No. 24-

IN THE

Supreme Court of the United States

CLINT MONROE UTTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the district court erred in denying Utter's objection to the United States Probation Officer's 5 level enhancement to his base offense level pursuant to U.S.S.G. §2B3.1(b)(2)(C) for purportedly brandishing a firearm during the commission of the robbery offense.

2. Whether the district court erred in denying Utter's objection to the United States Probation Officer's 4 level enhancement to his base offense level pursuant to U.S.S.G. §2B3.1(b)(4)(A) for purportedly abducting a bank employee during the commission of the robbery offense.

3. Whether the district court erred in denying Utter's objection to the United States Probation Officer's 2 level enhancement to his base offense level pursuant to U.S.S.G. §2B3.1(b)(5) for the robbery offense purportedly involving carjacking.

RULE 14.1(b)(I) STATEMENT

There are no parties in addition to those listed in the caption.

RULE 14.1(b)(iii) STATEMENT

United States v. Clint Monroe Utter, 1:20-CR-96-1, U.S. District Court for the Northern District of West Virginia. Judgment entered November 5, 2021.

United States v. Clint Monroe Utter, No. 21-4645, U.S. Court of Appeals for the Fourth Circuit. Judgment entered June 28, 2024.

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The United States Court of Appeals for the Fourth Circuit filed an unpublished opinion on June 28, 2024 affirming the petitioner's conviction and sentence. *U.S. v. Clint Monroe Utter*, ___ Fed.Appx. ___, (No. 21-4645)(4th Cir. 2024). The unpublished opinion of the Court of Appeals for the Fourth Circuit is attached to this Petition. (Appendix pgs. 1a-13a).

The district court filed an Order Addressing Objections to Presentence Investigation Report and Sentencing Guideline Calculations on November 12, 2021. This order is attached to this Petition. (Appendix pgs 14a-31a).

JURISDICTION

On June 28, 2024, the United States Court of Appeals for the Fourth Circuit rendered its decision and entered judgment whereby it affirmed the sentence imposed upon Clint Monroe Utter ("Utter") in the district court. The United States District Court for the Northern District of West Virginia had jurisdiction pursuant to 18 U.S.C. §3231 which provides in part that "the district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States." The United States Court of Appeals for the Fourth Circuit had jurisdiction pursuant to 18 U.S.C. §1291 which provides in part that "the courts of appeals (other than the United States Court of Appeals for the Federal circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States" and by Rule 4(b) of the Federal Rules of Appellate Procedure. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1) and Rule 10 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3

§3. Accessory after the fact

Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.

Except as otherwise expressly provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment or (notwithstanding section 3571) fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both; or if the principal is punishable by life imprisonment or death, the accessory shall be imprisoned not more than 15 years.

18 U.S.C. §1956(h)

§ 1956. Laundering of monetary instruments

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity -

(h) Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

18 U.S.C. §2113(a)

§ 2113. Bank robbery and incidental crimes

(a) 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.

STATEMENT OF THE CASE

On April 6, 2021 a federal Grand Jury returned a four count Superseding Indictment against the appellant Clint Monroe Utter ("Utter") and two codefendants in the Northern District of West Virginia. (JA 13-17). A forfeiture allegation was also returned by the Grand Jury.

Count One of the Superseding Indictment charged that Utter committed the offense of bank robbery on or about November 17, 2020 in violation of 18 U.S.C. §2113(a). Count Two charged Utter, along with one of the co-defendants David Alan Gill, with conspiracy to commit money laundering in violation of 18 U.S.C. §1956(h).

On June 4, 2021, a little over a week before the scheduled trial date of June 15, 2021, Utter filed a motion with the district court indicating that he would be pleading guilty to the Superseding Indictment. On June 7, 2021 Utter appeared before United States Magistrate Judge Michael John Aloi, signed a written waiver to have his plea taken by a United States Magistrate Judge, and entered a guilty plea to Counts One and Two of the Superseding Indictment. (JA 18-75)[1].

A Presentence Investigation Report ("PSR") was disclosed by United States Probation Officer Nikki M. Berger on July 25, 2021. (JA 175-214). Utter filed objections to such Presentence Investigation Report, objecting to various guideline enhancements applied by the probation officer in determining Utter's offense level

[1] All citation to "JA" refer to the Joint Appendix filed in the United States Court of Appeal for the Fourth Circuit filing.

for purposes of calculating an advisory sentencing guideline range of imprisonment. (JA 202-207).

A contested sentencing hearing was held on November 5, 2021 during which each of Utter's objections were addressed by the district court. The district court overruled each of Utter's objections and sentenced Utter to 188 months of imprisonment on both Counts One and Two of the Superseding Indictment, to be served concurrently with each other. Additionally, the district court sentenced Utter to serve a term of three (3) years of supervised release each as to Counts One and Two, such terms to also run concurrently. Utter was also ordered to pay the special mandatory assessment of $200.00 and $69,100.00 in restitution. The Judgment in a Criminal Case entered on November 12, 2021 reiterated Utter's sentence. (JA 148-154).

On November 17, 2021 Utter timely filed a Notice of Appeal. (JA 173-174).

On May 4, 2022 counsel for Utter filed his Opening Brief and Joint Appendix and on May 23, 2022 the government filed its Response Brief. No reply brief was filed.

On June 28, 2024, the Court of Appeals affirmed the judgment and sentence of the district court in an unpublished opinion *U.S. v. Clint Monroe Utter*, ___ Fed.Appx. ___, (No. 21-4645)(4th Cir. 2024). The unpublished opinion of the Court of Appeals for the Fourth Circuit is attached to this Petition. (Appendix pgs. 1a-13a).

REASONS FOR GRANTING THE PETITION

I. THE DISTRICT COURT ERRED IN DENYING UTTER'S OBJECTION TO THE UNITED STATES PROBATION OFFICER'S 5 LEVEL ENHANCEMENT TO HIS BASE OFFENSE LEVEL PURSUANT TO U.S.S.G. §2B3.1(b)(2)(C) FOR PURPORTEDLY BRANDISHING A FIREARM DURING THE COMMISSION OF THE ROBBERY OFFENSE.

It is undisputed that during the robbery Utter was in possession of something which appeared to be a firearm. In the PSR the United States Probation Officer applied a five level increase to Utter's base offense level pursuant to §U.S.S.G. §2B3.1(b)(2)(C) for Utter brandishing or possessing a firearm. However, as argued by Utter's counsel at the November 5, 2021 sentencing hearing, the object which appears to be a firearm which Utter possessed during the robbery was never definitively found and identified as being a firearm.

Application Note 1 to U.S.S.G. §2B3.1 provides that a "firearm" is to be defined by the Commentary to U.S.S.G. §1B1.1. Looking to U.S.S.G. §1B1.1(H) a firearm "means (I) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (ii) the frame or receiver of any such weapon; (iii) any firearm muffler or silencer; or (iv) any destructive device. A weapon, commonly known as a "BB" or pellet gun, that uses air or carbon dioxide pressure to expel a projectile is a dangerous weapon but not a firearm."

During the sentencing hearing it was made clear that the bank employees were not firearm experts and therefore could not themselves state conclusively that the item possessed by Utter was indeed a firearm as defined in U.S.S.G. §1B1.1(H). (JA

81). In reaching its decision that Utter indeed possessed and brandished a firearm thereby warranting a 5 level enhancement, the district court relied on statements made by Blaine Allen Ash, one of Utter's co-defendants, as well as another witness Richie Starkey. Both of these individuals informed law enforcement that they had seen a revolver which looked similar to the alleged firearm used by Utter as seen in the bank surveillance video. (JA 216) (Appendix pgs. 22a-23a). Additionally, co-defendant Ash also told investigators that Utter told him that he did in fact use a gun during the robbery. (JA 211). Neither Ash or Starkey were subject to cross examination by Utter to test the truth of their statements to law enforcement and to determine whether what they said was in fact reliable. However, despite this safeguard to the rights of Utter the district court took such statements as true in reaching its conclusion.

Furthermore, as this supposed firearm brandished and possessed by Utter was never recovered, and therefore never test fired or otherwise tested to see if it met the definition of a firearm set forth in U.S.S.G. §1B1.1(H), it remains unknown whether it is by definition indeed a firearm. Based on this reasoning alone it cannot be counted in looking to apply the 5 level enhancement found at U.S.S.G. §2B3.1(b)(C). A 3 level enhancement pursuant to U.S.S.G §2B3.1(b)(E) would have been appropriately applied as the item clearly possessed by Utter during his commission of the bank robbery closely resembled a firearm.

The district court, therefore, erred in applying a 5 level enhancement to Utter's offense level for his purportedly brandishing or possessing a firearm.

II. THE DISTRICT COURT ERRED IN DENYING UTTER'S OBJECTION TO THE UNITED STATES PROBATION OFFICER'S 4 LEVEL ENHANCEMENT TO HIS BASE OFFENSE LEVEL PURSUANT TO U.S.S.G. §2B3.1(b)(4)(A) FOR PURPORTEDLY ABDUCTING A BANK EMPLOYEE DURING THE COMMISSION OF THE ROBBERY OFFENSE.

While acknowledging that the issue of abduction in this case was harder to resolve than the court's holding in *United States v. Osborne*, 514 F.3d 377 (4th Cir. 2008), the district court nevertheless found it appropriate to assess a 4 level enhancement to Utter's offense level for abducting a bank employee when he committed the bank robbery. The district court erred in doing so. (Appendix pgs. 24a-27a).

U.S.S.G. §2B3.1(b)(4)(A) provides that "if any person was abducted to facilitate commission of the offense or to facilitate escape, increase [the base offense level] by 4 levels." The word abduction is defined in Application Note 1(A) to U.S.S.G. §1B1.1 by providing that "'Abducted'" means that a victim was forced to accompany an offender to a different location. For example, a bank robber's forcing a bank teller from the bank into a getaway car would constitute an abduction."

During the commission of the bank robbery Utter is seen on video surveillance with bank employee Penny Ash ("Ash") who is seen in the video with shoulder length blondish hair, glasses, a black shirt and gray pants. (JA 216). Utter, while holding an items which resembles a firearm, has three other bank employees lay prostrate on the ground behind the teller's desk area. Ash then assists Utter in restraining these three others by binding their hands behind their backs with zip ties.

After the roughly four minutes it takes to restrain the other three bank employees Ash obtains a plastic bag and walks out of the field of view of the video camera, follow immediately by Utter.[2] Approximately 24 seconds later Utter is seen returning alone to the area behind the teller counter to apparently ask one of the restrained employees a question. After a brief period of time Ash can be seen standing just on the edge of the video. Ash seems to say something to Utter as Utter then follows Ash off camera again, this time heading towards the bank manager's office. Ash and Utter come out of the manager's office seconds later and Utter is seen holding a woman's purse.

Ash proceeds to go back behind the tellers' area while Utter stays in front of such area, puts the purse on a chair, and proceeds to look through it. He seems to beckon to Ash who then comes out in front of the tellers counter to stand by Utter and they both appear to go through the purse presumably looking for car keys.

After looking through the purse for a brief period of time Ash picks it up and brings it back behind the teller counter and places it on the floor by bank employee Joan Nutt, the purse's owner. Utter remains out in front of the teller counter, away from Ash and the others. Utter then comes around back behind the counter and stands approximately 6-8 feet away while Ms. Nutt searches through her purse for her car keys.

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[2] From testimony during the sentencing hearing the bank vault is located out of the field of view of the video surveillance camera to the left.

Ms. Nutt finds her keys and throws them towards Utter who is still standing 6-8 feet away. Ash then restrains Ms. Nutt again and Utter restrains another employee who just came into the bank. Ash then goes off to the left of the camera again and is followed again by Utter.

About three minutes pass and bank manager Joan Nutt can then be seen getting free of her restraints and making a phone call, presumably to police. The other bank employees on camera free themselves from the restraints and one goes off camera to presumably free Ash who was restrained by Utter to a chair just inside the bank vault.

It is during the approximately three minute time period that Utter gains access to the bank vault, takes the $69,100.00 in cash, and leaves the bank.

On October 27, 2021 Utter's counsel, along with two FBI agents and Ash returned to Summit Community Bank to measure the distance traveled by Ash in the presence of Utter. The distance Ash moved in the presence of Utter was 28 feet from the bank's back door to the teller counter, 35 feet from there to the bank manager's office, 35 feet back to behind the teller counter and then 23 feet to the bank vault, a grand total of 121 feet. (JA 148).

The district court, in concluding that Ash was abducted by Utter, recognized that the Salem Community Bank was indeed a small bank and that Utter following Ash into the bank manager's office was not taking her to a "different location" in the bank as required for the 4 level enhancement set forth in U.S.S.G §2B3.1(b)(4)(A). (JA 99). However, the district court found that Utter's taking Ash into the bank

vault, which was closed and required the entry of two codes to open it, was "dispositive" in its mind to apply the 4 level enhancement for taking Ash to a "different location." (JA 99) (Appendix pgs. 26a-27a).

This district court erred in its conclusion. While Osborne did contemplate that bank vault "might be considered 'different locations' within the same building" Utter would argue that Utter's simply following Ash to the vault, its being opened, and then his restraining her to a chair just inside the vault, does not rise to the level of an abduction. (514 F.3d at 391). Unlike Osborne, in which Osborne moved two Walgreens pharmacy employees throughout different areas of the store, including "on a winding course through it aisles," Utter simply had Ash open the vault door and left her there in a chair just inside. He then proceeded to take the $69,100.00 and leave. At no time did he move her towards the entrance of the bank and thereby create a possible hostage situation.

The district court, therefore, erred in concluding that Utter abducted Ash and assessing the 4 level enhancement pursuant to U.S.S.G §2B3.1(b)(4)(A).

III. THE DISTRICT COURT ERRED IN DENYING UTTER'S OBJECTION TO THE UNITED STATES PROBATION OFFICER'S 2 LEVEL ENHANCEMENT TO HIS BASE OFFENSE LEVEL PURSUANT TO U.S.S.G. §2B3.1(b)(5) FOR THE ROBBERY OFFENSE PURPORTEDLY INVOLVING CARJACKING.

While acknowledging that the facts in this case were more akin to a "keyjacking" instead of a typical carjacking, the district court still found that a 2 level enhancement pursuant to U.S.S.G. §2B3.1(b)(5) applied. (JA 102-105). In reaching this conclusion the district court relied on the Sixth Circuit case of *United States v.*

Boucha, 236 F.3d 768 (6th Cir. 2001) and its conclusion that a carjacking enhancement can apply in a bank robbery case where keys to an employee's car are taken by the bank robber. (Appendix pgs. 28a-29a).

However, it is important to note in this case that it is bank employee Penny Ash who brings fellow employee Joan Nutt's purse to her as Ms. Nutt is restrained and on the floor behind the teller counter. At first Utter is on the other side of the teller counter while Ms. Nutt searches through her purse for the keys to her car. Utter then comes around back behind the teller counter and stands approximately 6-8 feet away from Ms. Nutt as she continues to search for her keys. Ash stands essentially between Utter and Ms. Nutt as Ms. Nutt searches for her keys. Ms. Nutt eventually does find the keys and then tosses them across the floor to Utter who bends down to pick them up.

It should also be noted that while the purported firearm is seen in Utter's right hand he does not appear to deliberately point it at Ms. Nutt or anyone else while she is searching for the keys. The facts as presented do not rise to the level of carjacking and the district court erred in assessing a 2 level enhancement to Utter's offense level pursuant to U.S.S.G. §2B3.1(b)(5).

CONCLUSION

For all of the foregoing reasons, Clint Monroe Utter respectfully requests that this Petition for Writ of Certiorari be granted. The decisions of the district and appellate court must be overruled and Utter respectfully requests that this Court reverse the district court's decision in applying the sentencing guideline enhancements as discussed herein, as well as the resulting prison sentence imposed by the district court, and remand this case to the district court for resentencing on Utter's guilty plea to Counts One and Two of the Superseding Indictment.

Respectfully submitted,

By: /s/ Scott C. Brown

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APPENDIX

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-4645

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

CLINT MONROE UTTER,

Defendant - Appellant.

Appeal from the United States District Court for the Northern District of West Virginia, at Clarksburg. John S. Kaull, Magistrate Judge. (1:20-cr-00096-TSK-MJA-1)

Submitted: January 13, 2023 Decided: June 28, 2024

Before GREGORY and HARRIS, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

ON BRIEF: Scott C. Brown, SCOTT C. BROWN LAW OFFICE, Wheeling, West Virginia, for Appellant. William Ihlenfeld, United States Attorney, Wheeling, West Virginia, Sarah W. Wagner, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Clarksburg, West Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Clint Monroe Utter ("Utter") appeals the district court's denial of his objections to sentencing enhancements under the U.S. Sentencing Guidelines § 2B3.1 for brandishing a firearm, abduction, and carjacking. Finding no error, we affirm.

I.

Utter pleaded guilty to one count of bank robbery in violation of 18 U.S.C. § 2113(a) and one count of conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h). During the plea hearing, the government presented a proffer to establish the factual basis for the guilty plea. Utter confirmed that the proffer was "substantially correct." J.A. 51. According to that proffer, bank surveillance video and eyewitness testimony showed that an individual, who was later identified to be Utter, "entered the Summit Community Bank in Salem, West Virginia, through the employee entrance" and robbed the bank. J.A. 35. The surveillance footage showed Utter carrying what appeared to be a firearm. Utter used zip ties to bind three bank employees and ordered Penny Ash ("Ash"), another bank employee, "at gunpoint, to give him money from the bank's drawers." *Id.* Still holding her at gunpoint, Utter ordered Ash to the vault where the bank stored its money and directed Ash to place the money in a trash bag. To facilitate his escape, Utter then demanded that the bank manager, Joan Nutt ("Nutt"), give him her car keys. He fled the scene in Nutt's car with $69,100 in stolen cash.

The government also included statements given by a witness named Richie Starkey ("Starkey") who was in the car with Utter when Utter was arrested. Starkey told officers

that he had two of Utter's firearms which he had taken from an allegedly suicidal Utter just days before the arrest. According to the officers, one of those firearms was "an old-style revolver" that appeared to be consistent with the one used by the robber on the bank's surveillance video. J.A. 39.

The probation office recommended three sentencing enhancements in the Presentence Investigation Report: a five-level enhancement under U.S.S.G. § 2B3.1(b)(2)(C) for brandishing a firearm; a four-level enhancement pursuant to U.S.S.G. § 2B3.1(b)(4)(A) for abduction during the commission of a robbery; and a two-level enhancement pursuant to U.S.S.G. § 2B3.1(b)(5) for carjacking during the commission of a robbery. Utter objected to each enhancement before the sentencing hearing. During the hearing, the government presented evidence in support of the enhancements. That evidence included testimony from FBI Special Agent James Wisniewski ("Wisniewski"), bank surveillance video footage of the robbery, and a report Wisniewski prepared during his investigation.

Regarding the brandishing enhancement under U.S.S.G. § 2B3.1(b)(2)(C), Wisniewski testified that the surveillance footage showed Utter following Ash with what appeared to be a firearm in his hands.

In support of the abduction enhancement under U.S.S.G. § 2B3.1(b)(4)(A), Wisniewski testified that he, other agents, and defense counsel went to the bank and measured the total distance that Utter forced Ash to travel at gunpoint during the robbery. Penny Ash was present during Wisniewski's visit and advised him of her movements during the robbery. First, Utter confronted Ash at the back door and then took her to the teller's

counter, a distance of "approximately 28 feet." J.A. 148. Next, Utter took Ash from the teller's counter to the manager's office, a distance of "approximately 35 feet." *Id.* Then, Utter took Ash from the manager's office back to the teller's counter, an additional 35 feet. *Id.* Finally, Utter ordered Ash from the teller's counter to a chair inside of the bank vault, approximately 23 feet. *Id.* In sum, Utter forced Ash to travel approximately 121 feet throughout the bank at gunpoint. Wisniewski detailed his findings in a report titled "Measurements of Clinton Utter's movements with Penny Ash" which the government introduced as an exhibit. J.A. 148, 168 n. 2.

In support of the carjacking enhancement under U.S.S.G. § 2B3.1(b)(5), Wisniewski testified that the surveillance footage showed that Utter took Joan Nutt's car keys during the robbery. According to Wisniewski, Utter had trouble finding Nutt's keys in her purse himself, so he directed Ash to take the purse to Nutt to retrieve the keys.

The district court denied Utter's objections to the sentencing enhancements. In response to the objection to the firearm enhancement, the district court reasoned that the footage showed Utter holding what appeared to be a firearm. Additionally, the district court noted that one of Utter's guns that Starkey gave to law enforcement was consistent with what Utter was holding in the surveillance footage. The district court also noted that one of Utter's codefendants stated that Utter admitted to using a firearm during the robbery, and that the codefendant saw a revolver in a blue and white cooler that Utter stored the stolen cash in after the robbery. The court also noted that Ash reported that Utter carried a firearm during the robbery. The district court ultimately found that this level of

corroboration paired with Wisniewski's testimony supported the application of the brandishing enhancement under U.S.S.G. § 2B3.1(b)(3)(C).

In response to the objection to the abduction sentencing enhancement, the district court cited to Wisniewski's testimony, the surveillance footage, and the FBI Report to note that Ash "walked approximately 121 feet" to various locations throughout the bank at Utter's direction. JA. 168. The court highlighted one location, the vault, which it described as a "separate room . . . disconnected by a locked door which requires two bank employees to enter a unique code to access the secured area." J.A. 168–69. Based on those facts, the court found that a preponderance of the evidence demonstrated that Utter accompanied Ash by force to a different location as required to apply the enhancement.

In response to Utter's objection to the carjacking sentencing enhancement, the district court reasoned that surveillance footage showed, and the parties agreed, that Utter ordered Nutt to give him her car keys. The court cited to Wisniewski's testimony that Utter had what appeared to be a firearm in his hand at the time he gave that order. Relying on the Sixth Circuit's decision in *United States v. Boucha*, 236 F.3d 768 (6th Cir. 2001), which likened the carjacking sentencing enhancement to the federal carjacking statute, the court found that the enhancement was appropriate because it was clear that Nutt surrendered her car keys because "Utter was standing over her with a gun in his hand" and that she would not have given Utter her keys "absent the violence and intimidation" he subjected her to. J.A. 171.

The court therefore rejected all of Utter's objections. It determined that Utter fell into criminal history category I and calculated Utter's total offense level as 36, making the applicable sentencing guideline range 188 months to 235 months. The court sentenced

Utter to 188 months incarceration on each of counts one and two, to be served concurrently. Utter timely appealed.

II.

A district court's improper calculation of the guidelines range renders the sentence procedurally unreasonable and subject to vacatur. *United States v. Hargrove*, 701 F.3d 156, 161 (4th Cir. 2012). We review challenges to a court's application of the guidelines for abuse of discretion. *Gall v. United States*, 552 U.S. 38, 41 (2007). In doing so, we review the court's factual findings for clear error and its legal conclusions de novo. *United States v. Allen*, 446 F.3d 522, 527 (4th Cir. 2006).

III.

Utter was sentenced on November 5, 2021, so we assess his challenges under the 2021 Guidelines Manuel which was in effect at that time. The issues pending before us on appeal are: (1) whether the district court properly applied a five-level enhancement pursuant to U.S.S.G. § 2B3.1(b)(2)(C) for possessing a firearm; (2) whether the district court properly applied a four-level enhancement pursuant to U.S.S.G. § 2B3.1(b)(4)(A) for abduction; and (3) whether the district court properly applied a two-level enhancement pursuant to U.S.S.G. § 2B3.1(b)(5) for carjacking. We consider each in turn.

A.

Under the 2021 Sentencing Guidelines, a defendant was subject to a five-level sentencing enhancement "if a firearm was brandished or possessed" during a robbery. U.S.S.G. § 2B3.1(b)(2)(C). The guidelines define firearm as "any weapon (including a

starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive." U.S.S.G. § 1B1.1 cmt. n. 1(H). "A weapon, commonly known as a 'BB' or pellet gun, that uses air or carbon dioxide pressure to expel a projectile is a dangerous weapon but not a firearm." *Id.*

Utter concedes that it is undisputed that he possessed "something which appeared to be a firearm" during the robbery. Opening Br. at 7. Nevertheless, he challenges the district court's application of the five-level brandishing enhancement on the grounds that the court did not conclusively determine that the object he carried was indeed a firearm. According to Utter, the district court should not have relied on the employee eyewitnesses' statements identifying the object as a gun because the bank employees "were not firearm experts" and therefore could not conclusively state that the item Utter had during the robbery was a firearm as defined under the guidelines. *Id*. Utter also contends that the court erred in relying on statements from his codefendant and Starkey, who were not present during the robbery, because their statements were not subject to cross examination.

We find neither of these arguments persuasive. We rejected an argument like Utter's first in *United States v. Jones*, where the appellants contended that the evidence was insufficient to sustain their 18 U.S.C. 924(c) because the government did not proffer expert testimony to establish that the appellants used a firearm. 907 F.2d 456, 460 (4th Cir. 1990). We held that expert testimony was not necessary, and that the testimony from five eyewitnesses that a firearm was used during the robbery was enough for a jury to find the appellants guilty beyond a reasonable doubt. *Id*. Similarly, in *United States v. Fields*, we held that the evidence was sufficient to sustain the appellant's conviction where the

government established that the defendant possessed firearms through eyewitness testimony. No. 00-4119, 2000 U.S. App. LEXIS 23337, at *2 (4th Cir. Sept. 15, 2000).

Here, bank employees provided consistent accounts of Utter's conduct during the robbery, including the insistence that he carried a firearm. As noted above, we said in *Jones* and *Fields* that eyewitness statements that perpetrators used firearms during their crimes was sufficient to sustain the challenged convictions where the government was required to prove use of a firearm beyond a reasonable doubt. *See Jones*, 907 F.2d at 460 ("[T]he only evidence that a firearm was used came from the testimony of witnesses unfamiliar with firearms and from bank photographs."); *Fields*, 2000 U.S. App. LEXIS 23337, at *2 (similar). It logically follows that eyewitness statements are sufficient to apply the sentencing enhancement here given that the government need only satisfy the preponderance-of-the-evidence burden. *See McClinton v. United States*, 143 S. Ct. 2400, 2402 (2023) (burden at sentencing).

Utter's argument that the district court erred when it considered statements from his codefendant and Starkey is similarly unpersuasive. The Confrontation Clause does not apply at sentencing. *See United States v. Powell*, 650 F.3d 388, 392 (4th Cir. 2011). Rather, the guidelines demand only that the evidence on which the court relies has "sufficient indicia of reliability to support its probable accuracy." *Id.* at 394 (quoting U.S.S.G. § 6A1.3(a)).

That test is met here. Utter's codefendant, Starkey, and the bank employees all stated that Utter carried a firearm during the robbery. One of Utter's guns that Starkey gave to police appears consistent with the object Utter is seen carrying during the robbery on the surveillance video. And, if there was any doubt, Utter's own recorded statement to an undercover agent where he described himself as being "a man with a gun in a robbery

in progress," J.A. 80, confirmed that he brandished a firearm while he robbed the bank. This level of corroboration outweighs any concern that Utter's codefendant or Starkey lied for personal gain which is generally the concern where witness statements are not subject to cross examination. The district court therefore did not err in considering statements from Starkey and Utter's codefendant and had sufficient evidence to apply the brandishing enhancement.

B.

The 2021 Sentencing Guidelines authorized a court to apply a four-level increase to a defendant's offense level if "any person was abducted to facilitate commission of the offense or to facilitate escape." U.S.S.G. § 2B3.1(b)(4)(A). A person is "abducted" if she "was forced to accompany an offender to a different location." U.S.S.G. § 1B1.1 cmt. n. 1(A), U.S.S.G. § 2B3.1(b)(4)(A).

What is meant by "a different location" may vary depending on the circumstances of a given case and thus should not be mechanically determined based on the presence or absence of any particular factor. Thus, in assessing whether a victim was moved to a different location courts must conduct a case-by-case determination of the relevant facts to determine whether the enhancement applies. Notably, the offender need not move the victim a great distance for the enhancement to apply. *United States v. Osborne*, 514 F.3d 377, 389 (4th Cir. 2008).

In *Osborne*, for example, we upheld the application of the abduction enhancement even though the victim was moved only within the confines of a single building. *Id.* In that case, the offender, armed with a knife, directed the victim from the pharmacy section

of the store, which was located behind a secure door, to the front door. *See id*. at 382, 389. We held that the enhancement applied because the front door where the offender moved the victim to was a different location from behind the secure door in the pharmacy section where they began, and the victim indicated that she complied with the offender's commands because she was afraid not to. *Id*.

Our rationale in *Osborne* is equally applicable in this case. The district court found that Utter escorted Ash from the teller's counter to the bank vault which was behind a secure door. The door to the vault was closed before Ash and another employee entered their codes to open it. Utter than accompanied Ash inside the vault and forced her to sit in a chair where he left her. Like in *Osborne*, the "closed, secure, locked door" here established a threshold to a different location from the teller area where the other employees remained. J.A. 99. Thus, in ordering Ash into the vault, Utter forced Ash to accompany him to an area where she was isolated from the other bank employees in an entirely different location within the bank.

Despite these similarities, Utter contends that *Osborne* is distinguishable because the offender in that case led employees "on a winding course through its aisles," while Utter simply took Ash into the vault and left her inside. Opening Br. at 13. Thus, he argues that the sentencing enhancement should not apply because he did not "create a possible hostage situation" by moving Ash "toward the entrance of the bank." *Id.* We have recognized that the enhancement was "intended, at least in part, to protect victims against the additional harm that may result from being forced to accompany an offender, such as being taken as a hostage during a robbery or being isolated to prolong a sexual assault."

Osborne, 514 F.3d at 387 (citations omitted). Utter's argument here makes much of the latter portion of our recognition and ignores the former—that the enhancement seeks to protect against any harm that may result from being forced to accompany an offender. Thus, while hostage situations are one type of the harms the enhancement seeks to protect victims against, a hostage situation is not necessary for the enhancement to apply. The enhancement is also appropriate where, as here, the offender takes a victim to another location at gunpoint, even if the offender leaves the victim in the new location alone.

C.

The Sentencing Guidelines authorize a district court to increase a defendant's offense level by two levels if the underlying offense involved a carjacking. U.S.S.G. § 2B3.1(b)(5). The guidelines make clear that "the taking or attempted taking of a motor vehicle from the person or presence of another by force and violence or by intimidation" constitutes a carjacking. U.S.S.G. § 2B3.1 cmt n. 1. However, they do not explicitly address the situation presented here where an offender takes car keys, but not the car itself, from the immediate presence of the victim. We have not yet addressed this scenario but find the conclusions reached by the Sixth Circuit in *United States v. Boucha*, 236 F.3d 768 (6th Cir. 2001), and the Seventh Circuit in *United States v. Rogers*, 777 F.3d 934 (7th Cir. 2015), persuasive.

In *Boucha*, the court highlighted that the phrase "person or presence" used in U.S.S.G. § 2B3.1(b)(5) mirrors the language used in 18 U.S.C. § 2119, the federal carjacking statute, and thus looked to cases interpreting that phrase as used in the statute for guidance. *Id*. at 771. The court noted that several circuits interpreting the phrase in the statutory context "found a carjacking violation had occurred even though the charged

defendant took the keys from the victim while the victim was away from his or her car." *Id*. Seeing no reason to deviate from that interpretation of the phrase in the guidelines context, the Sixth Circuit held that an offender who uses force or intimidation to take a victim's keys is subject to the carjacking enhancement. *Id.* at 776.

The Seventh Circuit reached a similar conclusion in *Rogers* in assessing whether "keyjacking" met the guidelines' "person and presence requirement." *Rogers*, 777 F.3d at 936–37. The *Rogers* defendant contended that the district court should not have applied the enhancement because he obtained the victim's car keys by "rummaging through" her purse, not her person. *Id.* at 936–37. The Seventh Circuit defined "presence" to include "ability to retain control of the vehicle through possession of the keys." *Id*. at 936. It therefore held that "there is no distinction—other factors notwithstanding—between taking a victim's car outright and taking a victim's keys as merely the first action in the seizure of her car." *Id*.

In agreement with the Sixth and Seventh Circuits, we similarly hold that the carjacking sentence enhancement applies where the offender uses force or intimidation to take a victim's car keys from her possession. Applying that standard to the facts of this case, we cannot say that the district court erred in applying the carjacking enhancement here. Wisniewski testified that Utter attempted to retrieve Nutt's car keys from her purse but could not locate them on his own and then directed Ash to take the purse to Nutt so that Nutt could locate the keys for him. The district court found that the surveillance video showed that Utter ordered Nutt to give him her car keys and that the parties had agreed to that fact. The court also found that "Utter obviously had a weapon or a firearm but certainly something that

instilled fear in everyone in that bank, including Ms. Nutt." J.A. 104. These facts sufficiently support the court's conclusion that Utter took Nutt's car keys by force or intimidation.

IV.

For the reasons set forth above, we affirm the district court's application of all three sentencing enhancements. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid in the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA,

Plaintiff,

v. **Criminal Action No. 1:20-cr-96-1**
(Judge Kleeh)

CLINT MONROE UTTER,

Defendant.

ORDER ADDRESSING OBJECTIONS TO PRESENTENCE INVESTIGATION REPORT AND SENTENCING GUIDELINE CALCULATIONS

This Court convened for sentencing on November 5, 2021. Prior to the sentencing hearing, Defendant Clint Monroe Utter ("Defendant" or "Defendant Utter") by counsel, objected to portions of the Presentence Investigation Report ("PSR"). In particular, Defendant objected to the application of three specific offense characteristics and one adjustment for role in the offense under the United States Sentencing Guidelines ("Sentencing Guidelines" or "U.S.S.G.").

Defendant Utter pleaded guilty to Count One (Bank Robbery 18 U.S.C. § 2113(a)) and Count Two (Conspiracy to Commit Money Laundering 18 U.S.C. § 1956(h)) of the Superseding Indictment, without a written plea agreement. Count One of superseding indictment charges that on November 17, 2020, Defendant Utter, by force, violence, and intimidation, took from the person $69,100.00

in U.S. Dollars belonging to the Summit Community Bank, insured by the Federal Deposit Insurance Corporation. Count Two charges that Defendants Utter and David Alan Gill did knowingly conspire with each other to conduct or attempt to conduct financial transactions affecting interstate commerce designed to conceal and disguise the nature of the proceeds contemplated in Count One.

The Court received evidence, particularly testimony from Special Agent James Wisniewski. The parties were afforded opportunity to be heard on the objections including the opportunity to submit evidence or make a proffer to the Court. Ultimately, the Court overruled the objections, accepted the PSR as drafted, and filed it under seal. The Court detailed its reasons for its rulings with respect to Defendant's objections to the PSR recommendations and this Court's calculations under the Sentencing Guidelines including the Court's factual findings after receiving evidence and legal rulings. Nonetheless, the Court authors this Order pursuant to Rule 32(i)(3)(C) of the Federal Rules of Criminal Procedure.

I. Legal Standard

Of course, the Court is mindful of its obligations and role during sentencing hearings and in making determinations under the Sentencing Guidelines. See Fed. R. Crim. P. 32; see also U.S.S.G.

§ 6A1.3 ("The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case."); United States v. Benkahla, 530 F.3d 300, 312 (4th Cir. 2008) (noting evidentiary standard district courts to utilize at sentencing).

Rule 32 of the Federal Rules of Criminal Procedure governs not only sentencing proceedings but also the critically important presentence investigation and reporting process. An investigation and report are required unless a specific statutory exception applies or determined unnecessary by the Court. See Fed. R. Crim. P. 32(c)(1)(A). The same rule sets forth the presentence investigation report's required content.

> (d) Presentence Report.
>
> (1) Applying the Advisory Sentencing Guidelines.
>
> The presentence report must:
>
> (A) identify all applicable guidelines and policy statements of the Sentencing Commission;
>
> (B) calculate the defendant's offense level and criminal history category;
>
> (C) state the resulting sentencing range and kinds of sentences available;
>
> (D) identify any factor relevant to:
>
> (i) the appropriate kind of sentence, or

> (ii) the appropriate sentence within the applicable sentencing range; and
>
> (E) identify any basis for departing from the applicable sentencing range.

Fed. R. Crim. P. 32(d)(1). The Rule's requirements impose mandatory obligations upon those charged with drafting presentence reports, United States Probation Officers. The USPO operates as "an arm of the district court" when discharging its presentence investigation and report duties. Rosales-Mireles v. United States, -- U.S. --, 138 S. Ct. 1897, 1904 (2018). District Courts rely heavily on their United States Probation Officers for their thorough and accurate presentence investigations and Sentencing Guideline calculations; however, sentencing courts retain the independent obligation to accurately calculate those guidelines based on the record presented. Of particular issue here are the United States Sentencing Guidelines and the USPO's recommended Guideline's calculation.

The Supreme Court has summarized the Guidelines calculation process as follows:

> Of course, to consult the applicable Guidelines range, a district court must first determine what that range is. This can be a "complex" undertaking. Molina-Martinez v. United States, 578 U.S. ----, ----, 136 S.Ct. 1338, 1342, 194 L.Ed.2d 444 (2016). The United States Probation Office, operating as an arm of the district court, first creates a

> presentence investigation report, "which includes a calculation of the advisory Guidelines range it considers to be applicable." Id., at ----, 136 S.Ct., at 1342; see Fed. Rules Crim. Proc. 32(c)(1)(A), (d)(1); United States Sentencing Commission, Guidelines Manual § 1B1.1(a) (Nov. 2016) (U.S.S.G.). That calculation derives from an assessment of the "offense characteristics, offender characteristics, and other matters that might be relevant to the sentence." Rita v. United States, 551 U.S. 338, 342, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007) (internal quotation marks omitted). Specifically, an offense level is calculated by identifying a base level for the offense of conviction and adjusting that level to account for circumstances specific to the defendant's case, such as how the crime was committed and whether the defendant accepted responsibility. See U.S.S.G. §§ 1B1.1(a)(1)-(5). A numerical value is then attributed to any prior offenses committed by the defendant, which are added together to generate a criminal history score that places the defendant within a particular criminal history category. §§ 1B1.1(a)(6), 4A1.1. Together, the offense level and the criminal history category identify the applicable Guidelines range. § 1B1.1(a)(7).

Id. at 1904. The USPO's calculations are based on information made available to them primarily by the Government, including but not limited to case discovery, but also from a defendant, such as an interview or statement.

Given the obligations imposed on sentencing courts, the USPO's work in drafting a complete and accurate PSR is of critical importance including the recommended Sentencing Guideline

calculation. See Fed. R. Crim. P. 32(d)(1)(B). District courts are required to properly calculate the applicable guidelines lest a resulting sentence be considered procedurally unreasonable. See United States v. Layton, 564 F.3d 330, 335-36 (4th Cir. 2009) (citing Gall v. United States, 552 U.S. 38 (2007)). "The district court has the ultimate responsibility to ensure that the Guidelines range it considers is correct, and the 'failure to calculate the correct Guidelines range constitutes procedural error.'" Rosales-Mireles, 138 S. Ct. at 1904 (quoting Peugh v. United States, 569 U.S. 530, 537 (2013)). "Guidelines miscalculations ultimately result from judicial error." Id. at 1908 (citation omitted). As such, when objections are made to the USPO's Guidelines recommendations, the Court must resolve those disputes and do so properly.

Recently, the Fourth Circuit vacated and remanded for re-sentencing a defendant after the district court neglected to comply with the mandates of Rule 32 as part of a Sentencing Guidelines calculation. See United States v. Treadway, 849 Fed. Appx. 425 (4th Cir. 2021) (unpublished). Specifically, the district court did not clearly set forth its determination on a guideline enhancement because the application (or lack thereof) of the enhancement would not have affected the guideline ranges. Therein, the Fourth Circuit noted the importance of an accurate Sentencing

Guidelines calculation but also the basis upon which the Court dispensed with any factual or legal dispute as required under Rule 32. Id. at 426. The court further emphasized the importance of an accurate PSR and the Rule 32-required appended order whenever a court resolves disputes as to a presentence report. Id. "Strict adherence to the dictates of [the rule] is essential because the rule helps ensure that future decisions about a defendant's penal treatment are based on a fair and accurate [PSR]." Id. (internal quotations and citation omitted); see also United States v. Murchison, 865 F.3d 23, 27 (1st Cir. 2017) ("[T]ogether, Rule 32 and the BOP's system work to ensure the BOP classifies and processes sentenced offenders with the benefit of all relevant and informative sentencing material."). In other words, the accuracy of a PSR and a Sentencing Guideline calculation is of critical importance not only to the procedural and substantive reasonableness of a sentence but also to the BOP as it takes custody of a defendant upon order of a district court.

The Sentencing Guidelines offer some suggested direction for courts when faced with the task of resolving disputed factors relevant to sentencing determinations. See U.S.S.G. § 6A1.3. That Guideline incorporates Rule 32(i) of the Federal Rules of Criminal Procedure. See id. at § 6A1.3(b). "Although lengthy sentencing hearings seldom should be necessary, disputes about sentencing

factors must be resolved with care." Id., Commentary. Evidentiary hearings are not required; however, the parties must be afforded an adequate opportunity to be heard and present relevant information on the matter. See id. Resolution of sentencing factor disputes are governed by a preponderance of the evidence standard and the Federal Rules of Evidence are not fully applicable. See id. (noting "[a]ny information may be considered, so long as it has sufficient indicia of reliability to support its probable accuracy.") (citations omitted).

II. Objections

Each objection to the PSR required resolution at the time of sentencing pursuant to U.S.S.G. § 6A1.3, Resolution of Disputed Factors.

a. Defendant objects to the applied special offense characteristic for brandishing a firearm which results in a 5-level enhancement pursuant to U.S.S.G. § 2B3.1(b)(2)(C).

In lieu of applying the 5-level enhancement pursuant to U.S.S.G. § 2B3.1(b)(2)(C), Defendant argued a 3-level enhancement pursuant to U.S.S.G. § 2B3.1(b)(2)(E) better fits the mold of this case. U.S.S.G. § 2B3.1(b)(2)(C) provides, "if a firearm was

brandish or possessed, increase by 5 levels." U.S.S.G. § 1B1.1 note (H) defines the term "Firearm" as

> (i) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (ii) the frame or receiver of any such weapon; (iii) any firearm muffler or silencer; or (iv) any destructive device. A weapon, commonly known as a "BB" or pellet gun, that uses air or carbon dioxide pressure to expel a projectile is a dangerous weapon but not a firearm.

Defendant argues for the application of U.S.S.G. § 2B3.1(b)(2)(E) because the weapon, while resembling a firearm, was not recovered at the scene. "If a dangerous weapon was brandished or possessed, increase by 3 levels . . . if (A) the object closely resembles an instrument capable of inflicting death or serious bodily injury." U.S.S.G. § 2B3.1(b)(2)(E), Application Note 2.

Special Agent James Wisniewski testified, and there was no dispute between the parties that, the surveillance footage[1] from the Summit Community Bank shows the defendant with what appears to be a firearm in his hand during the commission of the robbery. While the video resembles – but does not prove – a firearm in Utter's possession, the conduct that occurred after the robbery must be considered in applying this specific offense

[1] The surveillance video depicting the bank robbery was admitted into evidence and marked as Exhibit 1.

characteristic. A contact of the defendant's, Richie Starkey, provided two firearms to investigators which belonged to Utter. Starkey had previously taken the firearms from Utter, stating his concern that Utter was suicidal. One of those firearms is an old-style revolver that appeared consistent with the one depicted in the bank surveillance video. It is this old-style revolver that was seen by co-defendant Blaine Ash in his home on November 19, 2020, in the blue and white cooler, along with cash. One victim at the bank, the person who was held at gunpoint by Utter, reported that Utter did in fact have a firearm during the commission of the crime. Co-defendant Blaine Ash told law enforcement that Utter himself admitted that he used a firearm during the course of the robbery. These observations of eye witnesses, statements by the co-defendant, video surveillance, and testimony of SA Wisniewski support the application of the special offense characteristic. While Defendant argued the object merely looked like a firearm, and could have just as easily been a BB gun or the like, the preponderance of the evidence weighs in favor of the application of this special offense characteristic pursuant to U.S.S.G. § 2B3.1(b)(2)(C).

b. Defendant objects to the applied special offense characteristic for abduction during the bank robbery because Utter did not move any bank teller "to a different location" as required by U.S.S.G. § 1B1.1, Application Note 1(A).

Instead of applying the 4-level enhancement for abduction, Defendant argues the 2-level increase under U.S.S.G. § 2B3.1(b)(4)(B) applies because the bank employees were restrained with zip ties. U.S.S.G. § 2B3.1(b)(4) states: "(A) If any person was abducted to facilitate commission of the offense or to facilitate escape, increase by 4 levels; or (B) if any person was physically restrained to facilitate commission of the offense or to facilitate escape, increase by 2 levels." Application Note One directs the reader to U.S.S.G. § 1B1.1 for the definition of "abducted." § 1B1.1, Application Note 1(A) states "'Abducted' means that a victim was forced to accompany an offender to a different location. For example, a bank robber's forcing a bank teller from the bank into a getaway car would constitute an abduction."

Defendant Utter's grievance with the application of this special offense characteristic is supported by his argument that he did not accompany the bank teller "to a different location." Defendant cites to United States v. Osborne, 514 F.3d 377 (4th Cir. 2008). The Osborne Court was faced with determining the

movement requirement of "to a different location" under the sentencing guidelines. Defendant Osborne too argued against the application of the "abduction" special offense characteristic because he and the victims never left the building. Id. at 390. Instead, during the commission of the robbery, Defendant Osborne forcibly moved the pharmacy employees "from the pharmacy section (through its secured door), across the store area . . . to the front door of the Walgreens building." Id. This movement, he argued, was not "to a different location" because the undertaking occurred within the same building. Id. The Court of Appeals for the Fourth Circuit affirmed the district court's application of the "abduction" special offense characteristic pursuant to U.S.S.G. § 2B3.1(b)(4)(A) because Osborne forced the victims to accompany him "as he made his way from the pharmacy section through the store area to the front door" and by doing so, "rendered them potential hostages." Id.

Further, The Fourth Circuit has previously held that "for the abduction enhancement to apply, the victim need not have been moved any great distance." United States v. Coates, 2004 WL 2457768, Case No. 04-4321, *1, *3 (4th Cir. 2004) (*vacated on other grounds by* Coates v. U.S., 544 U.S. 916 (2005)). Also persuasive is the Fifth Circuit Court of Appeals' decision in United States v. Hawkins, 87 F.3d 722 (5th Cir. 1996). "[T]he court approved an

abduction enhancement under the robbery guideline where two carjacking victims were moved forty to sixty feet at gunpoint within the same parking area, despite the defendant's assertion that the victims were not forced from one location to another." Osborne, 514 F.3d at 389 (citing Hawkins, 87 F.3d at 726) (internal quotation marks omitted).

Here, the parties presented SA Wisniewski's testimony, the video surveillance, and the FBI report titled "Measurements of Clinton Utter's movements with Penny Ash."[2] The FBI report describes the distances of all the movements Defendant Utter took with the victim, Penny Ash. In total, to and from the back door to the teller counter, from the teller counter to the manager's office, from the manager's office to the teller counter, and from the teller counter to the vault, the pair walked approximately 121 feet at the direction of Utter. While all these movements occurred within the same building, the Court finds that when Defendant Utter accompanied the victim from the teller counter to the vault, by gunpoint, Defendant Utter abducted the victim pursuant to U.S.S.G. § 2B3.1(b)(4)(A). The vault is a separate room where the money is stored. It is disconnected from the main lobby by a locked door which requires two bank employees to enter a unique code to access

[2] The FBI report was admitted into evidence and marked as Exhibit 2.

the secured area. The vault remains locked and was designed to be a secure, and separate, location from the lobby where the teller counter is. Because the amount of space covered during the encounter is not dispositive, and sufficient evidence was presented to show by a preponderance of the evidence Defendant Utter accompanying the victim, by force, to a different location, the 4-level enhancement for abduction applies and Defendant Utter's objection is overruled.

c. Defendant objects to the applied special offense characteristic for carjacking during the bank robbery pursuant to U.S.S.G. § 2B3.1(b)(5).

U.S.S.G. § 2B3.1(b)(5) contemplates a 2-level increase "if the offense involved carjacking." Application Note 1 of the same guideline defines carjacking as "the taking or attempted taking of a motor vehicle from the person or presence of another by force and violence or by intimidation." Defendant argues that he did not "carjack" anyone as described under the sentencing guidelines; instead, he stole keys from the purse of a victim of the robbery. Indeed, during the robbery, as agreed by both parties and discovered in the video surveillance, Defendant Utter ordered one victim teller to hand over her car keys to her Chevy Blazer and later fled in the vehicle with the stolen $69,100.00 from the vault. The video surveillance depicts, and SA Wisniewski

confirmed, Defendant Utter took the victim's purse to her while she lay tied and restrained on the floor and ordered her to find her car keys. The victim retrieved the keys from her purse and threw the keys across the floor. During this exchange, SA Wisniewski testified that Defendant Utter's firearm is in his left hand.

Circuit Courts of Appeals have considered the question of "carjacking" as applied in the sentencing guidelines versus "keyjacking." In United States v. Archuleta the Court analyzed the "person or presence" requirement under the federal carjacking statute, 18 U.S.C. § 2119, after which the sentencing guideline is modeled. Notably, "the 'person or presence' element of § 2119 is satisfied if the victim could have prevented the carjacking by withholding the car keys, but was overcome by violence or fear." United States v. Archuleta, 348 Fed.Appx. 380, 383-84 (10th Cir. 2009) (quoting United States v. Moore, 198 F.3d 793 (10th Cir. 1999)). The Sixth Circuit Court of Appeals determined that it "is not so much a matter of eyesight as it is one of proximity and control: the property taken in the robbery must be close enough to the victim and sufficiently under his control that, had the latter not been subjected to violence or intimidation by the robber, he could have prevented the taking." United States v. Boucha, 236

F.3d 768, 772 (6th Cir. 2001) (internal citation and quotation marks omitted).

It is clear that the victim surrendered her car keys because Defendant Utter was standing over her with a gun in his hand and during the commission of the robbery. Certainly, absent the violence and intimidation subjected to the victim by Defendant Utter, she would not have given the keys to her Chevy Blazer. This objection is overruled and the two-level increase under U.S.S.G. § 2B3.1(b)(5) applies.

d. Defendant objects to the applied adjustment for role in the offense pursuant to U.S.S.G. § 3B1.1(c).

In considering the defendant's role in the Conspiracy to Commit Money Laundering offense, the Probation Officer applied the two-level increase because the defendant was an organizer and leader of the conspiracy, which involved one or more participants, pursuant to U.S.S.G. § 3B1.1(c). See U.S.S.G. § 3B1.1, Comment (n.2). Specifically, § 3B1.1(c) requires a 2-level increase "if the defendant was an organizer, leader, manager, or supervisor in any criminal activity." Defendant Utter argues that co-defendant Gill was the one who knew the identity of the money laundering contact - Nicole McCaulley, or "Shorty" - who would assist in the laundering scheme. Defendant Utter maintained that it was co-

defendant Gill who directed Defendant Utter to that location and that there was equal involvement between the defendants and Shorty.

While co-defendant Gill made the introduction between Utter and Shorty by accompanying Utter to the first meeting and recruiting Shorty by giving her a portion of the robbery funds, Utter directed Shorty to use the funds from the robbery to generate income for his benefit by purchasing drugs and prepaid cards. Indeed, all the robbery proceeds were directed to benefit Utter only, by paying either his spousal alimony payments or bills. Gill, at Utter's direction, gave Shorty account numbers in his name, his ex-wife's name, or both. Those account records demonstrate that Utter experienced otherwise unexplained wealth in the days following the bank robbery, having made $7,106.21 in cash deposits, and cash and money order payments toward bills and loan accounts held in his name between November 19, 2020, and November 25, 2020, despite the fact that he was unemployed and receiving minimal unemployment compensation payments.

The preponderance of the evidence weighs in favor of applying the adjustment for role in the offense pursuant to § 3B1.1(c). Defendant Utter exercised control and authority over others in the money laundering scheme, including Gill, because the two drove together to Fairmont to meet Shorty, Utter carried a firearm, and Gill made transactions with Shorty on Utter's behalf. The nature

and scope of the illegal activity is overwhelmingly Defendant Utter's project and entirely for his benefit. Notably, to the undercover FBI agent, Defendant Utter exclaimed that he was $15,000.00 short "because [Shorty's] sitting in jail." Because Defendant Utter orchestrated the money laundering conspiracy in order to conceal the money from the bank robbery, use that money to pay his spousal alimony ordered in his divorce decree, and pay bills, this role adjustment applies and Defendant's objection is overruled.

III. Conclusion

For the reasons set forth herein and stated upon the record at the November 5, 2021 sentencing proceeding, the Court made all appropriate findings as required by the Resolution of Disputed Factors pursuant to U.S.S.G. § 6A1.3 and imposes the sentence as set forth in its Judgment and Commitment Order entered contemporaneously with this Order.

It is so **ORDERED.**

The Court **DIRECTS** the Clerk to transmit copies of this Order to counsel of record and all appropriate agencies.

DATED: November 12, 2021

/s/ Thomas S. Kleeh
THOMAS S. KLEEH
UNITED STATES DISTRICT JUDGE