APPENDIX

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

CHARLES CHAVEZ,

Defendant-Appellee.

FILED
United States Court of Appeals
March 29, 2022
Christopher M. Wolpert
Clerk of Court

No. 20-2083

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. 1:19-CR-01818-MV-1)

Emil J. Kiehne, Assistant United States Attorney (John C. Anderson, United States Attorney, with him on the briefs), Office of the United States Attorney, Albuquerque, New Mexico, for Plaintiff-Appellant.

Aric G. Elsenheimer, Assistant Federal Public Defender, Office of the Federal Public Defender, Albuquerque, New Mexico, for Defendant-Appellee.

Before **BACHARACH**, **EBEL**, and **EID**, Circuit Judges.

EID, Circuit Judge.

Defendant-Appellee Charles Chavez is accused of attempting to force two individuals to withdraw their money from a bank automated teller machine ("ATM") at gunpoint, in violation of 18 U.S.C. § 2113(a) and (d), as well as 18 U.S.C. § 924(c)(1)(A)(ii). The district court dismissed these charges, reasoning that, had the accountholders completed the withdrawal as intended, Chavez would have taken the money from them, as opposed to from the bank that operated the ATM. The district court's decision aligns with the Fifth Circuit's approach to this issue but conflicts with the Seventh Circuit's. We side with the Seventh Circuit. Using force to induce a bank customer to withdraw money from an ATM is federal bank robbery, so Chavez cannot show that the government is incapable of proving that his specific conduct amounted to attempted federal bank robbery. Exercising jurisdiction under 18 U.S.C. § 3731, we reverse and remand.

I.

The following facts are undisputed at this stage, with one exception. On January 8, 2019, Charles Chavez, armed with a rifle, ran up to the passenger side of an occupied vehicle parked at a Wells Fargo ATM in Albuquerque, New Mexico. The ATM was not located on the premises of a Wells Fargo bank branch. Chavez demanded money from the vehicle's two occupants ("the accountholders"). The account holders, however, did not have any cash. Chavez demanded that they put a bank card into the ATM and make a withdrawal. They claimed that they could not make a withdrawal because they had just deposited a check (which had not yet cleared) and did not have other funds in their account. At that point, according to the government, a law enforcement

officer arrived on the scene, causing Chavez to change course. Chavez maintains that he changed course of his own accord, but this minor dispute of fact is not relevant. Either way, Chavez asked the accountholders for cigarettes and left. He was later arrested.

On June 27, 2019, a six-count indictment was returned against Chavez. Two of those counts—count 5 and count 6—are the subject of this appeal. Count 5 charged Chavez with, "by force, violence, and intimidation, . . . attempt[ing] to take from the person and presence of another a sum of U.S. currency belonging to and in the care, custody, control, management and possession of Wells Fargo Bank, . . . and in committing such offense, . . . assault[ing] and put[ting] in jeopardy the life of another person by use of a dangerous weapon," in violation of 18 U.S.C. § 2113(a) and (d). App'x at 8–9. Count 6 charged Chavez with "knowingly us[ing], carr[ying], and brandish[ing] a firearm, during and in relation to . . . attempted bank robbery with a dangerous weapon, as charged in Count 5 . . . , and in furtherance of such crime, possess[ing] and brandish[ing] said firearm," in violation of 18 U.S.C. § 924(c)(1)(A)(ii). *Id.* at 9.

After he was indicted, Chavez moved to dismiss counts 5 and 6. He contended that "the facts . . . fall outside of the relevant criminal statute" and are "insufficient to establish a basis for attempted bank robbery." *Id.* at 11–12. He maintained that "[b]ecause [he] did not commit the crime of attempted bank robbery, there is no federal jurisdiction—no crime for which [he] may be prosecuted in a court of the United States—for the charge under § 924(c) in count six." *Id.* at 15.

The district court granted Chavez's motion. Deeming Chavez's case to "fall[] within the limited scenario in which the operative facts are undisputed and a purely legal issue is presented," the district court assessed "whether, as a matter of law, the conduct alleged by the government constitutes a submissible case." *Id.* at 42. The key question, it determined, was "whether an individual violates 18 U.S.C. § 2113(a) when he forces someone to make a withdrawal from an ATM." *Id.* at 44. That turned on whether Chavez would have taken "money belonging to, or in the care, custody, control, management, or possession of [a] bank." *Id.* at 46. In the district court's view, he would not have. The court took the position that "the relevant time at which the money must be in the 'care, custody, control, management, or possession of, any bank' is the time of the transfer of the money from the victim to the defendant." *Id.* (quoting 18 U.S.C. § 2113(a)). "[A]lthough the bank undoubtedly had a property interest in the money while it was still in the ATM," the district court explained, "it no longer would have had such a property interest once the money was withdrawn." *Id.* at 48. Accordingly, the district court concluded that, "as a matter of law, Mr. Chavez's actions did not violate" the statute. *Id.* It added that "Count 6 of the Indictment is predicated on Count 5," so "Count 6 must also be dismissed." *Id.*

The government appeals. *See* 18 U.S.C. § 3731. Neither party disputes that if count 5 was properly dismissed, count 6 was properly dismissed as well. As a result, the issue presented is whether the government is incapable of showing that Chavez's conduct amounted to attempted bank robbery in

violation of 18 U.S.C. § 2113(a) and (d), as charged in count 5.

II.

A court may dismiss an indictment before trial, in whole or in part, for "failure to state an offense." Fed. R. Crim. P. 12(b)(3)(B)(v). However, pretrial dismissals based on "facts outside the indictment and bearing on the general issue" of guilt are uncommon. *United States v. Pope*, 613 F.3d 1255, 1260 (10th Cir. 2010). We have held that "courts may entertain" this type of dismissal "in the 'limited circumstances' where '[1] the operative facts are undisputed and [2] the government fails to object to the district court's consideration of those undisputed facts,' and [3] the district court can determine from them that, '*as a matter of law*, the government is incapable of proving its case beyond a reasonable doubt.'" *Id.* (alterations and emphasis in original) (quoting *United States v. Hall*, 20 F.3d 1084, 1088 (10th Cir. 1994)).

"[A] pretrial dismissal" of this sort "is essentially a determination that, *as a matter of law*, the government is incapable of proving its case beyond a reasonable doubt." *Hall*, 20 F.3d at 1088. Such a dismissal is appropriate "only when and 'because undisputed evidence shows that . . . the [d]efendant could not have committed the offense for which he was indicted.'" *Pope*, 613 F.3d at 1261 (quoting *United States v. Todd*, 446 F.3d 1062, 1068 (10th Cir. 2006)). "If contested facts surrounding the commission of the offense would be of *any* assistance in determining the validity of the motion," the prosecution must continue. *Id.* at 1259. Any other approach would "risk trespassing on territory reserved to the jury as the ultimate finder of fact in our criminal justice system."

Id. We agree that the district court properly evaluated the substance of the motion to dismiss because all operative facts outside the indictment were undisputed. Our review of its decision on the merits of the motion is de novo. *Hall*, 20 F.3d at 1088.

III.

Chavez was charged with attempted bank robbery under 18 U.S.C. § 2113(a), which imposes criminal liability on "[w]hoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another . . . money . . . belonging to, or in the care, custody, control, management, or possession of, any bank." Section 2113(d) adds that "[w]hoever, in committing, or in attempting to commit, any offense defined in subsection[] (a) . . . , assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device," is subject to an enhanced maximum sentence. The dispute here concerns solely § 2113(a).

Although the government appeals the dismissal of Chavez's attempted bank robbery charge, we agree with the parties and the district court that the legal question we must ultimately decide to resolve this appeal is whether the federal bank robbery statute covers successfully coercing an ATM withdrawal. We answer that question in the affirmative. First, however, we explain why the question on appeal concerns the completed offense, even though Chavez has not been charged with it.

a.

This case concerns the scope of the completed offense of federal bank robbery because Chavez's arguments for dismissal necessarily raise the legal impossibility defense. That defense turns on whether

Chavez's conduct, as he understood and intended it, would fall within the statute. "Under federal law, 'attempt generally requires both (1) an intent to commit the substantive offense, and (2) the commission of an act which constitutes a substantial step towards commission of the substantive offense.'" *United States v. Faulkner*, 950 F.3d 670, 676 (10th Cir. 2019) (brackets omitted) (quoting *United States v. Gordon*, 710 F.3d 1124, 1150 (10th Cir. 2013)). Chavez did not argue before the district court, nor does he argue now, that he lacked the intent to steal money from the ATM or that holding the accountholders at gunpoint was not a "substantial step" toward doing so. Instead, Chavez's narrow argument remains that, had he successfully coerced the accountholders into withdrawing money from the ATM, his conduct would nonetheless fall outside the federal bank robbery statute's scope because the money would have belonged to the accountholders, and not the bank, at the time he would have taken it. That argument clearly sounds in legal impossibility, although the parties have not used that term in their briefing. *See United States v. Aigbevbolle*, 827 F.2d 664, 666 n.2 (10th Cir. 1987) (referencing legal impossibility defense).

The legal impossibility defense to an attempt crime generally applies to "a situation 'when the actions which the defendant performs or sets in motion, even if fully carried out *as he desires*, would not constitute a crime.'" *United States v. Farner*, 251 F.3d 510, 513 (5th Cir. 2001) (quoting *United States v. Oviedo*, 525 F.2d 881, 883 (5th Cir. 1976)). Legal impossibility is distinct from factual impossibility, which is typically not a valid defense to attempt. Factual impossibility is where a defendant argues

that the course of conduct that he attempted to carry out would not, in fact, be criminal—usually for a reason unknown to the defendant. *Id.* at 512. For example, perhaps the defendant was unaware that a "bomb" he used was a fake, or that a "minor" he contacted was undercover and overage. Factual impossibility is not a defense to attempt because, under the circumstances as the defendant believed them to be, the defendant was still pursuing a criminal design. In contrast, legal impossibility comes up in fact patterns where the defendant's plans were arguably outside a statute entirely. *See United States v. Ballinger*, 395 F.3d 1218, 1238 n.8 (11th Cir. 2005) (en banc) ("[I]f the completed offense would not be a crime, neither is a prosecution for attempt permitted."). Although the line between factual and legal impossibility can sometimes be difficult to draw, *see Farner*, 251 F.3d at 512, we think Chavez's argument raises legal impossibility because he contends that, under the facts as he believed them to be, his course of conduct, if completed, would not have violated the statute.

We have endorsed the general view that factual impossibility is not a defense to attempt crimes. *See United States v. Hankins*, 127 F.3d 932, 934–35 (10th Cir. 1997). We have also acknowledged the legal impossibility defense. *See Aigbevbolle*, 827 F.2d at 666 n.2. However, we have not previously decided the extent to which federal law provides for a legal impossibility defense to attempt, either as a general matter or in the context of the federal bank robbery statute. *Cf. United States v. Tykarsky*, 446 F.3d 458, 466 (3d Cir. 2006) ("[I]t is well established in [the Third Circuit] that the availability of legal impossibility as a defense to a crime is a matter of

legislative intent."). For purposes of this appeal, we will assume without deciding that legal impossibility is a defense to attempt in this circuit, meaning that it would be a permissible basis for affirming the dismissal of Chavez's attempted bank robbery charge. This appeal thus turns on whether, had the accountholders withdrawn money, Chavez would have committed federal bank robbery under 18 U.S.C. § 2113(a). If so, Chavez's attempt charge would not be invalid as a matter of law. If not, it follows that the indictment, to the extent it charged Chavez with attempting to force the accountholders to withdraw money, would fail to state an offense and be subject to dismissal. *See* Fed. R. Crim. P. 12(b)(3)(B)(v).

b.

18 U.S.C. § 2113(a) provides, in relevant part, that "[w]hoever, by force and violence, or by intimidation, takes . . . from the person or presence of another . . . money . . . belonging to, or in the care, custody, control, management, or possession of, any bank" commits federal bank robbery. We are not the first circuit asked whether § 2113(a) encompasses a robbery in which a bank customer is forced to withdraw money from an ATM. The Fifth and Seventh Circuits have both addressed this question, and they have reached opposite conclusions.

In *United States v. McCarter*, 406 F.3d 460 (7th Cir. 2005) (Posner, J.), *overruled on other grounds by United States v. Parker*, 508 F.3d 434, 440–41 (7th Cir. 2007), the Seventh Circuit held that a man who accosted a woman in a parking garage and, at gunpoint, attempted to force her to drive to an ATM to withdraw funds was guilty of attempted federal bank robbery. *Id.* at 461–63. In reaching that

conclusion, the Seventh Circuit determined that applying § 2113(a) to the facts before it depended on two key questions: "first, on whether money in an ATM is 'in the care, custody, control, management, or possession of, any bank,'" and, "second, on whether forcing a customer to withdraw cash from an ATM is robbing the bank rather than robbing just the customer." *Id.* at 462–63 (quoting 18 U.S.C. § 2113(a)). The answer to the first question was "obviously" yes, in the court's view. *Id.* at 462. That was also its answer to the second question. *Id.* at 463. The Seventh Circuit explained that a fact pattern where "the depositor is robbed of the money he has just withdrawn after he leaves the bank" falls outside the statute, but reasoned that "if . . . [a] robber forces [a] bank's customer to withdraw . . . money, the customer becomes the unwilling agent of the robber, and the bank is robbed." *Id.* The court concluded that the defendant had attempted federal bank robbery. *Id.*

A few months after *McCarter*, the Fifth Circuit issued a conflicting ruling in a case involving the completed offense. In *United States v. Burton*, 425 F.3d 1008 (5th Cir. 2005), a man grabbed a woman as she left a post office, took her to a drive- through ATM, and forced her to withdraw money from her account. *Id.* at 1009. Observing that § 2113(a) applies when money "belong[s] to" or is in "the care, custody, control, management, or possession" of a bank, the Fifth Circuit considered whether either requirement was satisfied. *Id.* at 1010. Starting with whether the stolen funds belonged to the bank, the Fifth Circuit held that they did not. *Id.* The defendant, the Fifth Circuit noted, "knew [the bank customer's] account had sufficient funds." *Id.* Hence, "[t]his [was] not a

case in which the defendant sought the bank's money." *Id.* Rather, the bank customer "made a valid—albeit coerced— withdrawal of her own funds, which [the defendant] then stole." *Id.* The money the defendant took belonged to the bank customer, not the bank, in the court's view. *See id.* The Fifth Circuit also held that the funds were not in the bank's care, custody, control, management, or possession. It reasoned that § 2113(a) directed it to "only consider 'the care, custody, control, management, or possession' at the time of the transfer to [the defendant]." *Id.* That temporal requirement was not satisfied, the Fifth Circuit said, because "[r]egardless of how brief [the bank customer's] possession, the bank did not have 'care, custody, control, management, or possession'" of the money after the bank customer took it from the ATM. *Id.* at 1011. The court concluded that the defendant had not committed federal bank robbery.

The Fifth Circuit's holding in *Burton* followed largely from its earlier decision in *United States v. Van*, 814 F.2d 1004 (5th Cir. 1987). In *Van*, two men abducted a woman's two-year-old daughter and held her for ransom, directing the woman to withdraw money from her bank account and deliver it to them at a convenience store several miles away from the bank. *Id.* at 1005 & n.1. The next day, accompanied by a friend and a hidden FBI agent, the woman made the withdrawal and followed the kidnappers' instructions to recover her daughter. The men were charged with federal bank robbery. *Id.* at 1004. The Fifth Circuit determined that the men had not taken money belonging to or in the care, custody, control, management, or possession of a bank. *Id.* at 1006–07. It reasoned that "when [the money] was turned over

to" the men, it "was [the woman's] private funds and in her care, custody and control." *Id.* at 1007.

The Fifth Circuit relied on *Van* in *Burton* when it stated that the relevant time for evaluating whether money taken by a defendant belonged to a bank was the moment of transfer to the defendant. *Burton*, 425 F.3d at 1010. Observing that *Van* was "directly on point and controlling," it emphasized that the victim "inserted her ATM card, entered her PIN, and withdrew money from her account," which had sufficient funds, before the defendant stole it from her. *Id.* For its part, the Seventh Circuit cited *Van* in *McCarter* to support the proposition that "[i]f the depositor is robbed of the money he has just withdrawn after he leaves the bank, that is not a bank robbery," which the court distinguished from the proposition that "if . . . the robber forces the bank's customer to withdraw the money, the customer becomes the unwilling agent of the robber, and the bank is robbed." *McCarter*, 406 F.3d at 463.

c.

The issue is whether the money in the ATM would have "belong[ed] to" or been "in the care, custody, control, management, or possession of" Wells Fargo at the time that Chavez would have taken it "from the person or presence of another." *See* 18 U.S.C. § 2113(a).[1] We side with the Seventh Circuit and hold that directly forcing a bank customer to withdraw money from an ATM qualifies as federal bank robbery in violation of 18 U.S.C. § 2113(a) because the funds

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[1] We assume without deciding that the person-or-presence requirement would be met with respect to a forced withdrawal by the bank customers because the issue is not presented on appeal and was not addressed by the district court.

belonged to the bank at the time of the coerced withdrawal. That result leaves no room for dismissing the challenged counts under Chavez's legal impossibility argument, so the decision below must be reversed.

First, we agree with the Seventh Circuit that money in an ATM is "obviously" bank money under 18 U.S.C. § 2113(a). *See McCarter*, 406 F.3d at 462 (concluding that money in an ATM is in the care, custody, control, management, or possession of a bank); *see also Shaw v. United States*, 137 S. Ct. 462, 466 (2016) ("When a customer deposits funds, the bank ordinarily becomes the owner of the funds."). If Chavez were to take money from an ATM directly, he would be taking a bank's money within the statute's contemplation.

We also agree with the Seventh Circuit—as well as the Fourth Circuit and the Massachusetts Supreme Judicial Court, which have followed the Seventh Circuit's lead—that when "[a] robber forces [a] bank's customer to withdraw . . . money, the customer becomes the unwilling agent of the robber, and the bank is robbed." *McCarter*, 406 F.3d at 463; *see also United States v. Johnson*, 915 F.3d 223, 232 (4th Cir. 2019) ("Federal law . . . covers robbery by conscription."); *Commonwealth v. McGhee*, 25 N.E.3d 251, 255 (Mass. 2015). It is no different than "if the defendant had planned to have a confederate remove the money from the ATM." *McGhee*, 25 N.E.3d at 255. That means that if Chavez had succeeded in compelling the accountholders to withdraw money from the ATM, he would have stolen money from the bank through the accountholders, who were his "unwilling agent[s]." *See McCarter*, 406 F.3d at 463. We reject the Fifth Circuit's position that the

ownership of the money is not measured until the defendant physically places his hands on it, without regard to how the defendant acquired it. Not only would this produce absurd results, but the statute's text plainly calls for evaluating the money's status at the time of its "tak[ing]." 18 U.S.C. § 2113(a). In this case, the money would have been taken when the accountholders completed the coerced withdrawal.[2] We conclude that, had Chavez completed the course of conduct he attempted, he would have committed federal bank robbery under 18 U.S.C. § 2113. That result forecloses Chavez's legal impossibility argument, which means the attempt count, and the count predicated upon the attempt count, should not have been dismissed before trial.

We disagree with the Fifth Circuit's contrary approach. That court held that a forced withdrawal from an ATM can be "valid" even though "coerced." *Burton*, 425 F.3d at 1010. That aspect of its holding largely followed from *Van*. In the first place, we are not obligated to follow the Fifth Circuit's line of cases and, for the reasons above, we think *McCarter* was correct. A directly coerced withdrawal is not somehow "valid" enough to move these facts outside 18 U.S.C. § 2113(a).

Moreover, *Van* can be distinguished, just as it was distinguished in *McCarter*, because Chavez's control over the accountholders in this case would have been

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[2] We need not consider whether Chavez intended to take the money from the ATM tray himself, intended to demand that the accountholders hand it to him, or had other plans. For purposes of refuting Chavez's legal impossibility argument, the money would have been Wells Fargo's when the accountholders withdrew it as Chavez demanded.

much more immediate than the control exercised in *Van*. *See McCarter*, 406 F.3d at 463 (citing *Van* for proposition that where a "depositor is robbed of . . . money he has just withdrawn after he leaves the bank, that is not a bank robbery"). The men in *Van* told the woman to withdraw money from her bank account to get her daughter back. *See Van*, 814 F.2d at 1005. But the men were not with the woman when she withdrew the funds. Although it was unlikely that she could have obtained $4,000 without accessing her bank account, the men did not ultimately know where the money she handed over had come from. After all, she started working with the authorities immediately, and had an FBI agent in her car when she withdrew the funds and made the handoff. Here, by contrast, Chavez would have been present when the withdrawal occurred. With a gun pointed at the accountholders, he was positioned to direct every aspect of the withdrawal. Whereas the men in *Van* used the woman's kidnapped daughter as a means to obtain her money, which happened to be housed in a bank, Chavez used the accountholders as a tool to take from the bank by exploiting their access to funds in the ATM. *Cf. Burton*, 425 F.3d at 1010 ("This is not a case in which the defendant sought the bank's money."). The control exercised by the men in *Van* may not have sufficed to render the woman their agent during the bank withdrawal for purposes of § 2113(a), but we have no doubt that Chavez's control over the accountholders here would have cleared that threshold, rendering them, in *McCarter*'s terms, "unwilling agent[s]" of Chavez.

In sum, we adopt the Seventh Circuit's approach to 18 U.S.C. § 2113(a), distinguishing and rejecting that of the Fifth Circuit. Because Chavez would have

committed the offense of federal bank robbery if the accountholders completed the ATM withdrawal, his legal impossibility argument fails. Accordingly, we conclude that the government has stated an offense and the district court erred by dismissing counts 5 and 6.

IV.

We REVERSE the district court's dismissal of counts 5 and 6 of the indictment and REMAND for further proceedings consistent with this opinion.

United States v. Chavez, No. 20-2083
EBEL, J., concurring

I concur in the majority opinion. However, I write separately simply to point out that there is still an open question as to whether the facts can satisfy that the taking occurred "from the person or presence of another" under 18 U.S.C. § 2113(a). The government must prove several elements to convict on a charge of bank robbery under 18 U.S.C. § 2113(a). As addressed in our opinion, the statute requires that the funds at issue be taken while "in the care, custody, control, management, or possession of, [the] bank." But § 2113(a) also has an additional clause that requires the government to prove that the funds were taken or attempted to be taken "from the person or presence of another." (Emphasis added.) As the panel opinion correctly notes, this question was not before us in this appeal. However, the government must still satisfy this clause on remand as we have not decided whether this clause can be satisfied under the alleged facts.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

v. Crim. No. 19-01818 MV

CHARLES CHAVEZ,

Defendant.

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Defendant Charles Chavez's Motion to Dismiss Counts 5 and 6 of the Indictment. Doc. 28. The government responded [Doc. 29] and Mr. Chavez replied [Doc. 30]. The Court, having considered the motions, relevant law, and being otherwise fully informed, finds that Mr. Chavez's motion is well-taken and will be **GRANTED**.

BACKGROUND

On June 27, 2019, a six-count Indictment was returned against Mr. Chavez. Doc. 12. The instant motion concerns Counts 5 and 6 of the Indictment. *See* Doc. 28. Count 5 charges Mr. Chavez with Attempted Bank Robbery with a Dangerous Weapon, in violation of 18 U.S.C. §§ 2113(a) and (d). Doc. 12 at 2-3. Specifically, Count 5 charges that on or about January 8, 2019, Mr. Chavez attempted to take from the person and presence of another by force, violence, and intimidation a sum of United States currency belonging to and in the care, custody, control, management and possession of Wells Fargo Bank, the

deposits of which were then insured by the Federal Deposit Insurance Corporation ("FDIC"), and in committing such offense, did assault and put in jeopardy the life of another person by use of a dangerous weapon, that is a firearm. *Id.* Count 6 charges him with Using, Carrying, and Brandishing a Firearm During and in Relation to a Crime of Violence, specifically Attempted Bank Robbery as charged in Count 5 of the Indictment, and Possessing and Brandishing a Firearm in Furtherance of Such Crime, in violation of 18 U.S.C. § 924(c)(1)(A)(ii). *Id.* at 3.

Mr. Chavez moves the Court to dismiss Counts 5 and 6 of the Indictment "because the acts alleged in the discovery provided by the government fall outside of the relevant criminal statute." Doc. 28 at 2. He argues that the allegation that he, while armed with a rifle, demanded that two individuals withdraw money from an automated teller machine ("ATM") and give it to him is a legally insufficient factual basis to establish a bank robbery in violation of 18 U.S.C. §§ 2113(a) and (d) as charged in Count 5. *Id.* at 2-3. He further argues that since Count 6 is predicated on Count 5, Count 6 should likewise be dismissed. *Id.* at 6. In its response, the government argues that the alleged conduct falls within the scope of the bank robbery statute. *See* Doc. 29 at 1-2. For the reasons set forth below, the Court agrees with Mr. Chavez.

DISCUSSION

I. The Court has the authority to dismiss the charges under Rule 12(b).

Under Rule 12(b) of the Federal Rules of Criminal Procedure, a party may make a pretrial motion to dismiss an indictment due to its failure to state an

offense. *See* Fed. R. Crim. P. 12(b)(3)(B)(v). When analyzing an indictment's legal sufficiency, courts generally refrain from looking beyond the four corners of the indictment. *United States v. Hall*, 20 F.3d 1084, 1087 (10th Cir. 1994). However, "it is permissible and may be desirable where the facts are essentially undisputed, for the district court to examine the factual predicate for an indictment to determine whether the elements of the criminal charge can be shown sufficiently for a submissible case." *Id.* (quoting *United States v. Brown*, 925 F.2d 1301 (10th Cir. 1991)). The Tenth Circuit has accordingly held that a district court may "dismiss charges at the pretrial stage under the limited circumstances where the operative facts are undisputed and the government fails to object to the district court's consideration of those undisputed facts in making the determination regarding a submissible case." *Id.* at 1088. "Dismissals under this exception are not made on account of a lack of evidence to support the government's case, but because undisputed evidence shows that, as a matter of law, the Defendant could not have committed the offense for which he was indicted." *United States v. Todd*, 446 F.3d 1062, 1068 (10th Cir. 2006).

Mr. Chavez's case falls within the limited scenario in which the operative facts are undisputed and a purely legal issue is presented: whether, as a matter of law, the conduct alleged by the government constitutes a submissible case. The government has not explicitly objected to the Court's consideration of undisputed facts. *See generally* Doc. 29. Nor has the government argued that the Court should refrain from resolving the motion on its merits. *See generally id.* Although the government asserts that "[i]n this

case, the parties dispute the facts," the government does not expound upon which facts are in dispute. *See id*. at 5. Despite the government's general assertion that the facts are disputed, it appears to the Court that the *operative* facts are not in dispute.

The recitation of the operative facts in the Defendant's motion is essentially the same as in the government's response: the parties agree that Mr. Chavez jumped out of a stolen white Dodge Challenger, armed with a rifle, and ran up to the passenger side of a gold vehicle parked at an offsite Wells Fargo ATM. Doc. 28 at 2; Doc. 29 at 3. Mr. Chavez demanded money from the vehicle's occupants. Doc. 28 at 2-3; Doc. 29 at 3. When they were unable to produce any cash, Mr. Chavez demanded that they put their bank card back into the ATM and make a withdrawal. Doc. 28 at 3; Doc. 29 at 3. They informed him that they could not make a withdrawal because they had just deposited a check and did not have any money to give him. Doc. 28 at 3; Doc. 29 at 3. Mr. Chavez then asked for cigarettes. Doc. 28 at 3; Doc. 29 at 3.

There is admittedly a minor discrepancy between the facts as recited by the parties regarding Mr. Chavez's reason for changing course and asking for the cigarettes. Mr. Chavez states that after the victims told him they had no money to give him, he asked for their cigarettes, which they gave him, and then he got back into the white Challenger and left. Doc. 28 at 3. The government states that "[t]he arrival of law enforcement interrupted Defendant's attempt to force the pair to make a withdrawal. The victims saw the deputy. They believed that the Defendant's changed course and request for cigarettes [was] because he too saw the deputy approaching." Doc. 29

at 3. This minor factual dispute is immaterial, however, because the *operative* facts are undisputed. Both parties agree that the essential facts in the discovery are, in summary, that Mr. Chavez, while armed, approached a vehicle parked at an ATM and demanded that its occupants insert their ATM card into the machine in order to withdraw cash. Both parties agree that the issue presented in Mr. Chavez's motion is whether attempting to force a person to withdraw funds from an ATM falls within the bank robbery statute. *See* Doc. 28 at 2-3; Doc. 29 at 1. As such, this case falls within the limited exception carved out in *Hall* in which the Court may make a determination as to whether, as a matter of law, Mr. Chavez's alleged conduct falls outside of statute charged in the Indictment.

II. Mr. Chavez's alleged conduct does not constitute a violation of 18 U.S.C. § 2113.

The Court, having concluded that it has the authority to do so, now considers whether, as a matter of law, the conduct alleged by the government constitutes a submissible case. The Court concludes that it does not.

> Subsection (a) of the bank robbery statute, 18 U.S.C. § 2113, 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… Shall be fined

> under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 2113(a). Subsection (d) of the statute provides:

> Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.

18 U.S.C. § 2113(d). Plainly, if a person has not committed or attempted to commit an offense defined in subsection (a) or (b), then the person has not violated subsection (d).[1]

Mr. Chavez argues that he did not violate § 2113(a) because once the money was withdrawn from the ATM, it would have ceased to be the bank's money and would have become the property of the passengers of the car. Doc. 28 at 2-5 (citing *United States v. Burton*, 425 F.3d 1008 (5th Cir. 2005). He argues that therefore, as a matter of law, he did not attempt to obtain money belonging to, or in the care, custody, control, management, or possession of the bank. *Id*. at 3. The government argues that money in an ATM is in the care, custody, control, management, or possession of a bank, and that forcing a customer to withdraw cash from an ATM is robbing the bank rather than just robbing the customer. Doc. 29 at 10-11 (citing *United States v. McCarter*, 406 F.3d 460 (7th Cir. 2005) (overruled on other grounds)).

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[1] As Mr. Chavez has not been charged with subsection (b) of the statute, the Court confines its discussion to subsection (a).

The Tenth Circuit has not yet had occasion to consider whether an individual violates 18 U.S.C. § 2113(a) when he forces someone to make a withdrawal from an ATM. At least two other circuits have considered this issue, and have reached opposite conclusions. First, in *United States v. McCarter*, the Seventh Circuit considered whether a defendant violated 18 U.S.C. § 2113(a) when he pointed a gun at a victim, rifled through her purse, found her ATM card and said words to the effect of, "I see you have your bank card; we're going for a little ride." 406 F.3d. at 462. The defendant then walked the victim to her car and, at gunpoint, forced her to drive with him in the back seat. *Id.* However, the victim called out to pedestrians for help, and the defendant ran away. *Id.* In considering whether these facts constituted an attempted bank robbery in violation of 18 U.S.C. § 2113(a), the Seventh Circuit first concluded that money in an ATM is "obviously" in the "care, custody, control, management, or possession of, any bank." *Id.* (citations omitted). The Seventh Circuit then considered "whether forcing a customer to withdraw cash from an ATM is robbing the bank rather than just robbing the customer," and concluded that "if, as the defendant intended to do here, the robber forces the bank's customer to withdraw the money, the customer becomes the unwitting agent of the robber, and the bank is robbed." *Id.* at 463 (citing *Embrey v. Hershberger*, 131 F.3d 739 (8th Cir. 1997) (en banc)).

After the Seventh Circuit decided *McCarter*, the Fifth Circuit undertook a nuanced analysis of a similar factual scenario and rejected the Seventh Circuit's analysis and conclusions. In *United States v. Burton*, the Fifth Circuit considered whether a defendant violated § 2113(a) when he forced a victim

to drive to an ATM, to withdraw money using her ATM card, and to give the money to the defendant. 425 F.3d at 1009. The Fifth Circuit held that the funds did not "belong" to the bank, but rather, to the victim, who "made a valid–albeit coerced–withdrawal of her own funds, which [the defendant] then stole." *Id*. at 1010. The Fifth Circuit further held that the money was not in "the care, custody, control, management, or possession" of the bank at the relevant time, which was the time of the transfer of the money from the victim to the defendant. *Id*. The court reasoned that banks have "care, custody, control, management or possession of the many goings- on inside their own buildings." *Id*. at 1011 (quotation marks omitted). In contrast, "[i]t is absurd to think that a bank teller could enter a customer's vehicle to assert 'management' of the property within the vehicle," even if the vehicle is on bank property. *Id*. Given that the victim was not located inside of the bank–but rather, was in her vehicle–when she gave the money to the defendant, the money was not in the bank's "care, custody, control, management, or possession" of the bank at that time. *Id*. The court concluded that, as the money did not "belong to" and was not in the "care, custody, control, management or possession" of a bank at the relevant timeframe, the defendant's acts did not constitute a violation of 18 U.S.C. § 2113. *See id*. at 1011-12.

The Court agrees with the Fifth Circuit's analysis in *Burton* and finds that Mr. Chavez's case is indistinguishable. Indeed, the government does not attempt to distinguish *Burton*, but rather, argues that the *Burton* analysis is flawed for the following reasons: (1) it relies on a temporal event not required by statute; (2) it does not give proper consideration to

bank functions (which include caring for customer funds) or the bank's co-interest in customer funds accessible by the ATM; and (3) it does not properly consider the forcible and coercive nature of the withdrawal. Doc. 29 at 10. The Court is not persuaded by any of these arguments, which it will address in turn.

First, the Court disagrees with the government's assertion that *Burton* relies on a temporal event not required by the statute. The statute prohibits taking, or attempting to take, "*from the person or presence of another*… property or money… belonging to, or in the care, custody, control, management, or possession of, any bank…" 18 U.S.C. § 2113(a) (emphasis added).[2] The Fifth Circuit concluded that the relevant time at which the money must be in the "care, custody, control, management, or possession of, any bank" is the time of the transfer of the money from the victim to the defendant – in other words, the time at which the property is taken from the person or presence of another. *See Burton*, 425 F.3d at 1010. This interpretation comports with the plain language of the statute, which prohibits taking the property or money "from the person or presence of another." 18 U.S.C. § 2113(a). Therefore, the Court finds that, rather than relying on a temporal even not required by statute, as the government asserts, the *Burton*

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[2] Likewise, the Indictment returned against Mr. Chavez charges that he "attempted to take *from the person or presence of another*… a sum of United States currency belonging to and in the care, custody, control, management and possession of Wells Fargo Bank…" Doc. 12 at 2-3 (emphasis added).

analysis relies on the precise temporal framework specified in the statute.

Second, the Court is unpersuaded by the government's argument that *Burton* does not give proper consideration to bank functions, which include caring for customer funds, or to the bank's co-interest in customer funds accessible by the ATM. *See* Doc. 29 at 10. In support of this argument, the government points to *Shaw v. United States*, a recent case in which the Supreme Court considered the nature of a bank's interest in the funds held in its customers' accounts in the context of the bank fraud statute. *See* 137 S.Ct. 462 (2016). In *Shaw*, Supreme Court held that when a defendant obtained the bank account numbers of a bank customer and used those numbers to transfer funds out of the customer's account, the defendant did not merely obtain the bank *customer's* property, but he also obtained the *bank's* property, since the bank had property rights in the customer's account. *Id.* at 466.

While the Supreme Court's discussion of a bank's property rights in customer accounts is informative, it does not alter this Court's analysis of the relevant timeframe at which the property interest must be assessed in the context of the bank robbery statute. Unlike the bank fraud statute, which criminalizes the execution or attempted execution of a "scheme or artifice" to "defraud a financial institution" or to "obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises," 18 U.S.C. § 1344, the bank robbery statute does not reference the execution of schemes or artifices to obtain a bank's money. Rather, it

references the actual taking "from the person or presence of another" by force and violence or by intimidation. 18 U.S.C. § 2113(a). In Mr. Chavez's case, although the bank undoubtedly had a property interest in the money while it was still in the ATM pursuant to *Shaw*, it no longer would have had such a property interest once the money was withdrawn.

Finally, the government argues that *Burton* is flawed because it does not properly consider the forcible and coercive nature of the withdrawal. Doc. 29 at 10. However, *Burton* specifically recognizes that the withdrawal of the funds was coerced. *See* 425 F.3d at 1010 ("[The victim] made a valid–albeit coerced–withdrawal of her own funds, which Burton then stole."). *Burton* concluded that despite the coerced nature of the withdrawal, the funds were no longer in the custody of the bank at the time of the transfer to the defendant: "[the victim] had the money and gave it to Burton in her vehicle–not in the bank. Regardless of how brief her possession, the bank did not have 'care, custody, control, management, or possession' of property in Childs' vehicle." *Id.* at 1011. This Court agrees with that analysis and concludes that as a matter of law, Mr. Chavez's actions did not violate the federal bank robbery statute.

CONCLUSION

Because the Court finds that as a matter of law, Mr. Chavez's actions did not violate 18 U.S.C. §§ 2113(a) and (d), Count 5 of the Indictment must be dismissed. Because Count 6 of the Indictment is predicated on Count 5, Count 6 must also be dismissed.

IT IS THEREFORE ORDERED that Mr. Chavez's Motion to Dismiss Counts 5 and 6 of the Indictment [Doc. 28] is **GRANTED**.

Dated this 19th day of May, 2020

/s/ *Martha Vazquez*
MARTHA VAZQUEZ
UNITED STATES DISTRICT JUDGE

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APPENDIX C

UNITED STATES DISTRICT COURT OF FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA, Plaintiff, v. CHARLES JOSIAH CHAVEZ, Defendant.	CRIMINAL NO. 19-1818MV Counts 1 and 3: 18 U.S.C. § 2119: Carjacking Counts 2, 4, and 6: 18 U.S.C. § 924(c)(1)(A)(ii): Using, Carrying, and Brandishing a Firearm During and in Relation to a Crime of Violence, and Possessing and Brandishing a Firearm in Furtherance of Such Crime; Count 5: 18 U.S.C. §§ 2113(a) and (d): Attempted Bank Robbery with a Dangerous Weapon.

INDICTMENT

The Grand Jury charges:

Count 1

On or about January 8, 2019, in Bernalillo County, in the District of New Mexico, the defendant, **CHARLES JOSIAH CHAVEZ**, with the intent to cause death and serious bodily injury, took a motor vehicle, that is, a white Toyota Tacoma pickup truck, that had been transported, shipped, and received in interstate commerce, from its owner, by force, violence, and intimidation.

In violation 18 U.S.C. § 2119.

Count 2

On or about January 8, 2019, in Bernalillo County, in the District of New Mexico, the defendant, **CHARLES JOSIAH CHAVEZ**, knowingly used, carried, and brandished a firearm, during and in relation to a crime of violence for which the defendant may be prosecuted in a court of the United States, specifically, carjacking, as charged in Count 1 of this indictment, and in furtherance of such crime, possessed and brandished said firearm.

In violation of 18 U.S.C. § 924(c)(l)(A)(ii).

Count 3

On or about January 8, 2019, in Bernalillo County, in the District of New Mexico, the defendant, **CHARLES JOSIAH CHAVEZ**, with the intent to cause death and serious bodily injury, took a motor vehicle, that is, a white Dodge Challenger, that had been transported, shipped, and received in interstate commerce, from its owner, by force, violence, and intimidation.

In violation 18 U.S.C. § 2119.

Count 4

On or about January 8, 2019, in Bernalillo County, in the District of New Mexico, the defendant, **CHARLES JOSIAH CHAVEZ**, knowingly used, carried, and brandished a firearm, during and in relation to a crime of violence for which the defendant may be prosecuted in a court of the United States, specifically, carjacking, as charged in Count 3 of this indictment, and in furtherance of such crime, possessed and brandished said firearm.

In violation of 18 U.S.C. § 924(c)(l)(A)(ii).

Count 5

On or about January 8, 2019, in Bernalillo County, in the District of New Mexico, the defendant, **CHARLES JOSIAH CHAVEZ**, by force, violence, and intimidation, did attempt to take from the person and presence of another a sum of U.S. currency belonging to and in the care, custody, control, management and possession of Wells Fargo Bank, the deposits of which were then insured by the FDIC, and in committing such offense, the defendant did assault and put in jeopardy the life of another person by use of a dangerous weapon, that is a firearm.

In violation of 18 U.S.C. §§ 2113(a) and (d).

Count 6

On or about January 8, 2019, in Bernalillo County, in the District of New Mexico, the defendant, **CHARLES JOSIAH CHAVEZ**, knowingly used, carried, and brandished a firearm, during and in relation to a crime of violence for which the defendant may be prosecuted in a court of the United States, specifically, attempted bank robbery with a dangerous weapon, as charged in Count 5 of this indictment, and in furtherance of such crime, possessed and brandished said firearm.

In violation of 18 U.S.C. § 924(c)(l)(A)(ii).

/S/
FOREPERSON OF THE GRAND JURY

/S/
Assistant United States Attorney

/S/
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