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APPENDIX A

Memorandum, United States Court of Appeals for the Ninth Circuit, No. 25-5757
(June 23, 2026)

NOT FOR PUBLICATION

FILED

JUN 23 2026

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. MALLORY NEHEMIAH BROWN, Defendant - Appellant.	No. 25-5757 D.C. No. 9:24-cr-00049-DLC-1 MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
Dana L. Christensen, District Judge, Presiding

Argued and Submitted June 10, 2026
Portland, Oregon

Before: CHRISTEN, HURWITZ, and BADE, Circuit Judges.

Mallory Brown pleaded guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). He appeals the district court's denial of his motion to withdraw his guilty plea and its determination that his previous conviction for bank robbery in violation of 18 U.S.C. § 2113(a) was a crime of violence under United States Sentencing Guideline § 2K2.1(a)(4).

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

We have jurisdiction under 28 U.S.C. § 1291. We review a denial of a motion to withdraw a guilty plea for abuse of discretion, *United States v. Rios-Ortiz*, 830 F.2d 1067, 1069 (9th Cir. 1987), and review de novo whether a conviction constitutes a crime of violence, *United States v. Villavicencio-Burruel*, 608 F.3d 556, 561 n.3 (9th Cir. 2010). We affirm.

1. The district court did not abuse its discretion by denying Brown's motion to withdraw his guilty plea after the government produced police reports and FBI phone recordings showing that Brown had asked law enforcement to collect his firearms. To withdraw his guilty plea, Brown must show that he subjectively did not know of the "new reason to withdraw his plea," that he objectively "could not have known about or foreseen" it, and that the reason "could at least plausibly have motivated [him] not to have pled guilty." *United States v. Hernandez*, 105 F.4th 1234, 1239-40 (9th Cir. 2024) (cleaned up).

Brown failed to show that he "could not have known about or foreseen this new material basis for withdrawal at the time of his plea." *Id.* at 1240 (cleaned up). As the district court noted, Brown "himself made the phone calls that resulted in the recordings." Brown could have reasonably foreseen that the police and FBI would have recorded or otherwise documented a phone call from a person seeking to surrender firearms.

Moreover, the district court did not abuse its discretion by finding that it could

not assess whether the new evidence was exculpatory—and therefore "could at least plausibly have motivated the defendant not to have pled guilty"—because Brown never submitted the evidence to the court. *Id.* at 1239 (cleaned up). Brown had the "burden to show a fair and just reason for withdrawal of a plea," *United States v. Nostratis*, 321 F.3d 1206, 1208 (9th Cir. 2003), and admitted below that the new evidence "cuts both ways." Brown's own description of the evidence suggests that he owned the firearms, contrary to his initial denial of ownership upon arrest. At most, the evidence shows mitigating circumstances, and Brown was able to so argue at sentencing.

2. Brown acknowledges that *United States v. Watson*, 881 F.3d 782, 786 (9th Cir. 2018) (per curiam), forecloses his argument that 18 U.S.C. § 2113(a), which outlaws both bank robbery and bank extortion, is indivisible and that bank robbery is therefore not categorically a crime of violence. He raises the issue only to preserve it for possible en banc consideration.

AFFIRMED.

APPENDIX B

Excerpts of Transcript of Sentencing, United States District Court for the District of Montana, No. 9:24-cr-00049-DLC-1 (Sept. 3, 2025) (ruling on crime-of-violence objection)

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United States Court Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. MALLORY NEHEMIAH BROWN, Defendant.	No. CR 24-49-M-DLC **TRANSCRIPT OF SENTENCING**

BEFORE THE HONORABLE DANA L. CHRISTENSEN
UNITED STATES DISTRICT COURT JUDGE
FOR THE DISTRICT OF MONTANA

Russell Smith United States Courthouse
201 East Broadway
Missoula, Montana 59802
Wednesday, September 3, 2025
13:30:16 to 14:46:35

Proceedings recorded by machine shorthand
Transcript produced by computer-assisted transcription

In your opinion, was that gun capable of accepting a high-capacity magazine?

A Yes, it is.

MR. LOWNEY: Nothing further, Your Honor.

THE COURT: Okay. Special Agent Hess, you may return to counsel table. Thank you.

THE WITNESS: Thank you, Your Honor.

THE COURT: Any other testimony, Mr. Lowney?

MR. LOWNEY: No, Your Honor.

THE COURT: Okay. So let's switch back over to the defense side here.

Mr. Landsiedel.

MR. LANDSIEDEL: Very well.

THE COURT: So as I understand it, your first objection is that -- is your argument that the conviction for bank robbery is not a crime of violence, and, in your supplemental sentencing memorandum, you concede that that argument has been rejected by the Ninth Circuit, *United States v. Watson*, 881 F.3d 782, and yet -- but you're making the objection to preserve the record on that one.

MR. LANDSIEDEL: That is correct, Your Honor.

THE COURT: Okay. And I don't think you need to have any further argument on that. I'm going to overrule that objection, but you have reserved it for purposes of appeal.

MR. LANDSIEDEL: Very well. Thank you, Your Honor.

defendant's, which -- hold on.

The first objection being that the conviction for bank robbery under 18 United States Code Section 2113(a), the defendant argues this is not a crime of violence. However, as we have already discussed, the Ninth Circuit has precluded that argument, at least under the current status of Ninth Circuit precedent, and so I'm overruling that objection. It has, however, been reserved for purposes of appeal.

The third objection -- we'll just jump to that one -- is whether or not the firearms were -- whether or not the serial numbers were either unmarked, removed, obliterated, or modified. And my conclusion is that there's ample evidence of obliterated serial numbers here as testified to by Special Agent Thomas Hess, so I'm overruling that objection.

As to the second objection, whether or not Mr. Brown's offense involved a semiautomatic firearm that is capable of accepting a large-capacity magazine, I think it's clear, based on the testimony, that this ghost gun, Exhibit G, 9-millimeter pistol/handgun made from a Polymer 80 kit, I don't think there's any question that it's capable of accepting a large-capacity magazine, thus leaving the question as to whether or not it is, in fact, a semiautomatic firearm. I mean, it looks like one. Looks like a Glock 9-millimeter.

However, it was not tested to determine if the semiauto was functioning. It wasn't fired. So I am hesitant

to conclude that it is, in fact, an operable semiauto, so I'm going to sustain the objection as it relates to that issue, which means that instead of a base offense level of 22, we're going to have a base offense level of 20 when I calculate the guidelines, which I'm going to do here very shortly.

Anything further in terms of objections, Mr. Landsiedel?

MR. LANDSIEDEL: No, Your Honor.

THE COURT: Mr. Lowney?

MR. LOWNEY: No, Your Honor.

THE COURT: Okay. Well, let me indicate for purposes of the record that Mr. Brown has pled guilty to Count 1 charging prohibited person in possession of a firearm pursuant to 18 United States Code Section 922(g)(1) and 18 United States Code Section 924(a)(8).

Mr. Brown has pled guilty without a plea agreement.

It is my obligation, as counsel are well aware, to summarize the punishments available to me this afternoon. Let's start with the guidelines, and then we'll summarize the statutory punishments.

The guidelines are summarized beginning at paragraph 20 of the presentence investigation report. As indicated, I am going to apply a Level 20 base offense level pursuant to 2K2.1(a)(4) in sustaining that objection of the defendant's. I'm going to add 2 levels pursuant to

Section 2K2.1(b)(1)(A) in that the offense conduct here involved four firearms. And I'm going to add 4 levels pursuant to Section 2K2.1(b)(4)(B)(i), resulting in an adjusted offense level of 26 from which I subtract 2 levels for acceptance of responsibility, an additional 1 level for timely notification of plea, resulting in a total offense level of 23.

We then turn our attention to Mr. Brown's criminal history, which is, at risk of understatement, extensive. He's got a subtotal criminal history score of 23. An additional 1 level is added pursuant to -- or 1 point is added pursuant to Section 4A1.1(e), producing a total criminal history score of 24 which establishes a criminal history category of VI.

So with a total offense level of 23, a criminal history of VI, that results in a recommended custodial sentence under the guidelines of 92 to 115 months to be followed by supervised release for a period of one to three years. Mr. Brown is not eligible for probation pursuant to the guidelines. A fine could be assessed in the range of $20,000 to $200,000. Restitution is not applicable, and we have a special assessment owing of $100.

Pursuant to the applicable statutes, I could sentence Mr. Brown to a custodial sentence of zero to 15 years followed by supervised release for a period of zero to three years. Mr. Brown is eligible for probation pursuant to

release. You haven't always been, obviously, successful on supervised release. Obviously, we need to, we need to address mental health treatment and substance abuse treatment as we go forward.

I am going to recommend, Mr. Brown, that you be placed at F, I believe it is, FDC SeaTac; yeah, FDC at SeaTac in Seattle where you can most likely get some intensive mental health treatment. They also, of course, have the RDAP program which I'm going to recommend.

And so the question is: What is the appropriate custodial sentence? I am going to impose a custodial sentence at the high end of the guidelines of 115 months, and I'm going to follow this by three years of supervised release.

So, Mr. Brown, if you would please stand, and I will pronounce sentence at this time.

THE DEFENDANT: (Complied with request.)

THE COURT: Mallory Nehemiah Brown, pursuant to the authority vested in me by the Constitution of the United States and the laws as enacted by the United States Congress as they have been interpreted by the United States Supreme Court and the Ninth Circuit Court of Appeals, it is my obligation to impose sentence on you.

I do so having considered all of the material that has been provided to me, the recommendations of counsel, the character letters submitted on your behalf, and your own

REPORTER'S CERTIFICATE

I, JoAnn Jett Corson, a Registered Diplomate Reporter and Certified Realtime Reporter, certify that the foregoing transcript is a true and correct record of the proceedings given at the time and place hereinbefore mentioned; that the proceedings were reported by me in machine shorthand and thereafter reduced to typewriting using computer-assisted transcription; that after being reduced to typewriting, a certified copy of this transcript will be filed electronically with the court.

I further certify that I am not attorney for, nor employed by, nor related to any of the parties or attorneys to this action, nor financially interested in this action.

IN WITNESS WHEREOF, I have set my hand at Missoula, Montana this 22nd day of October, 2025.

/s/ JoAnn Jett Corson

JoAnn Jett Corson
United States Court Reporter

APPENDIX C

Order Denying Rehearing En Banc, United States Court of Appeals for the Ninth Circuit, No. 25-5757 (July 30, 2026)

FILED

JUL 30 2026

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. MALLORY NEHEMIAH BROWN, Defendant - Appellant.	No. 25-5757 D.C. No. 9:24-cr-00049-DLC-1 District of Montana, Missoula ORDER

Before: CHRISTEN, HURWITZ, and BADE, Circuit Judges.

Judges Christen and Bade have voted to deny the petition for rehearing en banc, and Judge Hurwitz so recommends. The petition for rehearing en banc was circulated to the judges of the Court, and no judge requested a vote for en banc consideration. Fed. R. App. P. 40(c).

The petition for rehearing en banc, **Dkt. 26**, is **DENIED**.

APPENDIX D

Petition for Rehearing En Banc, United States Court of Appeals for the Ninth Circuit, No. 25-5757 (filed July 7, 2026)

No. 25-5757

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellee,

v.

MALLORY BROWN

Defendant-Appellant.

On Appeal from the United States District Court for the District of Montana
No. CR-24-49-M-DLC
Hon. Dana L. Christensen

APPELLANT'S PETITION FOR REHEARING EN BANC

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INTRODUCTION AND FRAP 40(b)(2) STATEMENT

Pursuant to Federal Rule of Appellate Procedure 40(b)(2), the undersigned states that the panel's decision conflicts with an authoritative decision of another United States court of appeals, *United States v. Burwell*, 122 F.4th 984 (D.C. Cir. 2024), and that this proceeding involves a question of exceptional importance: whether federal bank robbery under 18 U.S.C. § 2113(a) is categorically a crime of violence.

As argued below, federal bank robbery is categorically not a crime of violence. The statute is indivisible and can be completed via extortion, without ever using any violence. The D.C. Circuit conducted an extensive analysis and found that 18 U.S.C. § 2113(a) is indivisible. By contrast, a 2018 panel in this Circuit dedicated two paragraphs to the question, conducted no divisibility analysis, and summarily concluded that the statute is divisible. *United States v. Watson*, 881 F.3d 782 (9th Cir. 2018). *Watson* rests on incomplete grounds and should be revisited.

A circuit split exists on this narrow question. *Watson* and *Burwell* conflict. Other circuits have visited this issue, and all of them relied in part on *Watson's* conclusion. The panel in this case, bound by circuit precedent, faithfully applied *Watson*. Only this Court, sitting en banc, can correct *Watson*'s error.

ISSUE PRESENTED

A statute is "indivisible" if it provides multiple ways for a person to commit a single crime. A statute is "divisible" if it sets out separate elements for separate crimes. 18 U.S.C. § 2113(a) provides that a person commits bank robbery if they take property from a bank by force and violence, intimidation, or extortion. Extortion can be completed without using violence. Is the federal bank robbery statute indivisible, such that bank robbery is categorically not a crime of violence?

BACKGROUND

Mr. Brown has a 2004 federal conviction for bank robbery. In January of 2024, law enforcement arrested Mr. Brown and the government charged him with violating 18 U.S.C. § 922(g)(1). In January 2025, Mr. Brown pleaded guilty to the charge.

At sentencing, Mr. Brown argued that his predicate conviction under 18 U.S.C. § 2113(a) was categorically not a crime of violence. The district court, in accordance with *Watson*, concluded that § 2113(a) is a crime of violence and sentenced Mr. Brown to 115 months incarceration.

On appeal, Mr. Brown raised two issues: (1) whether the district court erred in not permitting him to withdraw his plea, and (2) whether federal bank robbery is categorically a crime of violence. The panel held oral argument on June 10, 2026. In a memorandum, the panel affirmed the district court in all respects. The panel

noted that Mr. Brown raised his § 2113(a) argument "only to preserve it for possible en banc consideration." Mem. at 3. Mr. Brown petitions for rehearing en banc to reexamine the holding and rationale in *Watson*.

ARGUMENT

I. § 2113(a) is indivisible.

Under the categorical approach, statutes are "indivisible" when they set out a single set of elements to define a single crime. *Mathis v. United States*, 579 U.S. 500, 504–05, 136 S. Ct. 2243, 2248, 195 L. Ed. 2d 604 (2016). Conversely, a statute is "divisible" when it lists elements in the alternative and thereby defines multiple crimes. *Id*. at 505. Whether or not a statute is divisible or indivisible is a question of statutory construction. "Statutory construction is a holistic endeavor, and, at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter." *United States v. Nishiie*, 996 F.3d 1013, 1020 (9th Cir. 2021) (quoting *U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc*., 508 U.S. 439, 455, 113 S.Ct. 2173, (1993) (internal quotations omitted)).

The structure and language of the statute itself indicate that it criminalizes one, single indivisible crime. The statute reads:

> 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; or
>
> Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—
>
> Shall be fined under this title or imprisoned not more than twenty years, or both.

Importantly, the extortion language is found in the same paragraph and the same sentence as the language criminalizing robbery "by force and violence, or by intimidation." If extortion were a standalone crime, Congress could have created a separate paragraph for extortion, or created a whole new subsection, like it did for bank larceny and receiving stolen bank property. *See* 18 U.S.C. § 2113(b) and (c). The fact that Congress inserted the extortion language into the same sentence as the "force and violence" language indicates that the statute is indivisible. In that same vein, Congress used semicolons elsewhere in the statute to delineate separate crimes. It did not do so in the first sentence of subsection (a). Instead, it relied on commas, again indicating that bank robbery may be completed by force and violence, intimidation, or by extortion. Finally, the penalty for bank robbery, no matter how it is completed, is the same: a maximum of 20 years imprisonment. As *Mathis* noted,

statutory alternatives carrying different punishments indicate different elements and thus a divisible statute. *Mathis*, 579 U.S. at 518. The inverse should hold true as well. A uniform penalty points to a single indivisible offense.

The statute, on its face, is indivisible. As the *Burwell* Court concluded, "The statute therefore is best read to contain two distinct elements: coming into possession of bank property and the unlawful means by which that occurs." *Burwell*, 122 F.4th at 991.

Digging further into the statutory history further supports this conclusion. Congress amended § 2113(a) in 1986 to add the extortion language via an amendment titled, "Addition of Extortion to Bank Robbery Offense." The *Burwell* court surmised that the title indicated that "Congress intended to 'add' extortion to the extant offense of bank robbery, rather than create a new separate and distinct bank extortion offense." *Id.* (citing *Almendarez-Torres v. United States*, 523 U.S. 224, 234, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998) ("[T]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute." (internal quotation marks omitted)).

The House Report accompanying the amendment noted that "Federal courts are divided over the question whether this provision proscribed extortionate conduct . . . Some courts have held that such conduct may be prosecuted under 18 U.S.C. 2113(a). Some courts have held that such conduct may be prosecuted under the

Hobbs Act. Still other courts have determined that such conduct may be prosecuted under either provision. . .” H.R. REP. 99-797, 32, 1986 U.S.C.C.A.N. 6138, 6155. The amendment thus existed to resolve a circuit split and make clear that “§ 2113(a) expressly cover[s] crimes of extortion directed at federally insured banks.” *Id*. As *Burwell* highlighted, “In other words, the report explains that bank robbery by extortion was covered by the pre-existing statutory language—meaning even before the 1986 amendment, extortion, just like ‘force and violence’ and ‘intimidation,’ was simply another means of committing the same crime. Congress merely ‘clarifi[ed]’ that § 2113(a) would be the only statute covering bank robbery and inserted ‘obtain by extortion’ to ‘expressly’ cover what the statute always did. In that way, the 1986 amendment was not creating an altogether separate offense.” *Burwell*, 122 F.4th at 991-92.

Both the statute on its face and its statutory history demonstrate that § 2113(a) is indivisible as to bank robbery and bank extortion. Despite this, other circuit courts have analyzed whether § 2113(a) is divisible, and all but *Burwell* have held that it is. The problem stems, in part, from *Watson*. There, the Court conducted no divisibility analysis and concluded simply this, “. . . § 2113(a) does not contain one indivisible offense. Instead, it contains at least two separate offenses, bank robbery and bank extortion.” *Watson*, 881 F.3d at 786 (citing *United States v. Jennings,* 439 F.3d 604, 612 (9th Cir. 2006), *United States v. Eaton*, 934 F.2d 1077, 1079 (9th Cir.

1991), 9th Cir. Crim. Jury Instr. 8.16). The problem, as *Burwell* points out, is that neither *Jennings* nor *Eaton* stand for the proposition that § 2113(a) is divisible. *Burwell*, 122 F.4th at 995–96 ("[*Jennings* and *Eaton*] neither conducted a divisibility analysis nor addressed in any way whether force and violence, intimidation, and extortion are alternative means or elements.").

The First, Second, Third, and Eleventh circuits all relied in part on *Watson* in finding § 2113(a) divisible. In 2019, the Second Circuit in *United States v. Evans* similarly concluded divisibility in cursory fashion, relying solely on *Watson* to do so. 924 F.3d 21, 28 (2d Cir. 2019). Then, in 2020, the First Circuit relied in part on both *Watson* and *Evans* to determine that § 2113(a) is divisible. *King v. United States*, 965 F.3d 60, 69 (1st Cir. 2020). In the last two years, the Third Circuit and Eleventh Circuit reached the same conclusion, and each court cited *Watson* to buttress its reasoning. *United States v. Armstrong,* 122 F.4th 1278, 1287 (11th Cir. 2024), cert. denied, 146 S. Ct. 613, 223 L. Ed. 2d 229 (2025), and *United States v. Vines*, 134 F.4th 730, 734 (3d Cir.), cert. denied, 146 S. Ct. 607, 223 L. Ed. 2d 226 (2025).

The problem is thus foundational. *Watson* gave short shrift to the indivisibility question, and then four other circuit courts relied in part on that conclusion to hold that § 2113(a) is divisible. *Watson* has had a cascading effect on

circuit courts around the country. The question of divisibility as to § 2113(a) deserves a far more thorough analysis than *Watson* provided.

II. Because § 2113(a) is indivisible, bank robbery is categorically not a crime of violence.

An offense is categorically a crime of violence only if the least violent form of the offense qualifies as a crime of violence. *Watson*, 881 F.3d at 784 (citing *Moncrieffe v. Holder*, 569 U.S. 184, 190–91 (2013)). To qualify under the force clause, an offense must require "'violent' physical force—that is, force capable of causing physical pain or injury." *Watson*, 881 F.3d at 784 (quoting *Johnson v. United States*, 559 U.S. 133, 140 (2010)). Extortion requires no such force. A defendant can obtain a bank's property by threatening to reveal the details of the bank president's steamy affair with a bank teller to the board and/or the bank president's spouse. This hypothetical defendant obtains bank property without ever using force or violence.

Because § 2113(a) is indivisible, nonviolent extortion is the least violent means of committing bank robbery, and the offense is therefore categorically not a crime of violence. Mr. Brown's sentence should be vacated.

CONCLUSION

For the foregoing reasons, Defendant-Appellant Mallory Brown respectfully requests that the Court grant rehearing en banc, vacate Mr. Brown's sentence, and remand for resentencing.

Respectfully submitted this 7th day of July 2026.

LEISHER & LANDSIEDEL P.C.

/s/ F. Peter Landsiedel
F. Peter Landsiedel
Counsel for Defendant-Appellant

CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULE 40-1 (FORM 11)

I certify that pursuant to Circuit Rule 40-1, the attached petition for rehearing en banc is prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(c)(2) and contains 1,904 words, which does not exceed the 4,200-word limit of Circuit Rule 40-1(b).

Respectfully submitted this 7th day of July 2026.

LEISHER & LANDSIEDEL P.C.

/s/ F. Peter Landsiedel
F. Peter Landsiedel
Counsel for Defendant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on July 7th 2026, I electronically filed the foregoing with the Clerk of the Court for the United States Court of appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third-party carrier for delivery within 3 calendar days, to the following non-CM/ECF participants: Mallory Brown, Defendant-Appellant.

Respectfully submitted this 7th day of July 2026.

LEISHER & LANDSIEDEL P.C.

/s/ F. Peter Landsiedel
F. Peter Landsiedel
Counsel for Defendant-Appellant