APPENDICES

A. *Bolden v. United States*, No. 17-1087 (8th Cir.) (Order 9/05/2019)

B. *Bolden v. United States*, No. 17-1087 (8th Cir.) (Order 5/23/2018)

C. *Bolden v. United States*, No. 4:10-cv-02288-CEJ (E.D. Mo.) (Memorandum & Order 11/18/2016), 2016 WL 6822126, 2016 U.S. Dist. LEXIS 160111

D. *Bolden v. United States*, No. 16-2437 (8th Cir. 12/20/2016)

E. Superseding Indictment

F. Trial Verdict Form

G. Trial Jury Instructions (excerpt), Trial Tr., Vol. 12

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-1087

Robert L. Bolden, Sr.

Appellant

v.

United States of America

Appellee

Government of Canada

Amicus on Behalf of Appellant(s)

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:10-cv-02288-CEJ)

ORDER

The application to expand certificate of appealability filed by Appellant Mr. Robert L. Bolden Sr. is denied.

September 05, 2019

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-1087

Robert L. Bolden, Sr.

Appellant

v.

United States of America

Appellee

Government of Canada

Amicus on Behalf of Appellant(s)

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:10-cv-02288-CEJ)

ORDER

A certificate of appealability is granted on the issues numbered 1, 2, and, 3 in Appellant's Application for a Certificate of Appealability. Specifically, the issues on which the certificate of appealability are granted are as follows:

1) Whether the lack of notification to Bolden of his rights under Article 36 of the Vienna Convention on Consular Relations or to Canada of Bolden's arrest and prosecution resulted in a violation of Bolden's constitutional rights;

2) Whether Bolden's trial counsel were deficient in their investigation and presentation of mitigating evidence during the penalty phase of the trial, and whether any such deficiency was prejudicial in violation of Bolden's constitutional rights; and

3) Whether the government suppressed or withheld immigration records from Bolden in violation of his constitutional rights under Brady v. Maryland, 373 U.S. 83 (1963).

The certificate of appealability is denied as to all other issues.

May 23, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ROBERT BOLDEN, SR.,	)	
	)	
Movant,	)	
	)	
vs.	)	Case No. 4:10-CV-2288 (CEJ)
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

MEMORANDUM AND ORDER

Before the Court is the motion of Robert Bolden, Sr., for leave to amend his motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. The United States has filed a response in opposition.

Following a jury trial, Bolden was found guilty of conspiring and attempting to commit bank robbery and, in so doing, killing a security guard with a firearm, in violation of 18 U.S.C. §§ 2113(a), (e) and (f) (Counts I and II); using a firearm during and in relation to the attempted bank robbery in Count II, in violation of 18 U.S.C. §§ 924(c)(1),(j)(1) and 2 (Count III); and being a convicted felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1) (Count IV). He received the death sentence on Counts II and III. After the convictions were affirmed on appeal, Bolden filed a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. On March 21, 2016, the Court denied the motion to vacate.

Bolden now seeks leave to amend his motion to vacate in order to assert a new claim based on the decision of the United States Supreme Court in *Johnson v. United States*, 135 S.Ct. 2551 (2015). In the proposed new claim, Bolden asserts that the attempted bank robbery charge in Count II no longer qualifies as a "crime

of violence" after *Johnson.* Thus, he argues, his conviction under 18 U.S.C. § 924(c)—using a firearm during and in relation to a crime of violence, *i.e.*, the attempted bank robbery—is invalid.

In *Johnson*, the Supreme Court held that the "residual clause" of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), is unconstitutionally vague. The ACCA enhances the punishment for firearms offenses under 18 U.S.C. § 922(g) when the defendant has at least three prior convictions for a serious drug offense or a "violent felony." 18 U.S.C. § 924(e)(1). The term "violent felony" is defined in the ACCA as felony offense that "(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (ii) is burglary, arson, or extortion, involves the use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another."* 18 U.S.C. § 924(e)(2)(B) (emphasis added). The "otherwise involves" language of the ACCA is the residual clause that the Supreme Court found unconstitutional. *Johnson*, 135 S.Ct. at 2563.

Bolden was not sentenced under the ACCA. Instead, he was found guilty of violating 18 U.S.C. § 924(c)(1) by using a firearm during a "crime of violence." The term "crime of violence" as used in § 924(c)(1) means a felony offense that "(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 924(c)(3). The "elements" language in § 924(c)(3)(A) is almost identical to that in 924(e)(2)(B)(i). In *Johnson* the Court made it clear that its ruling pertained only to the residual clause of the ACCA. *Johnson*, 135 S.Ct. at 2563 ("Today's decision does not call into

question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony."]. Thus, Bolden cannot claim that *Johnson* invalidated the "elements" language of § 924(c)(3)(A).

The definition of "crime of violence" in § 924(c)(3) contains no "otherwise involves" language like the definition of "violent felony" in 924(e)(2)(B)(ii) which the Supreme Court found unconstitutional. Nevertheless, Bolden asserts that the "risk" clause of § 924(c)(3)(B) is not materially different from the "otherwise involves" language in 924(e)(2)(B)(ii) and, thus by extrapolation, the "risk" clause is equally unconstitutional. Thus, he argues, his conviction under § 924(c)(1) can be sustained only if the offense of bank robbery under 18 U.S.C. § 2113(a) meets the definition of crime of violence in § 924(c)(3)(A)——*i.e*, it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another."

Section 2113(a), the bank robbery statute under which Bolden was convicted provides, in relevant part:

> Whoever, *by force and violence, or by intimidation, takes, or attempts to take from the person or presence of another*, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association . . . [s]hall be fined under this title or imprisoned not more than twenty years, or both. [emphasis added]

In *United States v. Boman*, 810 F.3d 534 (8th Cir. 2016), a case decided after *Johnson*, the court held that the defendant's prior conviction for using a firearm during the commission of a violent crime was a predicate offense that qualified him as an armed career criminal. The "violent crime" in dispute was federal robbery under 18 U.S.C. § 2111, which the court held was a "crime of violence" as defined in

§ 924(c)(3)(A). *Id*. at 542-43. In reaching its decision, the court considered the statutory language of § 2111 which provides that robbery is committed when a person "by force and violence, or by intimidation, takes or attempts to take from the person or presence of another anything of value." Thus, the court reasoned, the defendant's federal robbery conviction "had as an element the 'attempted use, or threatened use of physical force against the person of another.'" *Id.* at 543 [*quoting* 18 U.S.C. § 924(c)(3)(A)].

More recently, in *United States v. Allen*, 836 F.3d 894 (8th Cir. 2016), the Eighth Circuit considered the motion of a movant convicted of armed bank robbery for authorization to file a successive § 2255 motion based on the *Johnson* decision. The court denied the motion, "because bank robbery in violation of 18 U.S.C. § 2113(a) and (e) is a 'crime of violence' under 18 U.S.C. § 924(c)(3)(A)." *Id.* [*citing Boman*, 810 F.3d at 543]. Courts in other circuits have reached the same conclusion. In *United States v. Armour*, 2016 WL 6440383 at *2 (7th Cir. 2016), the court held that the *Johnson* decision was inapplicable to a defendant convicted under 18 U.S.C. § 924(c)(1)(A), "because the federal crime of attempted bank robbery qualifies as a crime of violence under the 'elements' clause of the definition, which is not unconstitutionally vague." Likewise, in *In re Hines,* 824 F.3d 1334, 1337 (11th Cir. 2016), the court wrote "a conviction for armed bank robbery clearly meets the requirement . . . to include as an element, 'the use, attempted use, or threatened use of physical force against the person of property of another.'" Finally, in *United States v. McNeal*, 818 F.3d 141, 152-53 (4th Cir. 2016), the court ruled that "armed bank robbery is unquestionably a crime of violence, because it 'has as an element the use, attempted use, or threatened use of physical force . . .'".

Based on the foregoing, the Court concludes that Bolden's conviction under §

924(c) is not invalidated by the decision in *Johnson.* Therefore, he would not be entitled to relief based on the claim asserted in the proposed amendment.

Accordingly,

IT IS HEREBY ORDERED that the movant's motion to amend the motion to vacate, set aside, or correct sentence [Doc. # 235] is **denied**.

CAROL E. JACKSON
UNITED STATES DISTRICT JUDGE

Dated this 18th day of November, 2016.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 16-2437

Robert L. Bolden, Sr.

Petitioner

v.

United States of America

Respondent

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis

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JUDGMENT

Before SHEPHERD, BOWMAN and KELLY, Circuit Judges.

The petition for authorization to file a successive habeas application in the district court is denied. Mandate shall issue forthwith.

December 20, 2016

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Appendix D

147 9-15-03

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. S1-4:02CR557 CEJ (AGF)**
	)	
ROBERT L. BOLDEN, SR.,	)	
	)	
	)	
Defendant.	)	
	)	

SUPERSEDING INDICTMENT

COUNT I

The Grand Jury charges that:

A. On or about October 7, 2002, in the Eastern District of Missouri,

ROBERT L. BOLDEN, SR.,

defendant herein, did unlawfully, knowingly and intentionally conspire, combine, confederate and agree with Dominick Price, Corteze Edwards and other persons known and unknown to the grand jury, to commit an offense against the United States of America, that is, the crime of armed robbery of a federally insured financial institution, in violation of Title 18, United States Code, Section 2113(a) and (f), by using force, violence and intimidation to take and attempt to take from the person of another, a quantity of United States currency belonging to, and in the care, custody, control, management and possession of Bank of America, the deposits of which were then insured by the Federal Deposit Insurance Corporation, and in committing such offense, did kill Nathan Ley.

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Appendix E

B. Overt Acts

In furtherance of said conspiracy and to effect the objects thereof, overt acts were committed in the Eastern District of Missouri, including but not limited to the following:

1. On or about October 7, 2002, Robert Bolden, Sr., Dominick Price and Corteze Edwards met at Robert Bolden Sr.'s residence at 1157 Howell in St. Louis, Missouri.

2. On or about October 7, 2002, Robert Bolden, Sr., Dominick Price and Corteze Edwards had a conversation in which it was agreed that they would rob the Bank of America at 9075 Goodfellow Blvd. in St. Louis, Missouri.

3. On or about October 7, 2002, Corteze Edwards acquired masks and a nylon head covering for use during the robbery of the Bank of America at 9075 Goodfellow.

4. On or about October 7, 2002, Robert Bolden Sr., possessed a Harrington and Richardson .22 caliber 9-shot revolver bearing serial number W2252.

5. On or about October 7, 2002, Robert Bolden Sr., Dominick Price and Corteze Edwards rode in Robert Bolden Sr.'s automobile, a 1986 Toyota Celica bearing Missouri temporary license C19-77T, from 1157 Howell to the parking lot of the C&W Chop Suey Restaurant, 9009 Riverview Drive in St. Louis, Missouri, across Goodfellow Blvd. from the Bank of America.

6. On or about October 7, 2002, Robert Bolden, Sr., Dominick Price and Corteze Edwards proceeded on foot to locations on or near the parking lot of the Bank of America at 9075 Goodfellow.

7. On or about October 7, 2002, Robert Bolden, Sr., approached Nathan Ley, the armed security guard on the parking lot of the Bank of America at 9075 Goodfellow.

8. On or about October 7, 2002, Robert Bolden, Sr. shot Nathan Ley with said revolver once

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in the left jaw with the bullet fracturing Nathan Ley's jaw traveling rightward and rearward through the back of his throat and striking his spinal column.

9. On or about October 7, 2002, with Nathan Ley stunned, incapacitated and unable to defend himself, Robert Bolden, Sr. carefully aimed his small caliber revolver at the top of Nathan Ley's head and fired a second shot, with the bullet entering the right side of Nathan Ley's head proceeding backward, downward and to the left, penetrating his skull, traveling through his brain and striking the inner wall of the left side of his skull and ricocheting back through the brain a short distance before coming to rest.

10. On or about October 7, 2002, Robert Bolden, Sr., Dominick Price and Corteze Edwards fled from the area of the parking lot of the Bank of America.

11. On or about October 7, 2002, Robert Bolden Sr. drove in his 1986 Toyota Celica to his residence at 1157 Howell in St. Louis County, Missouri.

12. On or about October 7, 2002, Dominick Price fled to a residential street near the Bank of America and abandoned the outer laying of his clothing in a trash can at 9247 Sundown Drive in St. Louis County, Missouri.

In violation of Title 18, United States Code, Section 371.

COUNT II

The Grand Jury further charges that:

On or about October 7, 2002, in the Eastern District of Missouri,

ROBERT L. BOLDEN, SR.,

defendant herein, acting with others, by force, violence and intimidation, did attempt to take from the person and presence of another, United States currency belonging to, and in the care, custody,

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control, management and possession of the Bank of America, the deposits of which were then insured by the Federal Deposit Insurance Corporation, and in committing such offense, did kill Nathan Ley.

In violation of Title 18, United States Code, Sections 2113(a) and (e) and 2.

COUNT III 7

The Grand Jury further charges that:

On or about October 7, 2002, in the Eastern District of Missouri,

ROBERT L. BOLDEN, SR.,

defendant herein, acting with others, knowingly used, carried, brandished and discharged a firearm during and in relation to a crime of violence which may be prosecuted in a court of the United States, to wit: the attempted armed robbery of a bank as charged in Count II herein; and that in so doing

ROBERT L. BOLDEN, SR.,

defendant herein, committed murder as defined in 18 U.S.C. §1111, that is, the unlawful killing of Nathan Ley with malice aforethought, such murder being willful, deliberate, malicious, premeditated and committed in the perpetration of an attempted robbery.

In violation of Title 18, United States Code, Sections 924(c)(1), (j)(1) and 2.

COUNT IV

The Grand Jury further charges that;

On or about October 7, 2002, in the Eastern District of Missouri,

ROBERT L. BOLDEN, SR.,

defendant herein, having been previously convicted of crimes punishable by imprisonment for a term exceeding one year under the laws of the State of Michigan, to wit:

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1. on or about February 4, 1993, in the Circuit Court of Kent County, Michigan, in Cause Number 93-61231-FH, Resisting and Obstructing a Police Officer;

2. on or about October 27, 1993, in the Circuit Court of Kent County, Michigan, in Cause Number 93-63555-FH, Attempt Possession With Intent to Deliver Cocaine; and

3. on or about May 30, 1995, in the Circuit Court of Kent County, Michigan, in Cause Number 94-1644-FHB, Delivery of Cocaine, Less than 50 Grams,

did knowingly possess a firearm, to wit: a Harrington and Richardson .22 caliber 9-shot revolver bearing serial number W2252, which had been transported in interstate commerce.

In violation of Title 18, United States Code, Section 922(g)(1).

SPECIAL FINDINGS AS TO ROBERT BOLDEN, SR.

1. The Grand Jury repeats and realleges the accusations of Counts II and III of this indictment.

2. Further, as to Counts II and III, the defendant **ROBERT BOLDEN, SR.,**

a. was 18 years of age or older at the time of the offenses;

b. intentionally killed Nathan Ley (18 U.S.C. §3591(a)(2)(A));

c. intentionally inflicted serious bodily injury that resulted in the death of Nathan Ley (18 U.S.C.§3591(a)(2)(B));

d. intentionally participated in one or more acts, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than a participant in the offense, and Nathan Ley died as a direct result of such act or acts (18 U.S.C. §3591(a)(2)(C));

e. intentionally and specifically engaged in one or more acts of violence, knowing that the act or acts created a grave risk of death to a person other than one of the participants in the

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offense, such that participation in such act or acts constituted a reckless disregard for human life, and Nathan Ley died as a direct result of such act or acts (18 U.S.C. §3591(a)(2)(D));

f. committed the offense as consideration for the receipt, and in the expectation of the receipt, of anything of pecuniary value (18 U.S.C. §3592(c)(8)); and

g. has previously been convicted of two (2) State offenses punishable by a term of imprisonment of more than one (1) year, committed on different occasions, involving the distribution of a controlled substance, to wit: 1) on or about October 27, 1993, in the Circuit Court of Kent County, Michigan in Cause Number 93-63555-FH, Attempt Possession With Intent to Deliver Cocaine; and 2) on or about May 30, 1995, in the Circuit Court of Kent County, Michigan in Cause Number 94-1644-FHB, Delivery of Cocaine, Less than 50 Grams (18 U.S.C. §3592(c)(10)).

A TRUE BILL.

_____

FOREPERSON

RAYMOND W. GRUENDER
United States Attorney

_____

STEVEN E. HOLTSHOUSER, #24277
MICHAEL A. REILLY, #43908
Assistant United States Attorneys

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
	)	
Plaintiff,	)	
	)	**No. S1-4:02CR557 CEJ**
v.	)	
	)	
ROBERT L. BOLDEN, SR.,	)	
	)	
	)	
Defendant.	)	

VERDICT

Count I

We, the jury, find defendant Robert L. Bolden, Sr. GUILTY [guilty or not guilty] of the crime of conspiracy to rob the Bank of America as charged in **Count I** of the indictment.

Count II

We, the jury, find defendant Robert L. Bolden, Sr. GUILTY [guilty or not guilty] of the crime of attempted robbery of the Bank of America in which defendant killed Nathan Ley as charged in **Count II** of the indictment.

We, the jury, having found defendant Robert L. Bolden, Sr. not guilty of the crime of attempted robbery of the Bank of America in which defendant killed Nathan Ley as charged in Count II or having been unable to reach a decision on said charge, find the defendant Robert L. Bolden, Sr. _____ [guilty or not guilty] of the lesser included offense of attempted robbery of the Bank of America.

Count III

We, the jury, find defendant Robert L. Bolden, Sr. GUILTY [guilty or not guilty] of the crime of using, carrying, brandishing or discharging a firearm during and in relation to a crime of violence in which defendant committed murder as charged in **Count III** of the indictment.

If you find the defendant "guilty," of the offense charged in Count III, you must answer the following:

Appendix F

Which of the following do you find were committed by defendant?

✓ Use

✓ Carry

✓ Brandish

✓ Discharge

(Check each which the jury unanimously agrees defendant committed)

We, the jury, having found defendant Robert L. Bolden, Sr. not guilty of the crime of using, carrying, brandishing or discharging a firearm during and in relation to a crime of violence in which defendant committed murder as charged in Count III or having been unable to reach a decision on said charge, find the defendant Robert L. Bolden, Sr. _____ [guilty or not guilty] of the lesser included offense of using, carrying, brandishing or discharging a firearm during and in relation to a crime of violence .

If you find the defendant "guilty," of the lesser included offense in Count III, you must answer the following:

Which of the following do you find were committed by defendant?

_____ Use

_____ Carry

_____ Brandish

_____ Discharge

(Check each which the jury unanimously agrees defendant committed)

Count IV

We, the jury, find defendant Robert L. Bolden, Sr. GUILTY [guilty or not guilty] of the crime of being a felon in possession of a firearm as charged in **Count IV** of the indictment.

May 11, 2006
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

UNITED STATES OF AMERICA,
---------- Plaintiff,

vs.

ROBERT BOLDEN, SR.,
---------- Defendant.

Case No.
4:02-CR-557-CEJ
VOLUME 12

BEFORE THE HONORABLE CAROL E. JACKSON
UNITED STATES DISTRICT JUDGE
TRIAL TRANSCRIPT
MAY 10, 11 & 12, 2006

COURT REPORTER: GARY BOND, RMR, RPR
THOMAS F. EAGLETON COURTHOUSE
111 S. TENTH STREET, THIRD FLOOR
ST. LOUIS, MISSOURI 63102
314.244.7980

Appendix G

deserves, considering the witness' education, experience, and the soundness of the reasons given for the opinion; the acceptability of the methods used; and all the other evidence in the case.

Certain summaries were also admitted in evidence during the trial. These summaries will be provided to you, and you may use the summaries as evidence, even though the underlying documents and records are not here.

Intent or knowledge may be proved like anything else. You may consider any statements made and acts done by the defendant and all the facts and circumstances in evidence which may aid in a determination of the defendant's knowledge and intent. You may but are not required to infer that a person intends the natural and probable consequences of acts that are knowingly done or knowingly omitted.

The government and the defendant have stipulated -- that is, they have agreed -- that certain facts are, as counsel stated, in the stipulation. You must therefore treat those facts as having been proved.

The indictment in this case charges the defendant with four different crimes. Under Count 1, the indictment charges that the defendant committed the crime of conspiracy to rob the Bank of America on October 7, 2002. Under Count 2, the indictment charges that the defendant committed the crime of attempting to rob the Bank of America on October 7,

2002; and that, in committing that offense, did kill Nathan Ley.

Under Count 3, the indictment charges that the defendant committed the crime of using, carrying, brandishing and discharging a firearm during the attempt to rob the Bank of America on October 7th, 2002; and that, in so doing, murdered Nathan Ley.

Under Count 4, the indictment charges that the defendant committed the crime of being a previously convicted felon and possessing a firearm on October 7, 2002, that had been transmitted in interstate commerce.

The defendant has pleaded "not guilty" to each of the four charges. As I told you at the beginning of the trial, an indictment is simply an accusation. It is not evidence of anything. The defendant, to the contrary, is presumed to be innocent. So the defendant, even though charged, begins the trial with no evidence against him.

The presumption of innocence alone is sufficient to find the defendant not guilty and may be overcome only if the government proves beyond a reasonable doubt each essential element of the crime charged. Please keep in mind that each count charges a separate crime. So you must consider each count separately and return a separate verdict for each count.

A "reasonable doubt" is a doubt based upon reason

and common sense and not the mere possibility of innocence. A "reasonable doubt" is the kind of doubt that would make a reasonable person hesitate to act. "Proof beyond a reasonable doubt" must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it; however, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

The indictment is based upon federal statutes which are federal law. Section 371 of Title 18 of the United States provisions in part that, "It is unlawful if two or more persons to conspire to commit any offense against the United States and one or more of such persons do any act to affect the object of the conspiracy."

Section 922(g)(1) of Title 18 United States Code provides that, "It shall be unlawful for any person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year to possess in or affecting commerce any firearm."

Section 924(c)(1)(a) of Title 18 of the United States Code provides in part that, "It is unlawful for any person during and in relation to any crime of violence for which the person may be prosecuted in a court of the United States to use or carry or brandish or discharge a firearm."

Section 924(j) of Title 18 United States Code provides in part that, "It is unlawful for a person who, in

the course of a violation of Subsection C, to cause the death of any person through the use of a firearm if the killing is a 'murder,' as defined in Section 1111 of the Title 18."

Section 1111(a) of Title 18 of the United States Code provides in part that, "'Murder' is the unlawful killing of a human being with malice aforethought. Every murder perpetrated committed in the perpetration of or attempt to perpetrate any robbery is murder in the first degree."

Section 9213(a) of Title 18 United States Code provides in part that, "Whoever by force and violence or by intimidation takes or attempts to take from the person or presence of another or obtains or attempts to obtain any property or money or any other thing of value belonging to or in the care, custody, control, management, or possession of any bank shall be guilty of an offense against the United States."

Section 2113(e) of Title 18 of the United States Code provides in part that, "Whoever in committing any offense defined in this section or in avoiding or attempting to avoid apprehension for the commission of such offense or in freeing himself or attempting to free himself from arrest or confinement for such offense kills any person or forces any person to accompany him without the consent of such person shall be guilty of an offense against the United States."

One of the instructions that will be provided to you -- and all of them is numbered. This one is numbered 17(a) -- is a replication of the indictment in this case; and I'm not going to read it to you. You'll have the opportunity to read it, and you should read it when you get the written instructions.

The crime of conspiracy as charged in Count 1 of the indictment has four essential elements, which are, one, on or about October 7, 2002, two or more persons reached an agreement or came to an understanding to rob the Bank of America; two, the defendant voluntarily and intentionally joined in the agreement or understanding either at the time it was first reached or at some later time while it was still in effect; three, at the time the defendant joined in the agreement or understanding, he knew the purpose of the agreement or understanding; and, four, while the agreement or understanding was in effect, a person or persons who had joined in the agreement knowingly did one or more of the overt acts listed in the indictment for the purpose of carrying out or carrying forward the agreement or understanding.

If all of the essential elements of the crime of conspiracy have been proved beyond a reasonable doubt as to the defendant and if it has further been proved beyond a reasonable doubt -- I am sorry. There is a mistake here.

Let me reread that paragraph. If all of these essential elements for the charge of conspiracy have been proved beyond a reasonable doubt as to the defendant, then you must find the defendant guilty of the crime charged under Count 1; otherwise, you must find the defendant not guilty of the crime charged under Count 1.

The government must prove that the defendant reached an agreement or understanding with at least one other person. It makes no difference whether that other person is a defendant or named in the indictment. You do not have to find that all of the persons charged were members of the conspiracy. The agreement or understanding need not be an expressed or formal agreement or be in writing or cover all of the details as to how it is to be carried out, nor is it necessary that the members have directly stated between themselves the details or purpose of the scheme.

You should understand that merely being present at the scene of an event or merely acting in the same way as others or merely associating with others does not prove that a person has joined in an agreement or understanding. A person who has no knowledge of a conspiracy but who happens to act in a way which advances some purpose of a conspiracy does not thereby become a member.

But a person may join in an agreement or understanding as required by this element without knowing all

of the details of the agreement or understanding and without knowing who all of the other members are. Further, it is not necessary that a person agree to play any particular part in carrying out the agreement or understanding. A person may become a member of a conspiracy even if that person agrees to play only a minor part in the conspiracy, as long as that person has an understanding of the unlawful nature of the plan and voluntarily and intentionally joins in it.

You must decide, after considering all of the evidence, whether the conspiracy alleged in Count 1 of the indictment existed. If you find that the alleged conspiracy did exist, then you must also decide whether the defendant voluntarily and intentionally joined the conspiracy either at the time it was first formed or at some later time while it was still in effect.

In making that decision, you must consider only evidence of the defendant's open actions and statements. You may not consider the actions and pretrial statements of others, except to the extent that the pretrial statements of others describe something that had been said or done by the defendant.

To assist you in determining whether there was an agreement or understanding to rob the Bank of America, you are advised that the elements of bank robbery are, first, taking money from the presence of another while that money

was in the care or custody of the Bank of America; second, such taking was by force and violence; and, third, the deposits of the Bank of America were then insured by the FDIC.

Keep in mind that the indictment in Count 1 charges a conspiracy to commit bank robbery and not that bank robbery was committed.

It is not necessary that the overt act done in furtherance of the conspiracy be in itself unlawful. It may be perfectly innocent in itself. I should mention to you that in the indictment in Count 1 there are allegations of overt acts committed in furtherance of the alleged conspiracy. So in these instructions, when I refer to "overt acts," I'm referring to the allegations that are in the indictment, which you will see when you read Instruction 17(a).

It is not necessary that the defendant have personally committed the act; known about it; or witnessed it. It makes no difference which of the conspirators did the acts. This is because a conspiracy is a kind of partnership. So that, under the law, each member of the conspiracy is an agent or partner of every other member; and each member is bound by or responsible for the acts of every other member that is done to further their scheme.

It is not necessary that the government prove beyond

a reasonable doubt that more than one act was done in furtherance of the conspiracy. It is sufficient if the government proves beyond a reasonable doubt one such act. But in that event, in order to return a verdict of guilty, you must unanimously agree on which act was done.

You may consider acts knowingly done and statements knowingly made by a defendant's co-conspirators during the existence of the conspiracy and in furtherance of it as evidence pertaining to the defendant, even though they were done or made in the absence of and without the knowledge of the defendant. This includes acts done or statements made before the defendant joined the conspiracy, because a person who knowingly, voluntarily, and intentionally joins an existing conspiracy is responsible for all of the conduct of the co-conspirators from the very beginning of the conspiracy.

In Count 2, which alleges attempted bank robbery in which Nathan Ley was killed, that charge has four essential elements, which are, one, the defendant attempted to take money from the presence of another while that money was in the care or custody of the Bank of America; two, such attempted taking was by force or violence; three, the deposits of the Bank of America were then insured by the FDIC; and, four, in committing such offense, the defendant did kill Nathan Ley.

If all of these essential elements have been proved beyond a reasonable doubt as to the defendant, then you must find the defendant guilty of the crime charged under Count 2; otherwise, you must find the defendant not guilty of the crime under Count 2.

Excuse me. The crime charged in Count 2 of the indictment is an attempt to rob a federally insured bank. A person may be found guilty of an attempted if he intended to rob a bank and voluntarily and intentionally carried out some act which was a substantial step toward that bank robbery.

A "substantial step," as used in the previous instruction, must be something more than mere preparation; yet it may be less than the last act necessary before the actual commission of the substantive crime. In order for behavior to be punishable as an "attempt," it need not be incompatible with innocence; yet, it must be necessary for the consummation of the crime and be of a nature that a reasonable observer, viewing it in context could conclude beyond a reasonable doubt that it was undertaken in accordance with the design to violate the statute.

If your verdict under Count 2 is "not guilty" or if after all reasonable efforts you are unable to reach a verdict on Count 2, then you should record that decision on the verdict form which will be provided to you and then go on to consider whether the defendant is guilty of the crime of

attempted bank robbery under this instruction.

The crime of attempted bank robbery, which is separate from the -- a different offense than the crime charged under Count 2. The crime of attempted bank robbery is a lesser-included offense of the crime charged in Count 2 of the indictment. And it has three essential elements which are, one, the defendant attempted to take money from the presence of another while that money was in the care and custody of the Bank of America; two, such attempted taking was by force and violence and; three, the deposits of the Bank of America were then insured by the FDIC.

For you to find the defendant guilty of this crime of a lesser-included offense under Count 2, the government must prove all of these essential elements beyond a reasonable doubt; otherwise, you must find the defendant not guilty of this crime.

The crime of using, carrying, brandishing, and discharging a firearm in furtherance of a crime of violence which results in murder as charged Count 3 of the indictment has four essential elements, which are, one, the defendant committed the crime of attempted bank robbery as charged in Count 2; second, the defendant knowingly used or carried or brandished or discharged a firearm during and in relation to that crime; and three, the defendant used the firearm to cause the death of Nathan Ley; and four, the killing of

Nathan Ley was murder in the perpetration of an attempted bank robbery.

"Murder" is the unlawful killing of a human being with malice aforethought. A killing is unlawful if done without legal justification. Killing is done with malice aforethought if it results from the perpetration of an attempted bank robbery in which the defendant was aware of a serious risk of death attending his conduct. Malice aforethought does not necessarily imply any ill-will, spite, or hatred toward the individual killed.

If all of the essential elements of this offense has been proved beyond a reasonable doubt as to the defendant, then you must find the defendant guilty of the crime charged under Count 3; otherwise, you must find the defendant "not guilty" of the crime under Count 3.

Count 3 of the indictment charges a crime that may be committed in one or more ways: One, use; two, carry; three, brandish; or four, discharge a firearm during and in relation to a crime of violence and in doing so committed murder. It is not necessary for the defendant to prove all of these. I am sorry. Excuse me. It is not necessary for the government to prove all of these. It is sufficient if the government proves beyond a reasonable doubt one of these.

But in that event in order to return a verdict of guilty, you must unanimously agree upon which of these the

government has proven beyond a reasonable doubt. If you cannot agree in that manner, then you must find the defendant not guilty as to Count 3. In this case, you must decide whether the defendant used, carried, brandished, or discharged a firearm or all of these.

To "use a firearm" means that it was actively employed in the course of the commission of the crime of attempted bank robbery. To "carry a firearm" means that means to have the firearm on the person of the defendant. "To brandish a firearm" means 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 the person. "To discharge a firearm" means to expel a projectile by means of an explosive from the firearm.

If your verdict under Count 3 is "not guilty," or if after all reasonable efforts you are unable to reach a verdict on Count 3, then you should record that decision on the verdict form and then go on to consider whether the defendant is guilty of the crime of using, carrying, brandishing, or discharging a firearm during a crime of violence under this instruction.

The crime of using, carrying, brandishing, or discharging a firearm during a crime of violence is a lesser-included offense of the crime charged in Count 3 of

the indictment, and it has three essential elements, which are, one, the defendant committed the crime of attempted bank robbery as charged in Count 2. And, two, the -- would you all step up, please?

(Whereupon, the following sidebar conference took place:)

THE COURT: Should have three elements.

MR. HOLTSHOUSER: I think it is two.

THE COURT: I don't know where this came from.

MR. HOLTSHOUSER: That should be a "three."

THE COURT: Oh, I'm sorry.

MR. HOLTSHOUSER: Yes, that should be "three."

MR. REILLY: You said "three," when you read the instruction. But it needs to be changed.

THE COURT: I'll read it again.

MR. HOLTSHOUSER: Two elements.

THE COURT: Two elements? Okay.

(Whereupon, the sidebar conference concluded.)

THE COURT: No matter how many pairs of eyes that look at these, there is always a mistake that we all miss. So I'm sorry. I've caught a couple of typographical errors. So I'm going to reread this instruction to you.

If your verdict under Count 3 is "not guilty" or if after all reasonable efforts you are unable to reach a verdict on Count 3, then you should record that decision on

the verdict form and go on to consider whether the defendant is guilty of the crime of using, carrying, brandishing, or discharging a firearm during a crime of violence under this instruction. The crime of using, carrying, brandishing, or discharging a firearm during a crime of violence is a lesser-included offense of the crime charged in Count 3 of the indictment.

And it has two essential elements, which are, one, that the defendant committed the crime of attempted bank robbery as charged in Count 2; and two, that the defendant knowingly used or carried or brandished or discharged a firearm during and in relation to that crime.

For you to find the defendant guilty of this crime, which is a lesser-included offense under Count 3, the government must prove all of these essential elements beyond a reasonable doubt; otherwise, you must find the defendant not guilty of this crime.

The crime of being a felon-in-possession of a firearm as charged in Count 4 of the indictment has three essential elements, which are, one, the defendant had been convicted of a crime punishable by imprisonment for a term exceeding one year; two, the defendant thereafter knowingly possessed a firearm, to wit, a Harrington & Richardson .22-caliber nine-shot revolver bearing serial number W2252; and, three, that at sometime prior to the defendant's

possession of the firearm, it was transported across a state line.

You are instructed that the government and the defendant have stipulated -- that is, they have agreed -- that, prior to October 7, 2002, the defendant was convicted of a felony crime. That is, a crime punishable by imprisonment for a term of more than one year. Accordingly, you must consider the first essential element of this offense in Count 4 as having been proved.

If you have found beyond a reasonable doubt that the firearm in question was manufactured in a state other than Missouri and that the defendant possessed that firearm in the State of Missouri, then you may but are not required to find that it was transported across a state line.

The term "firearm" means any weapon which will or is designed to or may readily be converted to expel a projectile by the action of an explosive. If all of these essential elements have been proved beyond a reasonable doubt as to the defendant, then you must find the defendant guilty of the crime charged under Count 4; otherwise, you must find the defendant not guilty of the crime charged in Count 4.

I believe in my earlier instructions to you I told you that sometimes evidence may be admitted for a limited purpose. It can be used for one purpose and not for any other. That has happened in this case. The parties have

stipulated that the defendant has been convicted of one or more felony offenses. This stipulation may be considered only as it relates to Count 4, the charge of felon-in-possession of a firearm. You may not consider the fact that the defendant has been convicted of one or more felony offenses in determining whether the government has proved the first three counts of the indictment.

Under the statute on which Count 4 is based, the length of time that a firearm was possessed is not relevant. Also, the mere possession of a firearm by a previously convicted felon is a violation of the laws of the United States. It is not necessary for the government to prove that the defendant knew it was unlawful for him to possess the firearm or to prove that the defendant knew that the firearm had travelled in interstate commerce. It is sufficient if you find beyond a reasonable doubt that the defendant knowingly possessed the firearm.

Under the statute on which Count 4 is based, the government must prove that the defendant possessed the firearm. The issue of who actually owned the firearm is not relevant to the issue of whether the defendant possessed it.

As you conduct your deliberations and return your verdict, there are certain rules that you all will have to follow. First of all, when you go to the jury room, you will select a member of the jury to serve as the foreperson. That