guilty under *Pinkerton*. "Even if the jury found [the defendant] liable for bank robbery based on *Pinkerton*," the Court reasoned, ". . . that would not somehow transform her conviction for *substantive* bank robbery into one for bank robbery *conspiracy*, implicating the residual-clause concerns explored in *Davis* and this Court's

[4] Under the *Pinkerton* doctrine, "a jury [may] find a defendant guilty on a substantive count without specific evidence that he committed the act charged if it is clear that the offense had been committed, that it had been committed in the furtherance of an unlawful conspiracy, and that the defendant was a member of that conspiracy." *United States v. Miley*, 513 F.2d 1191, 1208 (2d Cir. 1975) (citing *Pinkerton v. United States*, 328 U.S. 640, 645 (1946)).

subsequent decision in [*Barrett II*.]" *Blanco*, 811 Fed. App'x at 701 n.2; *see also Lloyd*, 2020 WL 4750241, at *11.

V. Conclusion

For the foregoing reasons, Mr. Pannell's motion to withdraw his supplemental brief dated June 4, 2020 is granted, and his two petitions for relief under § 2255 are denied. Since petitioner has not made a "substantial showing of the denial of a constitutional right," a certificate of appealability shall not issue. 28 U.S.C. § 2253(c)(2).

The Clerk of Court is directed to enter judgment for respondent on each petition.

SO ORDERED.

/s/
NINA GERSHON
United States District Judge

August 26, 2021
Brooklyn, New York

ATTACHMENT B

Jury Charge

JURY CHARGE

INDEX

Members of the Jury:

Now that the evidence has been presented and the attorneys have concluded their closing arguments, it is my responsibility to instruct you on the law that governs this case.

My instructions will be in three parts:

First: I will instruct you regarding the general rules that define and govern the duties of a jury in a criminal case;

Second: I will instruct you as to the legal elements of the crimes charged in the indictment -- that is, the specific elements that the government must prove beyond a reasonable doubt to warrant a finding of guilt; and

Third: I will give you some important principles that you will use during your deliberations.

Shortly after you retire for your deliberations, I will provide you with

several copies of these instructions.

FUNCTION OF JURY

Let me remind you that it is your duty to follow the law as I state it. You have the important responsibility to judge the facts. And you alone are the judges of the facts -- not counsel -- not I.

Counsel have made reference to legal terms such as "reasonable doubt." I instruct you that it is my instructions and my definitions of legal terms and mine only that you must follow, and not counsel's.

COURT HAS NO VIEW

I express no view as to whether the defendant is guilty or not guilty. You should not draw any conclusion as to whether he is guilty or not guilty from anything I may have said or done. You will decide the case solely on the evidence and the law.

PARTIES ARE EQUAL

The prosecution is brought in the name of the United States, but that does not entitle the government to any greater consideration than the defendant. The

parties -- the government and the defendant -- are equal before this Court. They are entitled to equal consideration.

IMPROPER CONSIDERATIONS

Your verdict must be based solely upon the evidence developed at trial, or the lack of evidence. It would be improper for you to consider, in reaching your decision as to whether the government sustained its burden of proof, any personal feelings you may have about the defendant's race, religion, national origin, ethnic background, sex or age.

It would be equally improper for you to allow any feelings you might have about the nature of the crimes charged to interfere with your decision-making process. To repeat, your verdict must be based exclusively upon the evidence or the lack of evidence in the case.

You have heard evidence about the involvement of certain other people in the transactions referred to in the indictment. That these individuals are not on trial before you is not your concern. You should neither speculate as to the reason these people are not on trial before you nor allow their absence as parties to influence in

any way your deliberations in this case.

You may not conclude that a defendant is guilty just because a prosecution witness pled guilty to similar charges. That witness's decision to plead guilty was a personal decision about his own guilt.

Reference has been made to interviews that the attorneys conducted with witnesses prior to the witnesses taking the stand. I instruct you that attorneys not only have a right to interview witnesses prior to putting them on the stand, but it is professionally proper to do so.

The question of possible punishment of the defendant is of no concern to the jury and should not enter into or influence your deliberations. The duty of imposing sentence rests exclusively upon the court. Your function is to weigh the evidence in the case and to determine, solely upon the basis of the evidence, whether or not the defendant is guilty beyond a reasonable doubt of each crime charged against him.

You have heard testimony that the defendant has been incarcerated while awaiting this trial. You are instructed to ignore that fact in determining whether the

government has satisfied its burden as to the charges in the indictment. Which is to say, the defendant's pretrial custody is irrelevant to your role as the triers-of-fact.

ALL AVAILABLE EVIDENCE NEED NOT BE PRODUCED

Although the government bears the burden of proof, and although a reasonable doubt can arise from lack of evidence, I instruct you that the law does not require the government to produce all available evidence. The law further does not require that any particular investigative techniques be used by law enforcement authorities to uncover or prosecute crime.

Your concern is to determine whether or not, based upon all the evidence in the case, the government has proven that the defendant is guilty beyond a reasonable doubt.

INDICTMENT IS ONLY AN ACCUSATION

An indictment is merely an accusation in writing. It is not evidence of guilt. It is entitled to **no** weight in your determination of the facts. The defendant has pleaded not guilty, thereby placing in issue each allegation in the indictment.

I'll now address certain fundamental principles that I spoke to you about

earlier.

BURDEN OF PROOF

First, the government has the burden of proving guilt beyond a reasonable doubt as to each element of the crimes the defendant is charged with committing. Throughout the trial, this burden never shifts. The defendant does not have to prove his innocence; indeed he need not submit any evidence at all.

PRESUMPTION OF INNOCENCE

Second, the law presumes a defendant innocent of the charges against him. I instruct you that the defendant is to be presumed by you to be innocent throughout your deliberations until such time, if ever, you as a jury are satisfied that the government has proven him guilty beyond a reasonable doubt. This presumption of innocence alone is sufficient to acquit a defendant unless you as jurors are unanimously convinced beyond a reasonable doubt of his guilt, after a careful and impartial consideration of the evidence.

REASONABLE DOUBT

Third, I have said that the government must prove the defendant guilty beyond

a reasonable doubt. The question, naturally, is what is a reasonable doubt? It is a doubt based upon reason and common sense. It is a doubt that a reasonable person has after carefully weighing all of the evidence. It is a doubt that would cause a reasonable person to hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her own affairs.

A reasonable doubt is not speculation or suspicion. It is not an excuse to avoid the performance of an unpleasant duty. And it is not sympathy.

The law does not require that the government prove guilt beyond all possible doubt; proof beyond a reasonable doubt is sufficient to convict.

WHAT IS EVIDENCE?

The evidence upon which you are to decide what the facts are comes in several forms:

A. Sworn testimony of witnesses, both on direct and cross-examination;

B. Exhibits that have been received by the Court in evidence; and

C. Facts to which the lawyers have agreed or stipulated.

When the attorneys on both sides stipulate, that is, agree, to the existence of a fact, you the jury must accept the stipulation and consider the fact as proven.

D. Stipulation of Testimony

A stipulation of testimony is an agreement among the parties that, if called, a witness would have given certain testimony. You must accept as true the fact that the witness would have given that testimony. However, it is for you to determine the effect to be given that testimony.

WHAT IS NOT EVIDENCE?

The following things are not evidence:

A. Arguments or statements by lawyers are not evidence.

B. A question put to a witness, standing alone, is not evidence. Only the answer, understood in light of the question, is evidence. Innuendo or

suggestion contained in the question is not evidence.

C. Objections to the questions or to offered exhibits are not evidence.

In this regard, attorneys have a duty to their clients to object when they believe evidence should not be received. You should not be influenced by the objection or by my ruling on it. If the objection was sustained, ignore the question and any answer that followed. If the objection was overruled, treat the answer like any other answer.

D. Obviously anything you may have seen or heard outside the courtroom is not evidence.

E. Nothing I have said is evidence.

EVIDENCE

There are, generally speaking, two types of evidence. One is direct evidence -- such as the testimony of an eyewitness or participant, or physical evidence. The other is indirect or circumstantial evidence -- evidence of facts and circumstances from which it is reasonable to infer or deduce connected facts that reasonably follow

in the common experience. You infer on the basis of reason, experience, and common sense from an established fact or facts the existence or the nonexistence of some other fact.

In an effort to convey what is meant by circumstantial evidence, I usually give jurors an example.

Assume that when you came to court today, it was a bright, clear sunny day. And also assume that we have closed the window shades.

But after awhile someone walks in from the hallway with an umbrella that is dripping wet, followed by people wearing wet raincoats.

Now, you cannot see or hear the falling of rain by direct observation.

But certainly, upon the combination of facts that you DO observe, even though when you entered the building it was sunny, it would be reasonable and logical for you to conclude that the weather had changed to rainy. You will have inferred, on the basis of reason and experience, from established facts, that it was raining. That's all

circumstantial evidence amounts to.

There is no distinction between the weight to be given to direct evidence and the weight to be given to circumstantial evidence. No greater degree of certainty is required of circumstantial evidence than of direct evidence.

DEMONSTRATIVE AIDS

I have allowed the lawyers to use certain documents or objects which we call demonstrative aids in their summations. These items are not themselves in evidence but the prosecutor chose to use them as aids in presenting his arguments to you.

WEIGH ALL EVIDENCE

You should weigh ALL the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt then you must find him not guilty. On the other hand, if you are convinced beyond a reasonable doubt that the defendant is guilty of the crime you are considering, then you should find him guilty.

INFERENCES

The attorneys in summing up have asked you to draw certain inferences from the evidence in this case. Any inference you draw must be reasonably based on the evidence, and you may infer only such facts that your reason and common sense lead you to believe follow from the evidence. You are not to engage in speculation based on matters that are not in evidence.

THE INDICTMENT

I will now turn to the second part of this charge and instruct you as to the legal elements of the specific crimes charged in the indictment. That is to say, I will now instruct you as to the specific elements of the crimes charged that the government must prove beyond a reasonable doubt for you to find the defendant guilty in this case.

VARIANCE IN DATES

The indictment charges that acts occurred on or about certain dates. It does not matter if the indictment charges that a specific act occurred on or about a certain date, and the evidence indicates that, in fact, it was on another date. Nor is it essential that the government prove that a conspiracy started and ended on the dates charged. The law requires only substantial similarity between the dates alleged in the indictment and the dates established by the evidence.

SEPARATE COUNTS

At the beginning of the trial, I told you that the indictment in this case accuses the defendant of three crimes. Each charge or count must be considered separately by you and you will be asked to render a separate verdict on each charge. Whether

you find the defendant guilty or not guilty of a count, however, your verdict on that count must be unanimous.

To make these instructions easier to understand, I will first instruct you on Count Two, the robbery charge. Then, I will instruct you on Count One, which is the conspiracy to commit robbery charge. Finally, I will instruct you on Count Three, the unlawful use of a firearm charge.

COUNT TWO:
ROBBERY

Count Two of the indictment reads as follows:

> On or about November 15, 2005, within the Eastern District of New York, the defendant[], DERREK PANNELL . . ., together with others, did knowingly and intentionally assault and rob persons having lawful charge, custody and control of property of the United States, to wit: a quantity of money and mail matter, which property belonged to the United States Postal Service, and put such persons' lives in jeopardy by the use of a dangerous weapon.

Count Two charges the defendant under a federal robbery statute. This statute, Title 18, Section 2114(a) of the United States Code, states, in relevant part:

> A person who . . . robs . . . any. . . person [having lawful charge, control, or custody of] any money [] or other property of the United States, . . . and . . . in effecting . . . such robbery . . . puts [the life of the person having custody of the money or other property of the United States] in jeopardy by the use of a dangerous weapon [is guilty of a crime].

To find the defendant guilty of the crime charged in Count Two, you must find that the government has proven the following four elements beyond a reasonable doubt:

First, that the defendant took money or other property of the United States from the person or presence of another having lawful charge, control and custody of the money or property;

Second, that the taking was done by "robbery," that is, by force, violence, or intimidation;

Third, that in carrying out the robbery, the defendant put the life of the person having control of the money in jeopardy by use of a dangerous weapon; and

Fourth, that the defendant acted knowingly and intentionally.

ELEMENTS OF THE OFFENSE

I will now explain each of these elements in more detail.

1. *First Element: Obtaining Money or Property of the United States from Another*

The first element the government must prove is that the defendant took money or other property of the United States from someone who was in lawful charge, control, or custody of that money. If an employee at a United States Postal Office has control over and responsibility for money or other property of the United States Postal

Service, he or she is in lawful charge, custody, or control of the money.

2. *Second Element: By Robbery*

The second element that the government must prove is that the defendant took money or other property of the United States by "robbery." The term "robbery" means the unlawful taking or obtaining of property from another person, against his will, by force or violence, or by acting in an intimidating manner. The government does not have to prove that the defendant used force or violence if the government established that the defendant acted in an intimidating manner. The phrase "intimidating manner" means that the defendant said or did something that would make an ordinary person fear bodily harm. However, it is not necessary that the government prove that the victim was actually frightened in order to establish that the defendant acted in an intimidating manner. The appropriate inquiry is whether the threat was reasonably calculated to instill fear in the victim.

3. *Third Element: In Carrying out the Robbery, the Defendant Put the Life of the Person Having Control of the Money in Jeopardy by Use of a Dangerous Weapon*

The third element requires proof that the defendant, in effecting the robbery of money or other property belonging to the United States, did put in jeopardy the life

of the person robbed by use of a dangerous weapon. A dangerous weapon includes anything capable of being readily operated, manipulated, wielded or otherwise used by an individual to inflict severe bodily harm or injury upon another person. A firearm, such as a pistol, revolver, or other gun, capable of firing a bullet or other ammunition may be found to be a dangerous weapon. To put a person's life in jeopardy by use of a dangerous weapon means to expose such person to a risk of death by the use of such a dangerous weapon.

4. *Fourth Element: The Defendant Acted Knowingly and Intentionally*

The final element of proof is that the defendant's actions were knowing and intentional. A defendant acts knowingly if he acts purposely and voluntarily and not because of a mistake, accident, or other innocent reason. A person acts intentionally if he acts with the specific intent to do something the law forbids, in this case, if he acts with the intent to rob a person of money or other property of the United States by threatening immediate bodily injury and, in doing so, intends to jeopardize the lives of others by use of a dangerous weapon. This requires you to make a decision about a defendant's state of mind. It is obviously impossible to prove directly the operation of a person's mind. But a wise and intelligent consideration of all the facts and circumstances shown by the evidence in the case may enable you to infer what

a person's state of mind was.

Aiding and Abetting POST DAUIS?

The government can prove the defendant guilty of this charge either by proving he did the acts charged himself or by proving that he aided and abetted another person.

Section 2(a) of Title 18 of the United States Code provides 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."

Accordingly, even if the defendant did not personally do every act constituting an offense, you may find that he committed that offense if the government proves beyond a reasonable doubt that he aided and abetted the offense.

A person who aids and abets another to commit an offense is just as guilty of that offense as if he personally committed it. The essence of aiding and abetting is the intentional and knowing participation in the unlawful act by furthering it in some way.

To find that the defendant is an aider and abettor under Section 2(a), you must find beyond a reasonable doubt that the government has proven that another person actually committed the crime with which the defendant is charged, and the defendant

aided or abetted that person in the commission of the offense.

In order to aid or abet another to commit a crime, it is necessary that the defendant knowingly associate himself in some way with the criminal venture, that he participate in it out of a desire to make the crime succeed.

The mere presence of the defendant where a crime is being committed, even coupled with knowledge that a crime is being committed, or the mere acquiescence by the defendant in the criminal conduct of others, even with guilty knowledge, is not sufficient to establish aiding and abetting. An aider and abettor must have some stake, some interest, in the outcome of the criminal venture. That stake or interest need not be a financial one, but you may consider the presence or absence of a financial interest in making your determination.

To determine whether the defendant aided and abetted the commission of the crime that is charged, ask yourself these questions:

- Did he participate in the act charged as something he wished to bring about?
- Did he associate himself with the criminal venture, knowingly and intentionally?
- Did he seek by his action to make the criminal venture succeed?

If he did, then the defendant is an aider and abettor, and, therefore, responsible for the act and guilty of the offense charged just as if he had committed the act or

offense himself. If, on the other hand, your answer to any of these questions is "no," then the defendant is not an aider and abettor, and you must find the defendant not guilty of the crime charged.

COUNT ONE:
CONSPIRACY TO COMMIT ROBBERY

Count One of the indictment charges the defendant with a conspiracy to commit robbery. The indictment reads as follows:

> In or about and between September 2005 and November 15, 2005, both dates being approximate and inclusive, within the Eastern District of New York, the defendant[] DERREK PANNELL, [and] DARREN RUCKER and CIVILIZE AMENRA . . ., together with others, did knowingly and willfully conspire to assault and rob persons having lawful charge, control and custody of property of the United States, to wit: a quantity of money and mail matter, which property belonged to the United States Postal Service, and put such persons' lives in jeopardy by the use of a dangerous weapon, in violation of Title 18, United States Code, Section 2114(a).

The indictment additionally alleges that in furtherance of this conspiracy, and to effect the objects thereof, within the Eastern District of New York, the defendant and others committed and caused to be committed Overt Acts "a" and "b," which I will describe for you later. I will now instruct you regarding the elements of a conspiracy. Section 371 of Title 18 of the United States Code provides, in relevant part:

> If two or more persons conspire . . . to commit any offense against the United States, . . . and one or more of such persons do any act to effect the object of the conspiracy, each [shall be guilty of a crime.]

A conspiracy is a kind of criminal partnership – a combination or agreement of two or more persons to join together to accomplish some unlawful purpose.

The crime of conspiracy to violate a federal law is an independent offense. It is separate and distinct from the actual violation of any specific federal laws, which are usually referred to as "substantive crimes." Indeed, you may find a defendant guilty of the crime of conspiracy to commit an offense against the United States even though the substantive crime that was the object of the conspiracy was not actually committed.

In order to satisfy its burden of proof with respect to the charge of conspiracy, the government must establish each of the following three elements of the crime of conspiracy as charged in Count One beyond a reasonable doubt:

First: Two or more persons entered into the unlawful agreement to commit an offense against the United States as charged in the indictment;

Second: The defendant knowingly and intentionally became a member of the conspiracy;

Third: One of the members of the conspiracy knowingly committed at least one of the Overt Acts charged in the indictment in furtherance of the objective of the

conspiracy.

Let me address each of these elements:

1. *First Element: Agreement*

The first element of conspiracy requires proof beyond a reasonable doubt that two or more persons entered into an agreement to do something unlawful as charged in the indictment. In other words, one cannot commit the crime of conspiracy by oneself. Rather, the proof must convince you that at least two persons joined together in a common criminal scheme. In this case, the agreement charged is an agreement to engage in the robbery of the Post Office. I have previously explained to you the elements of robbery.

The gist of the crime of conspiracy is the unlawful combination or agreement to violate the law. Accordingly, a conspiracy, even if it should fail of its purpose, is nevertheless a crime.

Now, to prove that two or more persons entered into an agreement, the government need not establish that members of the conspiracy met together and entered into any express or formal agreement. You need not find that the alleged conspirators stated, in words or in writing, what the scheme was, its object or purpose, or the means by which it was to be accomplished. It is sufficient to show

that the conspirators tacitly came to a mutual understanding to accomplish an unlawful act by means of a joint plan or common design.

You may find that the existence of an agreement between two or more persons to engage in criminal conduct has been established by direct proof. But since a conspiracy is, by its very nature, characterized by secrecy, direct proof may not be available. You may, therefore, infer the existence of a conspiracy from the circumstances and the conduct of the parties involved. In a very real sense, then, in the context of conspiracy cases, actions often speak louder than words.

Proof concerning the accomplishment of the object of a conspiracy may be the most persuasive evidence of the existence of the conspiracy itself. In determining whether the particular conspiracy charged in the indictment actually existed, you may consider the evidence of the acts and conduct of the alleged conspirators as a whole and the reasonable inferences to be drawn from such evidence.

2. *Second Element: Knowing Participation*

The second element which the government must prove beyond a reasonable doubt to establish the offense of conspiracy is that the defendant knowingly, willfully, and voluntarily, became a participant in, or member of, the conspiracy charged.

If you are satisfied that the conspiracy existed, you must then ask yourselves

who the members of that conspiracy were. In deciding whether the defendant was, in fact, a member of the conspiracy charged, you should consider whether the government has proved beyond a reasonable doubt that the defendant knowingly and willfully joined the conspiracy. Did he participate in it with the knowledge of its unlawful purpose and with the specific intention of furthering its objective? In that regard, it has been said that in order for a defendant to be deemed a participant in a conspiracy he must have had a stake in the venture or in its outcome. This may, but need not necessarily be, a financial interest in the scheme. If you find that the defendant had such an interest, that is a factor which you may properly consider in determining whether or not the defendant was a member of the conspiracy charged in the indictment.

The key question is whether the defendant joined the conspiracy with an awareness of the basic aim and purpose of the unlawful agreement. The defendant need not have known the identities of each and every other member of the conspiracy. He need not have been fully informed as to all of the details or the scope of the conspiracy. He need not have been a member of the conspiracy for the entire time of its existence.

If the defendant did knowingly and intentionally participate in the charged conspiracy, the extent of his participation has no bearing on the issue of his guilt.

Each member of a conspiracy may perform separate and distinct acts and may perform them at different times. Some conspirators may play major roles, while others play minor parts in the scheme. Even if the defendant played only a minor role in the conspiracy, you may find him guilty of participation.

The government must prove beyond a reasonable doubt the defendant's participation in the conspiracy by proof based on reasonable inferences drawn from evidence of his own acts, conduct, statements or declarations, and his connection with the acts and conduct of other alleged co-conspirators.

I must caution you, however, that the defendant's mere presence at the scene of the alleged crime, assuming that you find that he was there, does not, by itself, make him a member of the conspiracy. Similarly, mere association with or relation to one or more members of the conspiracy does not make the defendant a member. A person may know, be friendly with, or work with a person engaged in criminal activity without being a criminal himself.

Mere similarity of conduct or the fact that they may have assembled together and discussed common aims and interests does not necessarily establish proof of the existence of a conspiracy, though you may consider any such evidence together with other evidence in deciding whether or not the government has met its burden of proof as to the defendant's knowing and willful membership in the conspiracy. I also want

to caution you that mere knowledge of, or acquiescence without participation in, the unlawful plan is not sufficient to prove membership. Moreover, the fact that the defendant, without knowledge, merely happens to act in a way that furthers the purpose or objective of the conspiracy, does not make him a member. More is required under the law.

What is required is that the defendant must have participated with knowledge of the purpose or objective of the conspiracy and with the intention of aiding in the accomplishment of those unlawful ends.

3. *Third Element: Overt Act*

The third element that must be proved beyond a reasonable doubt for Count One is that at least one of the Overt Acts charged in Count One was knowingly and willfully committed by one of the conspirators at or about the time and place alleged in furtherance of the object of the conspiracy. The indictment charges the following Overt Acts in this case:

> a. In October and November 2005, DERREK PANNELL, DARREN RUCKER and CIVILIZE AMENRA, together with others, met in Queens, New York to plan an armed robbery of the James E. Davis Post Office, located at 315 Empire Boulevard, Brooklyn, New York [].
>
> b. In October and November 2005, DERREK PANNELL, DARREN RUCKER and CIVILIZE AMENRA conducted surveillance of the interior and exterior of the Post Office.

An Overt Act means an act committed by any member of the conspiracy in an effort to accomplish a purpose of the conspiracy. The Overt Act need not be an unlawful act in and of itself, but it must be an act that promotes, aids, or assists the unlawful goal of the conspiracy.

The purpose of the overt act requirement is to be sure that a defendant is not convicted of conspiracy because of mere talk about criminal activity. He must, under the second element, have reached an agreement with others to engage in criminal activity; under the third element, one of the conspirators must have engaged in an Overt Act in furtherance of the conspiracy. In that regard, the agreement to commit a crime is not itself an Overt Act. The Overt Act must be an independent act that tends to carry out the crime. It need not be a criminal act, but it must be an act related to the agreement.

In order for the government to satisfy this element as to Count One it is not required that both of the Overt Acts alleged be proven. You must find that at least one of the alleged Overt Acts was committed, and your decision as to which one must be unanimous. That is, in regards to Count One, it would not be sufficient for six of you to find that Overt Act (a) was committed and six of you to find that Overt Act (b) was committed. All of you must agree on the same Overt Act.

Bear in mind that the Overt Act, standing alone, may be an innocent, lawful act.

Frequently, however, an apparently innocent act sheds its harmless character if it is a step in carrying out, promoting, aiding, or assisting the conspiratorial scheme. You are therefore instructed that the Overt Act does not have to be an act which, in and of itself, is criminal.

In sum, the burden is on the government to prove each essential element of the charged conspiracy beyond a reasonable doubt, namely:

One: that a conspiracy as charged in Count One existed to commit an offense against the United States;

Two: that the defendant knowingly and willfully became a member of that conspiracy;

Three: that at least one Overt Act was committed by at least one of the conspirators in furtherance of the conspiracy.

COUNT THREE:
FIREARM CHARGE

Count Three of the indictment charges as follows:

> On or about November 15, 2005, within the Eastern District of New York, the defendant[] DERREK PANNELL [], together with others, did knowingly and intentionally use and carry a firearm, to wit: a handgun, during and in relation to crimes of violence, to wit: the crimes charged in Counts One and Two, and did knowingly and intentionally possess that firearm in furtherance of those crimes, which firearm was brandished.

Section 924(c)(1)(A)(ii) of Title 18 of the United States Code states in pertinent part:

> . . . [A]ny person who, during and in relation to any crime of violence . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm [shall be guilty of a crime].

If you find that the government has failed to sustain its burden of proof as to Counts One and Two, then you will not proceed to Count Three. In order to find a defendant guilty of the crime charged in Count Three, you must have first found the defendant guilty of one of the "predicate" crimes charged in either Count One, conspiracy to commit robbery, or Count Two, robbery, and that during and in relation to the commission of those crime(s), the defendant knowingly used and carried a firearm. However, the defendant need not be guilty of both Counts One and Two before you may consider his guilt as to Count Three. You must find at least one of

the alleged predicate offenses was committed, and your decision as to which one must be unanimous. That is, in regards to Count Three, it would not be sufficient for six of you to find that Count One was committed and six of you to find that Count Two was committed. All of you must agree on the same predicate count.

A "firearm" is any weapon which will or is designed to or may readily be converted to expel a projectile by the action of an explosive. In order to satisfy this element, it is not necessary for the government to establish that the weapon was fired. Nor is it necessary the firearm be operable, but it must have been designed to expel a projectile by the action of an explosive. It is sufficient if the firearm furthered the commission of or was an integral part of a crime of violence.

The government must prove beyond a reasonable doubt that the defendant used or carried a firearm, as I will now define those terms. In order to prove that the defendant "used" the firearm, the government must prove beyond a reasonable doubt an active employment of the firearm by the defendant during and in relation to the commission of the crime of violence. This does not mean that the defendant must actually fire or attempt to fire the weapon, although those would obviously constitute "use" of the weapon. Brandishing, displaying, or even referring to the weapon so that the victims present knew that the defendant had the firearm available if needed all constitute "use" of the firearm. The term "brandish" means, with respect to a firearm,

to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person. However, the mere possession of a firearm at or near the site of the crime without active employment as I just described it is not sufficient to constitute a "use" of the firearm.

In order to prove that the defendant "carried" the firearm, the government must prove beyond a reasonable doubt that the defendant had the weapon within his control in such a way that it furthered the commission of the crime of violence or was an integral part of the commission of the crime.

To satisfy this element, you must also find that the defendant carried or used the firearm knowingly. This means that he carried the firearm purposefully and voluntarily, and not by accident or mistake. It also means that he knew that the weapon was a firearm. However, the government is not required to prove that the defendant knew that he was breaking the law.

Although there is a firearm charge for you to consider, that count of the indictment is not an accusation of possession of an unlicensed pistol in the city or state of New York. You have heard testimony that the defendant possessed a weapon that was unlicensed in New York. That is not an element of the crimes charged. Therefore, if you credit the testimony, you must nonetheless evaluate whether the

government has proved beyond a reasonable doubt the firearms charge based upon the instructions I have just given you.

Aiding and Abetting

As in Count Two, the defendant is again charged as an aider and abettor on Count Three. My earlier instruction on aiding and abetting applies as well to Count Three. You must consider whether, even if the defendant did not himself carry or use a firearm during and in relation to the corresponding crime of violence, he aided and abetted another in doing so, as I have already instructed you. Specifically, a person is guilty of aiding and abetting a violation of Section 924(c) if the evidence shows that (1) some person did actually use or carry a firearm during a crime of violence, as I have defined those terms earlier, and (2) the defendant (a) knowingly and willfully associated himself with that plan, i.e., the plan to use or carry a firearm, and (b) deliberately engaged in some act intended to contribute to its success.

I caution you that the defendant cannot be convicted as an aider and abettor under Section 924(c) merely because he knew that a firearm would be used or carried and, with that knowledge, performed an act to facilitate or encourage the conspiracy to commit robbery, or the robbery itself. Rather, you must find that the defendant knowingly and intentionally performed some act that directly facilitated or

encouraged the use or carrying of a firearm during a crime of violence, as I have defined those terms.

Co-Conspirator Liability

For Counts Two and Three, if you do not find that the government has satisfied its burden of proving that the defendant is guilty as an aider and abettor or as a principal, there is another method by which you may evaluate the defendant's possible guilt on these counts.

If you find, beyond a reasonable doubt, that the defendant was a member of the robbery conspiracy charged in Count One of the indictment, then you may also, but you are not required to, find him guilty of the substantive crimes charged in Count Two and Three, provided you find, beyond a reasonable doubt, each of the following elements:

> First, that the substantive crime charged in the count you are considering was committed by someone else;
>
> Second, that the person or persons who committed that substantive crime were members of the conspiracy charged in Count One;
>
> Third, that the substantive crime charged in the count you are considering was committed pursuant to a common plan and understanding you found to exist among the conspirators and in furtherance of that conspiracy;
>
> Fourth, that the defendant was a member of that conspiracy at the time

the substantive crime was committed; and

Fifth, that the defendant could reasonably have foreseen that the substantive crime charged either in Count Two or Three might be committed by his co-conspirators.

If the government has proven all five of these elements beyond a reasonable doubt, then you may find the defendant guilty of the substantive crimes charged against him in Counts Two and Three, even if he did not have actual knowledge of or participate in the acts constituting the crimes.

The reason for this rule is simply that a co-conspirator who commits a substantive crime pursuant to a conspiracy is deemed to be the agent of the other conspirators. Therefore, all of the co-conspirators must bear criminal responsibility for the commission of the foreseeable substantive crimes.

If, however, you are not satisfied as to the existence of any of these five elements, then you may not find the defendant guilty under this theory of the substantive crime charged in the count you are considering.

DELIBERATIONS

I will now give you some guidance for use in your deliberations.

WITNESS TESTIMONY

In a criminal case, a defendant cannot be required to testify, but in this case the defendant has chosen to do so. You are to evaluate his testimony in the same manner that you evaluate the testimony of the other witnesses.

You are the sole judges of the credibility or believability of the witnesses and the weight their testimony deserves. You should carefully scrutinize all the testimony given, the circumstances under which each witness testified, and other matters in evidence which tend to indicate whether a witness is worthy of belief. Your determination of the issue of credibility very largely must depend upon the impression that a witness makes upon you as to whether or not he or she is telling the truth or giving you an accurate version of what occurred.

If you believe that a witness has given false testimony with respect to a material fact, you may disregard the entire testimony of the witness. You may however accept part of the testimony. Bear in mind, a witness may have been mistaken or may have

lied as to part of the testimony, and yet be accurate and truthful as to other parts. The decision as to what to accept and what to reject is yours.

Consider each witness's motive and state of mind, possible partisanship in the case, and demeanor and manner while on the stand. Consider particularly the relationship each witness bears to either side of the case, the nature of that relationship, the manner in which each witness might be affected by the verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

The question really is, how did the witness impress you? Did the witness's version appear straightforward and candid or did the witness try to hide some of the facts? Is there a motive of any kind to testify falsely or truthfully or to shade the testimony offered? In other words, what you try to do, is to size the person up, just as you would do in any important matter when you are undertaking to determine whether or not a person is being truthful, candid, straightforward, or otherwise reliable.

That a witness may be employed as a law enforcement official or agent of the government does not mean that his or her testimony is deserving of more or less consideration or greater or lesser weight than that of an ordinary witness. You should evaluate such testimony in the same manner as you would the testimony of any other witness.

During this trial, both counsel asked certain witnesses to comment on the credibility of other witnesses. All determinations regarding the credibility of witnesses should be made by you the jury. Thus, you should disregard these questions and answers.

PRIOR INCONSISTENT STATEMENTS

You have heard evidence that witnesses made prior statements that counsel argues are inconsistent with the witnesses' trial testimony. If you find that a witness made an earlier statement that conflicts with his or her trial testimony, you may consider that fact in deciding how much of the witness's trial testimony, if any, to believe.

In making this determination, you may consider whether it was an innocent mistake; whether the inconsistency concerns an important fact, or whether it had to do with a small detail; whether the witness had an explanation for the inconsistency, and whether that explanation appealed to your common sense.

It is exclusively your duty, based upon all the evidence and your own good judgment, to determine whether the prior statement was inconsistent.

WITNESS'S FELONY CONVICTION

You have heard that Darren Rucker and Civilize Amenra were previously convicted of crimes punishable by more than one year in jail. These prior convictions were put into evidence for you to consider in evaluating the witness's credibility. You may consider the fact that the witness is a convicted felon in deciding how much of his testimony to accept and what weight, if any, it should be given.

TESTIMONY OF ACCOMPLICES / COOPERATING WITNESSES

You have heard testimony from certain witnesses, Darren Rucker and Civilize Amenra, admitting their own involvement in criminal conduct, including some of the conduct charged in the indictment. These witnesses have themselves pleaded guilty

to charges relating to this case. You are to draw no inferences or conclusions of any kind about the guilt of the defendant on trial from the fact that prosecution witnesses pleaded guilty to similar or related charges. Each witness's decision to plead guilty was personal to his own guilt and that decision may not be used as evidence against the defendant on trial.

I have already given you general instructions about factors you should consider in evaluating the testimony of any witness. There has, however, been much said about these so-called accomplice witnesses in the summations of counsel. Thus, I wish to give you further instructions relevant to your evaluation of their testimony.

The government argues, as it is permitted to do, that it must take the witnesses as it finds them. It argues that only people who themselves take part in criminal activity have the knowledge required to reveal criminal behavior by others. For that very reason, the law allows the use of accomplice testimony. Indeed, the testimony of an accomplice may be enough, by itself, to support a conviction, if the jury finds that the believable testimony establishes guilt beyond a reasonable doubt.

Because of the very nature of accomplice testimony, however, it must be scrutinized with great care and viewed with particular caution when you decide how much of that testimony to believe. You should, for example, ask yourselves whether an accomplice witness would benefit more by lying or by telling the truth.

In this case, you have heard that the accomplice witnesses, Darren Rucker and Civilize Amenra, entered into written plea agreements with the government that provided, in part, for them to give testimony in this case. The government agreed to reduce the charges, as to Mr. Rucker, and not to pursue other charges, as to Mr. Rucker or Mr. Amenra, in exchange for each witness's agreement to plead guilty and testify at trial. The government also agreed to bring any substantial assistance provided by a witness to the attention of the court for consideration at sentencing.

The government is permitted to enter into such agreements. But a witness who testifies pursuant to such an agreement does have an interest in this case different from an ordinary witness. This is why you must carefully scrutinize whether the testimony of such a witness was made up in any way because the witness believed or hoped that he would receive favorable treatment by testifying falsely. Or, ask yourselves, did the witness believe that his interests would be best served by

testifying truthfully? If you believe that the witness was motivated by hopes of personal gain, was the motivation one that would cause the witness to lie, or was it one that would cause the witness to tell the truth? Did this motivation color the witness's testimony?

A witness's understanding of his agreement and his expectations under that agreement may be more important to your assessment of his credibility than the actual terms of the agreement. Thus, I permitted examination of the cooperating witnesses regarding their expectations with respect to their sentence in light of their agreements with the government.

In this connection, you heard testimony about what has been referred to as a 5K1.1 letter from the government asking the court to sentence the witness below the Sentencing Guidelines. These Guidelines are advisory guidelines which the court must consider. In some cases, as with witness Darren Rucker, there are also mandatory minimum sentences in the plea agreement. If the prosecutor writes a letter to the court, stating that a defendant has provided substantial assistance in the investigation or prosecution of another person who has committed a crime, the court is empowered to impose a lower sentence than that called for under the Guidelines

and lower than the mandatory minimum sentence. The court may also, on its own, even in the absence of a letter from the government, consider whether a witness's cooperation with the government warrants a lower sentence than would otherwise be imposed. However, the court cannot sentence a defendant below the mandatory minimum unless the prosecutor writes a letter requesting it. Whether or not the government asks the court to reduce the witness's sentence based upon his cooperation, the final determination as to the sentence to be imposed and whether to consider the witness's cooperation rests with the Court.

I have now reached the final phase of these instructions.

JUROR'S RECOLLECTION GOVERNS

Your recollection of the evidence governs. Nobody else's. Not mine -- if I have made reference to the evidence -- and not counsel's recollection. It is your recollection that must govern during your deliberations. If necessary during those deliberations, you may request a reading from the trial transcript to refresh your recollection. Please, as best you can, try to be as specific as possible in your requests for read backs; in other words, if you are interested only in a particular part of a witness's testimony, please so indicate. It may take some time for us to locate the portion in the transcript, so please be patient.

You may also request that exhibits be sent to you in the jury room. If you do request exhibits do not write on them. We will provide you with all the paper you need.

As a general matter, if there is ever a delay in responding to a jury note, please understand there is a reason for it. None of us goes anywhere. As soon as a jury note is delivered to the Court by the Marshal, we turn our attention to it immediately.

If you have any questions about the applicable law and you want a further explanation from me, send me a note.

Let me make a suggestion regarding notes. Let one person write it, and someone else read it out loud, so that you will know that the note is legible and there will be no misunderstanding about what you want.

NOTES TAKEN BY JURORS

I also want to remind you of my instructions when I permitted you to take notes during the trial.

As I told you, your notes are not to substitute for your recollection of the evidence and a juror's notes are to be used solely by that juror. Remember, you can request that the official transcript be read to you. Most importantly, that some of you took notes and some did not does not entitle the views of those who took notes to any greater weight than the views of those who did not.

NO INVESTIGATION

In reaching a decision, you are to rely solely on the testimony of the witnesses

and the physical evidence introduced into evidence at trial. You are not to do any investigation on your own. Do not do any "research" such as consulting dictionaries or the internet.

DELIBERATIONS

You are entitled to your own opinions but you should exchange views with the other jurors and listen carefully to each other. Do not hesitate to change your opinion if you are convinced that another opinion is correct. But each of you must make your own decision.

JURY CHARGE

In a few minutes, I will supply you with several copies of my instructions. Keep in mind that you should consider the instructions as a whole. Each part of these instructions is important in your deliberations. And do not let my giving you my instructions in writing discourage you from requesting further instructions or clarification.

UNANIMOUS VERDICT

Any verdict you reach must be unanimous. That is, you must all agree as to

whether your verdict on a specific count is guilty or not guilty.

FOREPERSON

In order that your deliberations may proceed in an orderly fashion, you should have a foreperson. Traditionally, Juror Number One acts as foreperson. Of course, his vote is entitled to no greater weight than that of any other juror.

VERDICT SHEET

When you retire to the jury room, you will be given a verdict sheet which will be self-explanatory. When you are ready to report your verdict, the foreperson should check it carefully so that it accurately reflects the jury's verdict, and bring it to the courtroom when summoned. The foreperson will be asked to read the verdict sheet in response to questions from the Court.

COMMUNICATION WITH COURT

If you wish during your deliberations to communicate with the Court, for any reason, send me a note through the Marshal. No member of the jury should ever attempt to communicate with me by any means other than a writing; and I will never communicate with any member of the jury on any subject touching the merits of the

case, other than in writing, or, more likely than not, orally here in open court.

NO DISCUSSION

You will not discuss this case with anyone outside the jury room. And that includes the other jurors. You will only discuss the case when all 12 deliberating jurors are together, in the jury room, with no one else present, behind the closed door. At no other time is there to be any discussion about the merits of the case. Period.

NOT TO REVEAL STATUS

Bear in mind also that you are not to reveal to any person -- not even me -- how the jury stands numerically on the question of whether the defendant is guilty or not guilty, until after you have reached a unanimous verdict. At that time, you should simply send me a note saying, "We have reached our verdict." You will be summoned to the courtroom and I will take the verdict.

OATH

Your oath sums up your duty -- and that is, without fear or favor to any person, you will well and truly try the issues before these parties according to the evidence given to you in court, and the laws of the United States.