The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: Matthew "Matt" Joseph Wilson

Office Address: (including county)
United States Attorney's Office
109 S. Highland Ave., Room 300
Jackson, TN 38301
Madison County

Office Phone: (731) 422-6220 Facsimile: (731) 422-6668

Email Address: [redacted]

Home Address: (including county)
[redacted]
Jackson, TN 38305

Home Phone: Cellular Phone: [redacted]

INTRODUCTION

The State of Tennessee Executive Order No. 87 (September 17, 2021) hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

The Council requests that applicants use the Microsoft Word form and respond directly on the form using the boxes provided below each question. (The boxes will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit your original hard copy (unbound) completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts as detailed in the application instructions. Additionally you must submit a digital copy with your electronic or scanned signature. The digital copy may be submitted on a storage device such as a flash drive that is included with your original application, or the digital copy may be submitted via email to rachel.harmon@tncourts.gov.

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Assistant United States Attorney, United States Department of Justice, assigned to the United States Attorney's Office, Western District of Tennessee.

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

2013, BPR Number 032517.

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

Florida, Active License, Florida Bar Number 20584, admitted April 2006.

I am also admitted to the following courts: United States District Court in the Western District of Tennessee, admitted 2011; United States District Court in the Middle Tennessee, admitted 2021; United States District Court in the Western District of Arkansas, admitted 2008; United States Circuit Court, Sixth Circuit, admitted 2011; United States Circuit Court, Eighth Circuit, admitted 2008.

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any state? If so, explain. (This applies even if the denial was temporary).

No.

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

From October 2008 to present, I have been an attorney with the United States Department of Justice. From November 2011 to present, I have been an Assistant United States Attorney in the Western District of Tennessee. From October 2008 until October 2011, I was an Assistant United States Attorney in the Western District of Arkansas. From December 2005 until October 2008, I worked in state prosecutor offices in Florida. From December 2006 to October 2008, I was a felony prosecutor in branch offices in Jackson and Calhoun Counties, in Florida, and became the lead prosecutor in Calhoun County. From December 2005 until November 2006, I

was a misdemeanor prosecutor primarily in Gadsden County, Florida. I worked under a provisional license following my early graduation from law school until I was admitted to the Florida Bar in April 2006.

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

N/A.

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

Criminal prosecution, 100 percent.

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Council needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Council. Please provide detailed information that will allow the Council to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

Since November of 2011, I have been an Assistant United States Attorney in the United States Attorney's Office in the Western District of Tennessee. I am the Deputy Branch Chief of the Eastern Division, located in Jackson and covering an 18-county area. As Deputy Chief, I oversee four attorneys and four support staff. I am also the Appellate Supervisor for the Eastern Division, where I review and approve all appellate briefs filed with the Sixth Circuit Court of Appeals, as well as post-conviction filings in United States District Court. I currently handle white-collar crime prosecutions, including complex healthcare fraud, bank fraud, and criminal tax matters. I also handle bank robbery prosecutions. I have litigated 16 federal jury trials, with nine as lead counsel. I have been government counsel on more than 70 appellate matters.

Until September 2014, I was the primary narcotics prosecutor in the Eastern Division. I led more than 25 Title-III wiretap investigations and submissions, and I led Organized Crime and Drug Enforcement Task Force ("OCDETF") investigations. As the narcotics prosecutor, I carried the largest caseload in the Eastern Division.

From October 2008 until October 2011, I was an Assistant United States Attorney in the Western District of Arkansas. I prosecuted largely narcotics and immigration cases, and carried a general criminal caseload in all six divisions of the office. I tried six federal jury trials, with four as lead counsel. I regularly filed appellate briefs to the Eighth Circuit Court of Appeals. I was also the Criminal Asset Forfeiture Attorney, where I handled all criminal forfeiture actions in the district, and forfeited more than $3 million in currency, real and personal property, and firearms.

From December 2006 until my departure to the federal system, I was a felony prosecutor with the State Attorney's Office in the 14th Circuit of Florida, which was based out of Panama City. Shortly into my tenure, I handled the entire felony caseload for the Calhoun County branch office, where I prosecuted defendants for violent crimes, sex crimes, and drug crimes. In Jackson and Calhoun Counties, I tried 18 felony jury trials and several misdemeanor jury trials.

From December 2005 until November 2006, I worked as a misdemeanor prosecutor at the State Attorney's Office in the Second Circuit of Florida. Working in the Gadsden and Liberty County branch offices, I tried 13 misdemeanor jury trials, two felony jury trials, and more than 100 bench trials. I also conducted involuntary civil commitment proceedings at Florida State Hospital in Chattahoochee, Florida.

9. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

I was lead counsel in *United States. v. Sandra Bailey et. al.*, WDTN Case Number 1:15-cr-10011, in a jury trial which commenced in October 2017, and went to verdict in February 2018 for Conspiracy to Commit Health Care Fraud, Health Care Fraud, and Violations of the Anti-Kickback Statute. The defendants' scheme led to more than $9 million in loss to the taxpayers. All three defendants were convicted of all counts. I was also lead appellate counsel on the case and argued the case before the Sixth Circuit at oral argument. All convictions were upheld on appeal, with the sentences of two of the defendants remanded to the trial court for technical matters. The defendants were sentenced to nine years, seven years, and nearly four years in federal prison.

I was lead counsel in *United States v. Charles Smith*, WDTN Case Number 1:16-cr-10089, which was a bank fraud case with nearly a $10-million loss to the victims. The defendant was convicted of all counts by the jury and sentenced to federal prison. I solely handled the case on appeal, and the Sixth Circuit upheld the defendant's convictions and sentence.

I was lead counsel in *United States v. Gene Howell*, WDTN Case Number 1:17-cr-10098, where the defendant was charged with two bank robberies and firearms violations. The defendant had robbed banks in Finger and Reagan, Tennessee, and had assaulted and attempted to murder the bank employee victims. The jury convicted the defendant of all counts at trial, and he was sentenced to 466 months in federal prison. I solely handled the case on appeal, and the Sixth Circuit upheld the defendant's convictions and sentence.

I was trial and appellate counsel in *United States v. Michael Jay Harris*, WDTN Case Number 1:17-cr-10093, in a jury trial where the defendant was charged with trafficking methamphetamine. The jury convicted the defendant as charged, and as he was a recidivist

offender with a history of drug trafficking and violent offenses, he was sentenced to life in federal prison. I solely handled the case on appeal, and the Sixth Circuit upheld the defendant's conviction and sentence.

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

N/A.

11. Describe generally any experience you have serving in a fiduciary capacity, such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

N/A.

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Council.

I was a member of the 2018 United States Magistrate Judge Selection Committee, where I served with nine other individuals, ultimately leading to the appointment of United States Magistrate Judge Jon A. York.

13. List all prior occasions on which you have submitted an application for judgeship to the Governor's Council for Judicial Appointments or any predecessor or similar commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

N/A.

EDUCATION

14. List each college, law school, and other graduate school that you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

Florida State University College of Law, J.D., December 2005, Tallahassee, Florida.
Honors: Dean's List - Spring 2004, Fall 2004; Champion, FSU Dispute Resolution Competition Fall 2004; Finalist ABA Dispute Resolution Competition, Birmingham, AL. I also worked as a research assistant for Professor John F. Yetter, researching Confrontation Clause issues following the Supreme Court's decision in *Crawford v. Washington*.

Auburn University, B.A., Corporate Journalism, December 2002, Auburn, Alabama.
Honors: *Cum Laude,* Dean's List Spring 2001, Fall 2001, Spring 2002. Also, I was a Student Recruiter, one of 38 students chosen to represent Auburn, attending college fairs and giving campus tours.

From January 2000 until May 2000, I attended the University of Colorado, in Boulder and took full-time undergraduate coursework until I transferred to Auburn University. I transferred because I missed the South. From August 1998 until December 1999, I attended Lipscomb University, in Nashville, where I took full-time undergraduate coursework. I transferred because I wanted to move to Colorado, and fly fish.

PERSONAL INFORMATION

15. State your age and date of birth.

43, [redacted] 1979.

16. How long have you lived continuously in the State of Tennessee?

Since November 1, 2011. Also, as I was born in Tennessee and raised in the Nashville area, I lived here from 1979 until January 2000.

17. How long have you lived continuously in the county where you are now living?

Since November 1, 2011.

18. State the county in which you are registered to vote.

Madison County.

19. Describe your military service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

N/A.

20. Have you ever pled guilty or been convicted or placed on diversion for violation of any law, regulation or ordinance other than minor traffic offenses? If so, state the approximate date, charge and disposition of the case.

No.

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No.

22. Please identify the number of formal complaints you have responded to that were filed against you with any supervisory authority, including but not limited to a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you. Please provide any relevant details on any such complaint if the complaint was not dismissed by the court or board receiving the complaint.

2008, Florida Bar: As a state prosecutor, a criminal defendant alleged that I had threatened him with criminal prosecution if he did not provide information against a co-defendant. It was untrue, and I responded in writing to The Florida Bar, the equivalent of the Board of Professional Responsibility. The complaint was determined to be unfounded and dismissed following my written response. At the time, Florida did not have a Consumer Assistance Program to screen complaints. For unfounded complaints, records are purged after one year.

2008, Florida Bar: As a state prosecutor, a criminal defendant's mother alleged I vindictively prosecuted her son. It was untrue, and I responded in writing to The Florida Bar, the equivalent of the Board of Professional Responsibility. The complaint was determined to be unfounded and dismissed following my written response. At the time, Florida did not have a Consumer Assistance Program to screen complaints. For unfounded complaints, records are purged after one year.

2022, Consumer Assistance Program ("CAP"), Tennessee Board of Professional Responsibility: Michael Jay Harris, whom I prosecuted and was sentenced to life in prison, filed a complaint with CAP in July 2022, alleging I had committed prosecutorial misconduct. I responded in writing, and have received a letter that the matter has been closed by CAP.

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or

local authorities or creditors within the last five (5) years? If so, give details.

No.

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

No.

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

No.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices that you have held in such organizations.

Fellowship Bible Church, Jackson, Tennessee: Third Grade Sunday School Teacher, Men's Bible Study Leader, current.

AIM Ministries, co-founder: We provide housing and employment opportunities to young men, particularly those who have aged out of the foster care system, and those with intellectual disabilities. Since 2020, we have assisted several young men in this situation, and currently have one resident who lives in a home my wife and I own, and we assist with transportation, maintaining employment, life skills.

Samaritan's Purse Disaster Relief: September 2021, Waverly, Tennessee.

27. Have you ever belonged to any organization, association, club or society that limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

    a. If so, list such organizations and describe the basis of the membership limitation.

    b. If it is not your intention to resign from such organization(s) and withdraw from

any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

N/A.

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices that you have held in such groups. List memberships and responsibilities on any committee of professional associations that you consider significant.

Tennessee Bar Association, Leadership Law, Class of 2016.

Howell Edmunds Jackson Inns of Court, Jackson Tennessee, 2017 to present.

Federal Bar Association 2016, 2022.

Federalist Society, 2020 to present.

29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school that are directly related to professional accomplishments.

2010, Federal Bureau of Investigation Director's Certificate, for the prosecution in *United States v. Billy Craig Underwood*. 2011, Federal Bureau of Investigation Director's Certificate, for Operation Street Sweeper. 2012, Federal Bureau of Investigation Director's Certificate, for Operation Snow Roots. 2018, Federal Bureau of Investigation Director's Certificate, for the prosecution of *United States v. Sandra Bailey et. al.*

2011, Award of Appreciation, Drug Enforcement Administration, Fort Smith Resident Office.

2011, Award of Appreciation by the Special Agent in Charge, Department of Homeland Security, United States Immigration and Customs Enforcement, Office of Investigations.

Spirit of Excellence Award, for the years of 2012, 2014, 2016 and 2018, from the United States Attorney's Office and given by the United States Attorney to top performers in the office.

2014, Award of Appreciation, Drug Enforcement Administration, Jackson Resident Office, for Operation Desert Spice.

2018, Award of Appreciation, Department of Health and Human Services, Office of Investigations, for health care fraud prosecutions.

30. List the citations of any legal articles or books you have published.

N/A.

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

N/A.

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

N/A.

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

No.

34. Attach to this application at least two examples of legal articles, books, briefs, or other legal writings that reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

See United States Sixth Circuit Court of Appeals briefs in *United States v. Gene Howell*, Sixth Circuit Case Number 20-5858; and *United States v. Michael Jay Harris*, Sixth Circuit Case Number 18-6264, attached. Both are 100 percent my work.

ESSAYS/PERSONAL STATEMENTS

35. What are your reasons for seeking this position? ***(150 words or less)***

Tennessee needs a strong and experienced appellate bench. As is evident in my 16-plus years as a state and federal prosecutor, I believe in the rule of law and a strict adherence to it. I have tried more than 50 jury trials, more than 50 appellate matters, and hundreds of contested hearings and bench trials. For these reasons, I believe I am highly qualified for this position.

I am a textualist and originalist. Statutes and Constitutions are generally written in plain language, and rarely should courts look beyond that. I respect the independent branches of government. I also believe in judicial restraint, and that in most circumstances, considerable deference is due to the courts below. From my extensive experience, I know that trials require judges to make decisions very quickly, and in strenuous environments. For this reason, I have the upmost respect for standards of review on appeal.

36. State any achievements or activities in which you have been involved that demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. ***(150 words or less)***

I am prohibited by law from providing pro bono service; however, I believe my current service demonstrates my commitment to equal justice. I treat individuals with respect, whether they are victims or criminal defendants. Each victim, rich or poor, is worthy of my best effort. As a financial-crimes prosecutor, my victims have often lost their life savings. I have been a strong advocate for restitution, to avoid victims having to incur additional costs to be made whole. Regarding criminal defendants, I have considerable discretion to make charging decisions and sentencing recommendations to account for defendants' circumstances that may go beyond their crimes.

There are matters in my personal life I believe show this commitment. One is my involvement with young men with troubled pasts through my ministry. Intervention, so far, has kept them from meeting me in a courtroom.

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. ***(150 words or less)***

I seek an appointment to the Tennessee Court of Criminal Appeals, Western Section, for one of the positions dedicated to the Western Grand Division. While I do not have "Judge" before my name, my current position can dramatically impact people's lives. I respect that power, because through the filing of an indictment or sustaining a conviction, a person's life can be forever changed. I also must faithfully discharge my duties to my office and protect the community we all share.

I would use my considerable trial and appellate experience as a prosecutor to become an excellent appellate judge. Not to prosecute from the bench, but to use that ample experience to identify and evaluate legal issues I have likely encountered through handling all types of criminal matters. As my entire practice has been in criminal law, I am uniquely qualified for this judgeship.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? ***(250 words or less)***

I am a firm believer in educating the public, especially youth, about our criminal justice system. I have spoken to criminal justice classes at Freed-Hardeman University and at Lexington High School, about federal prosecution and constitutional issues. I have spoken to health care workers about federal narcotics laws. I have taught local and state police officers about federal prosecution. I would like to expand my teaching, especially if chosen for this position. As the deputy chief, appellate supervisor and second-most senior prosecutor in the Jackson office, I regularly mentor others and enjoy lending my experience to them.

If selected for this position, I will continue my work with AIM, and I hope it will expand. Beyond meeting the basic needs of young men, I serve as a father figure to them, and do my best to teach them to avoid the criminal justice system. I have taken them to see me at work, and to see their future if they continue to make poor choices. I also hope to reach other young men. Recently, a friend of mine from my Bible study began working at a youth facility. He and

I have counseled young men in the past to attempt to intervene. He and I come from completely different backgrounds and life experiences, but our approach has been effective, and I see a bright future.

I will also continue to teach Third Grade Sunday School. It's the best part of my week.

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Council in evaluating and understanding your candidacy for this judicial position. ***(250 words or less)***

I am a front-line prosecutor. I currently handle cases from the investigation stage, including grand jury proceedings, through guilty pleas and trials, and through the Sixth Circuit Court of Appeals. In the appellate courts, I have had to defend my actions, the actions of other government actors, and of the trial court. Because of this, I understand the importance of making a clear, unambiguous record. I understand that an appellate court relies solely on the record below in making its decisions. While the record is "cold," it needs to sufficient information to inform reviewing courts.

I have prosecuted the largest and most complex cases. One example is the *Bailey* case, the three-defendant trial cited in Paragraph 9. The investigation stage took more than four years and involved subpoenaing hundreds of thousands of documents and grand jury appearances of many witnesses. The trial began in October of one year and finished in February of the next. The proof was 35 witnesses, and 118 exhibits consisting of tens of thousands of pages. The appellate brief was 112 pages. I argued the case at the Sixth Circuit following convictions on all counts. The Court found no reversible error in the trial, and only remanded sentences on two of the defendants for restitution and a minor sentencing issue. I have continued to solely handle post-trial litigation, a second appeal from a defendant, and all matters on the case.

I also prosecute criminal tax matters, which requires evaluation of complex laws before prosecutions are initiated.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. ***(250 words or less)***

Absolutely. One example from my experience is where a married couple had come to the attention of federal agents who were investigating the drug trafficking activities of their son. The son had called his parents and asked them to hide evidence he had secreted in her house. They were shocked and appalled at their son's actions, but hesitantly agreed after their son repeatedly had begged them to do so. I felt bad for them, but they were technically guilty of conspiracy to distribute narcotics and had to be held accountable. A sentence under that statute would carry an extremely lengthy prison sentence.

Ultimately, I allowed the couple to plead guilty to the crime of misprision of a felony, which carried a lesser sentence, but still held them accountable for their actions. In doing so, I believe I recognized the extremely difficult position their son had placed them in by hiding contraband

in their house, but I also ensured justice was done. I was able to use my discretion afforded to me by my department's policies and my position to achieve a just result.

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Council or someone on its behalf may contact these persons regarding your application.

A. Chief United States District Judge S. Thomas Anderson, [redacted] Jackson, TN 38301. [redacted]
B. United States District Judge J. Daniel Breen, [redacted]., Jackson, TN 38301. [redacted]
C. United States Magistrate Judge Jon A. York, [redacted]., Jackson, TN 38301. [redacted]
D. William Chenault, Associate Pastor, Fellowship Bible Church, [redacted], Jackson, TN 38305. [redacted]
E. Clayton Goldsmith, Special Agent, Federal Bureau of Investigation, [redacted], Jackson, TN 38305. [redacted]

AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the Court of Criminal Appeals of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended application with the Administrative Office of the Courts for distribution to the Council members.

I understand that the information provided in this application shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Council may publicize the names of persons who apply for nomination and the names of those persons the Council nominates to the Governor for the judicial vacancy in question.

Dated: October 20, 2022.

Signature

When completed, return this application to Rachel Harmon at the Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

THE GOVERNOR'S COUNCIL FOR JUDICIAL APPOINTMENTS
ADMINISTRATIVE OFFICE OF THE COURTS

511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
TENNESSEE BOARD OF JUDICIAL CONDUCT
AND OTHER LICENSING BOARDS

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information that concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, the Tennessee Board of Judicial Conduct (previously known as the Court of the Judiciary) and any other licensing board, whether within or outside the State of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Governor's Council for Judicial Appointments to request and receive any such information and distribute it to the membership of the Governor's Council for Judicial Appointments and to the Office of the Governor.

Matthew Joseph Wilson
Type or Print Name

Matthew Joseph Wilson
Signature

October 20, 2022
Date

032517
BPR #

Please identify other licensing boards that have issued you a license, including the state issuing the license and the license number.

Florida, 020584

No. 18-6264

United States Court of Appeals
for the Sixth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

MICHAEL JAY HARRIS,
Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Tennessee
No. 1:17-CR-10093 (Breen, C.J.)

BRIEF FOR PLAINTIFF-APPELLEE UNITED STATES

For the Appellee:

D. MICHAEL DUNAVANT
United States Attorney

MATTHEW J. WILSON
Assistant United States Attorney
109 South Highland Avenue, Suite 300
Jackson, Tennessee 38301
(731) 422-6220
matthew.j.wilson@usdoj.gov

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Statutes

STATEMENT REGARDING ORAL ARGUMENT

The briefs adequately set forth the legal issues in this appeal. The United States, therefore, does not believe the decisional process would be significantly aided by oral argument.

STATEMENT OF JURISDICTION

The district court had jurisdiction in this case pursuant to 18 U.S.C. § 3231, because the defendant was indicted by a federal grand jury for offenses against the laws of the United States. This Court has jurisdiction pursuant to 28 U.S.C. § 1291, which grants this Court jurisdiction over final decisions of the district courts.

ISSUE PRESENTED

I. Did the district court clearly err in determining that defendant voluntarily consented to the officers' entry into his residence, after the court determined that the officers were credible and defendant was not credible?

STATEMENT OF THE CASE

This is a criminal case. Defendant appeals from the denial of his motion to suppress.

Offense conduct

On February 13, 2017, Officer Michael Gilbert with the McNairy County, Tennessee, Narcotics Unit, went to the residence of Michael Harris ("defendant") to serve an arrest warrant on Harris. Record Entry ("RE") No. 57, Suppression Hearing Transcript (Supp. Tr.), PageID 116-17. Gilbert testified that he, along with other officers, went to defendant's house trailer, and Gilbert went to the rear of the trailer. *Id*. at PageID 117. Other officers, including Deputy Larry Wilbanks, went to the front of the trailer and made contact with defendant. *Id*. at PageID 117-18.

Gilbert returned to the front of the trailer, and the officers advised defendant of the arrest warrant. *Id*. After defendant was advised he was under arrest, defendant complained other people had been left in his home on a previous occasion he was arrested, and he wanted everyone out of his trailer. *Id*. at PageID 118, 128. Defendant told the officer, "I want y'all to make sure everybody is out of my house. Because the last time I got arrested, y'all left people in there, stuff got stolen, things got broken." *Id*. at PageID 129. Defendant also wanted everything turned off in the trailer. *Id*. at PageID 129-30. Gilbert agreed to take defendant into the trailer and clear it of people. *Id*. at PageID 118. The defendant was "pretty much leading

the way" through the trailer, "[r]oom to room." *Id*. at PageID 123.

Gilbert walked through the whole trailer with the defendant and encountered a female. *Id*. at PageID 118. She was asked to leave, gathered her belongings, and walked out of the trailer. *Id*. Officers made sure the back door was locked, and defendant asked them to leave one light on over the sink. *Id*. at PageID 134.

The entire process of clearing the trailer took approximately five minutes. *Id*. at PageID 119. Gilbert testified the act of clearing defendant's trailer of people was nothing like executing search warrants, which he had done numerous times. *Id*. at PageID 120. He smelled the odor of burnt marijuana in the residence. *Id*. at PageID 139.

After the officers determined no one else was in the residence, they began to leave, and Gilbert noticed, in plain view, a plastic bag hanging from the side of a couch by the side of the door. *Id*. at PageID 137-39. Through the thin, white bag, Gilbert was able to determine it contained marijuana, as it was clear enough to see the marijuana pressed against the material. *Id*. at PageID 121, 137-38. Subsequently, he discovered it also contained methamphetamine. *Id*. at PageID 121-22. Gilbert also saw a digital scale, and some other paraphernalia in plain view. *Id*. at PageID 122. Gilbert contacted an investigator for a search warrant, and no search was conducted until the investigator arrived with the warrant. *Id*. at PageID 121-22.

Deputy Wilbanks also testified at the hearing. *Id*. at PageID 148-74. Wilbanks said: "But after – he had [an] altercation with us. He was really upset. He said, y'all left people in my house before, and I don't want anybody at my house. We asked [defendant] if he wanted us to get the people out of his house. And he stated, yes….He asked us if we would remove the people out of the house. And deputies did exactly what we was asked to do." *Id*. at PageID 149-50. Wilbanks took defendant's words as an invitation to enter the trailer, and said that the officers' reason for entering the trailer was to remove people. *Id*. at PageID 150-51.

On cross examination, Wilbanks stated that defendant remained on the front porch with another officer, while Wilbanks and the other officers cleared one side of the trailer. *Id*. at PageID 159-60. At some point, Gilbert cleared the rest of the trailer. *Id*. Wilbanks also stated the process of clearing the trailer took approximately five minutes. *Id*. at PageID 165. Wilbanks later clarified that while he and another officer were searching back bedrooms in the trailer, Wilbanks was not in a position to see Gilbert or defendant. *Id*. at PageID 174.

Defendant also testified at the suppression hearing. *Id*. at PageID 176-94. Defendant said he wanted to secure his house, but asked to secure it himself. *Id*. at PageID 177. Defendant stated the officers did not let him go back into the house, but went in themselves. *Id*. The woman in the trailer was his girlfriend, Crystal Bailey. *Id*. at PageID 177-78. Defendant stated officers had left his house unlocked

when he previously was arrested and his belongings were stolen. *Id*. at PageID 179.

On cross examination, defendant admitted to multiple felony convictions. *Id*. at PageID 182. Defendant stated his girlfriend did not have a key to the trailer. *Id*. at PageID 184. He denied ever seeing Wilbanks before. *Id*. at PageID 188. Defendant admitted to previous use of marijuana, cocaine, and methamphetamine. *Id*. at PageID 188-89.

The district court questioned defendant. Defendant admitted that he wanted his house secured, and the only difference between his and the officers' testimony was defendant wanted to secure the house himself. *Id*. at PageID 191.

Procedural history

On October 16, 2017, a grand jury charged defendant with one count of possessing more than 50 grams of actual methamphetamine with intent to distribute, in violation of 21 U.S.C. §§ 841(a) and 846. RE-1, Indictment, PageID 1-2.

Defendant filed a motion to suppress. RE-38, Motion to Suppress, PageID 58-61. On July 3, 2018, the district court conducted a suppression hearing. RE-57, Supp. Tr., PageID 108-98.

On July 9, 2018, the district court entered an order denying defendant's motion to suppress. RE-54, Order, PageID 99-105. The district court found that defendant consented to the officers' entry to secure his home, and defendant's contrary testimony was not credible. *Id*. at PageID 105. The district court also cited

United States v. Holland, 522 F. App'x 265, 274 (6th Cir. 2013), for the proposition that officers are not required to explicitly ask for consent to enter a home. RE-54, Order, PageID 103. As such, the district court found no Fourth Amendment violation. *Id*.

On August 8, 2018, the case proceeded to trial, and on August 9, 2018, a jury convicted defendant. RE-72, Minute Entry; RE-75, Minute Entry. On November 16, 2018, the district court sentenced defendant to life in prison. RE-98, Redacted Judgment, PageID 604-09. This timely appeal followed. RE-101, Notice of Appeal, PageID 616.

SUMMARY OF THE ARGUMENT

This Court should affirm the denial of defendant's motion to suppress. The district court did not clearly err in crediting the officers' testimony and discrediting defendant's testimony. Because the officers were more credible, the district court found that defendant verbally consented to the officers' entry into his home to secure it. His consent was voluntary.

ARGUMENT

I. The district court did not clearly err in determining that defendant voluntarily consented to the officers' entry into his home, after finding that the officers were credible and defendant was not credible.

Standard of review

"In reviewing a district court's suppression determination, [this Court] review[s] findings of facts for clear error, and legal conclusions *de novo*." *United States v. Moon*, 513 F.3d 527, 536 (6th Cir. 2008). "Where a district court denies a motion to suppress, we consider the evidence in the light most favorable to the government." *Id.* at 536-37 (internal quotation marks and citation omitted). This Court can affirm the denial of a motion to suppress on any basis supported by the record. *United States v. Gill*, 685 F.3d 606, 609 (6th Cir. 2012). "Whether consent to search is voluntarily given is a question of fact." *United States v. Erwin*, 155 F.3d 818, 822 (6th Cir. 1998). Therefore, a "district court's finding of voluntary consent will be reversed only if clearly erroneous." *Id.* (citing *United States v. Calhoun*, 49 F.3d 231, 234 (6th Cir. 1995)). Under this standard, a district court's finding of consent should be upheld unless this Court is "left with the definite and firm conviction that a mistake has been committed." *Tran v. Gonzales*, 447 F.3d 937, 943 (6th Cir. 2006) (internal citation omitted).

Where there are two permissible views of the evidence, and the court simply chooses one over the other, the court's conclusions cannot be clearly erroneous.

See United States v. Worley, 193 F.3d 380, 384 (6th Cir. 1999). Further, when a finding of voluntariness is based on the credibility of witnesses, deference to the district court's determination is "especially warranted." *McCall v. Dutton*, 863 F.2d 454, 459 (6th Cir. 1998).

This Court has identified a number of factors that are often relevant to the question whether consent was voluntary, including:

> the accused's characteristics and the details of the interrogation, including the youth of the accused, his lack of education, his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of the detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep.

United States v. Canipe, 569 F.3d 597, 603 (6th Cir. 2009). This Court also considers whether a defendant has experience in the criminal justice system. *Id*. at 604. "There is no 'magic' formula or equation that a court must apply in all cases to determine whether consent was validly or voluntarily given." *Worley*, 193 F.3d at 387.

A. The district court did not clearly err in crediting the testimony of the two officers and finding that defendant voluntarily consented to the officers' entry.

The defendant does not contest his sentence or any of the trial court's rulings at trial. Nor does he dispute that the officers properly seized the narcotics in his residence after seeing them in plain view. Rather, his sole claim on appeal is that

the district court clearly erred in finding that he consented to the officers' search of his residence. But the district court's finding of consent was based on credibility determinations that are essentially unassailable on appeal.

During the suppression hearing, the court observed the demeanor and testimony of three witnesses – Officer Gilbert, Deputy Wilbanks, and defendant. All three testified defendant was concerned about leaving his home unlocked. Wilbanks testified unequivocally that defendant asked them to enter his trailer to clear it of people and secure it. And Gilbert testified defendant was leading the way, room to room, while they cleared it. As the district court stated, and defendant agreed, the only difference between the officers' testimony and defendant's was that the defendant claimed he wanted to secure the trailer himself. The district court adopted the officers' testimony. This was not clear error. *See United States v. Dillard*, 438 F.3d 675, 680-81 (6th Cir. 2006).

In his brief, defendant relies heavily upon *United States v. Little*, 431 F. App'x 417 (6th Cir. 2011). *Little* is readily distinguishable from the instant case. In *Little*, the police officer "neglected to ask for permission," and "merely followed [Little] into the house when [Little] went in to get additional clothing." *Id*. at 420. And the officer's motive in *Little* was to secure Little's cell phone. *Id*. Here, as opposed to *Little*, defendant was already under arrest. And defendant gave Wilbanks an explicit request to clear the trailer of people, and the officers complied. Gilbert agreed to

take defendant back into the trailer only after defendant requested it be cleared, where defendant led the way, room to room. Gilbert's reason for going into the trailer was only to clear it of people and secure it, and he discovered the methamphetamine only as he was leaving. Factually, this case differs from *Little*, and it should have no bearing on this case.

B. Any inconsistencies in testimony were immaterial to the primary issue of consent.

Throughout his brief, defendant argues purported inconsistences in the officers' testimony as a basis for this Court to find clear error. For instance, defendant argues that the officers' testimony differed on who entered the trailer and when. App. Br. at pp. 19-20. He also argues inconsistencies about who found the methamphetamine, and the identity and role of the female inside defendant's residence. *Id*. at 20-21. But as the district court correctly observed, those details had no bearing on defendant's consent to the officers' entry, just how the sweep was conducted. RE-54, Order, PageID 104.

Such inconsistencies went to tangential details, as the officers' testimony was entirely consistent on the issue of defendant's consent to entry. *See United States v. Clark*, 136 F. App'x 831, 835-36 (6th Cir. 2005) (finding that the district court did not commit clear error in choosing to credit testimony of police officer despite inconsistencies in collateral facts). Accordingly, the district court was more than

reasonable in finding these details to be minor inconsistences. Because this is an instance where there are two permissible views of the evidence, and the court chose one over the other, the court's conclusions cannot be clearly erroneous. *See Dillard*, 438 F.3d at 681.

C. The district court did not clearly err in finding that defendant was not credible.

The district court did not consider the officers' testimony in isolation. Rather, it weighed their testimony against that of defendant. In making this credibility assessment, the court gave more weight to the officers' testimony because their testimony was consistent and plausible. The court discredited defendant's testimony as "implausible," because of his "blanket denial," and "his multiple prior felony drug convictions." RE-54, Order, PageID 105.

There was no evidence of police-induced coercion or duress to rebut the government's evidence that defendant's consent was provided freely and voluntarily. Moreover, defendant's familiarity with the criminal justice system because of his prior felony convictions showed that he was a sophisticated and experienced criminal. *United States v. Van Shutters*, 163 F.3d 331, 336 (6th Cir. 1998).

As defendant admits, *see* App. Br. at p. 20, the district court found the officers' testimony more credible. But defendant cannot show clear error with

regard to the district court's determination that the officers were credible and that he consented to the officers' entry. This Court should therefore affirm the denial of defendant's motion to suppress.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's denial of defendant's motion to suppress.

Respectfully submitted,

D. MICHAEL DUNAVANT
United States Attorney

s/ Matthew J. Wilson
MATTHEW J. WILSON
Assistant United States Attorney
109 South Highland Avenue, Ste 300
Jackson, Tennessee 38301
(731) 422-6220
matthew.j.wilson @usdoj.gov

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation provided in Rule 32(a)(7)(C)(i) of the Federal Rules of Appellate Procedure. The brief contains 2,464 words of Times New Roman (14-point) proportional type, from the Statement of Jurisdiction through the Conclusion. Microsoft Word 10 is the word-processing software that I used to prepare this brief.

By: s/Matthew J. Wilson
Matthew J. Wilson
Assistant United States Attorney

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Appellee, pursuant to Sixth Circuit Rules 28(c) & 30(b), hereby designates the following filings in the District Court's record as entries that are relevant to this appeal:

Date	**RE No.**	**PageID**	**Description**
10/16/2017	1	1-2	Indictment
04/06/2018	38	58-61	Motion to Suppress
07/09/2018	54	99-105	Order
07/13/2019	57	108-198	Suppression Hearing Transcript
08/08/2018	72		Minute Entry
08/09/2018	75		Minute Entry
11/16/2018	98	604-609	Redacted Judgment
11/19/2018	101	616	Notice of Appeal

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Plaintiff-Appellee United States was served upon the following attorney of record for Defendant-Appellant:

Matthew M. Nee
Nee Law Firm, LLC
26032 Detroit Road, Ste. 5
Westlake, Ohio 44145
440-793-7720

by filing with the Court's CM/ECF system this 11th day of June 2019.

By: s/Matthew J. Wilson
Matthew J. Wilson
Assistant United States Attorney

No. 20-5858

United States Court of Appeals

for the Sixth Circuit

UNITED STATES OF AMERICA,

***Plaintiff-Appellee*,**

v.

GENE HOWELL,

***Defendant-Appellant*.**

On Appeal from the United States District Court

for the Western District of Tennessee

No. 1:17-cr-10098 (Anderson, Chief J.)

BRIEF FOR PLAINTIFF-APPELLEE UNITED STATES

For the Plaintiff/Appellee:

JOSEPH C. MURPHY, JR.
Acting United States Attorney

MATTHEW J. WILSON
Assistant United States Attorney
109 South Highland, Suite 300
Jackson, Tennessee 38301
(731) 422-6220
Matthew.J.Wilson@usdoj.gov

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STATEMENT REGARDING ORAL ARGUMENT

The United States submits that the briefs adequately set forth the legal issues in this appeal. The United States, therefore, does not believe the decisional process would be significantly aided by oral argument.

STATEMENT OF JURISDICTION

The district court has jurisdiction in this case pursuant to 18 U.S.C. § 3231, because defendant was indicted by a federal grand jury for offenses against the laws of the United States. This Court has jurisdiction pursuant to 28 U.S.C. § 1291, which grants this Court jurisdiction over final decisions of the district courts, and 18 U.S.C. § 3742(a), which grants this Court jurisdiction over appeals from criminal sentences.

ISSUES PRESENTED

1. Is the issue of whether defendant may be impeached by prior convictions preserved on appeal? If so, did the district court abuse its discretion in taking defendant's motion in limine regarding the issue under advisement?

2. Did the district court abuse its discretion in allowing the victim to identify defendant and testify that defendant robbed her?

3. Did the district court abuse its discretion in denying defendant's motion to bifurcate Count Five, and finding joinder of the offenses was proper?

4. Did the district court clearly err in imposing a cross reference under the guidelines for attempted first-degree murder? Further, did the district court clearly err in imposing a two-level guidelines enhancement for physical restraint of a victim?

STATEMENT OF THE CASE

a. The Bank Robberies

For Dianne Talbott, the manager of the Home Banking Company branch bank office in Finger, Tennessee, the morning of August 25, 2017, began like any other day, where she went to went work and was soon joined by her two bank tellers. RE-159, Trial Transcript ("Trial T."), PageID 665-69. Ms. Talbott was approximately 67 years old, married, with three children. *Id.* at PageID 664.

Shortly after 9 a.m., while Ms. Talbott was on the phone, defendant Gene Howell, wearing a camouflage mask and sunglasses, came into the bank with a handgun, pointed it at her face, and demanded money. *Id*. at PageID 669-70, 672-73. Defendant pointed the gun at Ms. Talbott, made her lie on the floor, and threatened to shoot her multiple times. *Id*. at PageID 671. Defendant demanded money from the two tellers' cash drawers, and after the tellers complied, defendant demanded the money from the bank's vault. *Id*. at PageID 670. He also threatened the tellers. *Id*. at PageID 673-74. When the tellers were not getting the money out of the vault quickly enough, defendant told them "if y'all don't hurry up, I'm fixing to kill this bitch," referring to Ms. Talbott. *Id*. One of the tellers gave defendant a $2 bill from her drawer. *Id*. at PageID 706. Defendant obtained approximately $43,000 in the robbery and fled from the bank on a side-by-side utility vehicle. *Id.*

at PageID 677; Tr. Exh. 24; Exh. 25 at "ch06_20170825091825091958.mp4." [1] Surveillance cameras in the bank captured the robbery from several angles. Exh. 25; RE-159, Trial T., PageID 678-81.

Something about the robber's focus on Ms. Talbott stuck with her, and she felt that he knew her, and once police caught the robber, she would know him. RE-159, Trial T., PageID 673-74. Less than two months later, while watching television news coverage, she saw video about an attempted bank robbery in Reagan, Tennessee, and believed the same man had robbed her bank. *Id*. at PageID 674.

Ms. Talbott knew the defendant and identified him in court. *Id*. at PageID 674, 682. Before the robbery, he had come into the bank with his wife, and after his wife's death, had come to Ms. Talbott and asked to open an account. *Id*. at PageID 675. When Ms. Talbott was unable to open an account for defendant, she hugged him and told defendant she would think of him and his children. *Id*. At trial, Ms. Talbott believed defendant robbed the bank. *Id*. at PageID 675-76.

[1] The United States is providing this exhibit, Exhibit 25 – a disc with three video files on it – to the Court. The videos, which have time stamps, are in mp4 format per the Court's guidelines. There is also an embedded player on the exhibit, titled "player exe," which will play the three videos. The video "ch01_20170825091745.mp4" shows the interior of the bank for a minute before and during the robbery. The video ch06_20170825091825.mp4" shows the robber arriving on the side by side utility vehicle before the robbery. The video "ch06_20170825091825091958.mp4" shows the robber fleeing the robbery on the side by side utility vehicle.

At the time of the robbery of the Finger bank, defendant was dating Janet Nicole Thompson, who testified at his trial. *Id*. at PageID 824. Thompson had pleaded guilty to two counts of bank robbery (Counts One and Three of the second superseding indictment in this case). *Id*. at PageID 817. In August 2017, Thompson and defendant were homeless, staying with friends, in hotels, and in their car. *Id*. at PageID 832. The day before the Finger robbery, defendant had hidden snacks and chips in the woods, and took Thompson to a stolen side-by-side vehicle, which he hot-wired to start. *Id*. at PageID 832-35. The side-by-side had been stolen from a home in Selmer, Tennessee on August 24, 2017. *Id*. at PageID 709-11.

Defendant took the side-by-side to an acquaintance's house, where he and others rode it and smoked methamphetamine. *Id*. at PageID 836. The night before the Finger robbery, the acquaintance, Ms. Martin, saw defendant driving the stolen side-by-side and rode on it with defendant before he left on it. *Id*. at PageID 802-06. The morning of August 25, 2017, defendant told Thompson to follow him while he drove the side-by-side, and she did until they reached a store, where he continued. *Id*. at PageID 836-37. Defendant told Thompson to meet him at a prearranged location in the woods and turn her phone off; she waited for him approximately 30 to 45 minutes. *Id*. at PageID 837. Thompson next saw defendant when he jumped in her Jeep, threw a bag in the back, and told her to drive. *Id*. at PageID 838. Defendant seemed rushed and panicked, and was wearing camouflage clothes, which

he changed while they were driving. *Id*. at PageID 839. Defendant had a court appearance at 10 a.m. *Id*. at PageID 840. Defendant told Thompson to drive to a secluded area, where he buried a bag in the woods. *Id*. at PageID 840-41. After getting in Thompson's car, they drove to defendant's court appearance, where she dropped him off. *Id*. at PageID 842-44. After defendant's court appearance, Thompson drove defendant to retrieve the bag. *Id*. at PageID 845-46.

On that same day, an evidence technician with the Federal Bureau of Investigation processed the stolen side-by-side, which had been found by law enforcement. *Id*. at PageID 765-77. He took samples from the vehicle for DNA analysis, and after analysis, the results showed a moderate support for inclusion of defendant. *Id*. at PageID 774-77; Exh. 5.

Later that night, defendant met Thompson with "a lot of meth," which was "[m]ore than usual." *Id*. at PageID 847. Thompson and defendant went to a hotel in Mississippi where he paid cash, and defendant told her details of the Finger robbery. *Id*. at PageID 848-49. Defendant described the three women in the bank, including Ms. Talbott, who he called "a stubborn bitch…so he threatened to shoot her," and mocked Ms. Talbott for falling to the floor and screaming. *Id*. at PageID 849. This upset Thompson. *Id*.

Defendant kept the cash from the robbery in a lockbox, including a $2 bill as a trophy to give to his sons. *Id*. at PageID 849-50. Defendant purchased a car, rims,

tires for Thompson's Jeep, brake pads, a camera system, a stereo, a speaker, shoes, glasses and contact lenses for Thompson, deposit and rent on a house, furniture, unpaid traffic tickets, and methamphetamine daily until his and Thompson's October 24, 2017 arrest. *Id*. at PageID 850-59. Defendant did not have a steady job at the time. *Id*. at PageID 854.

Soon, the money from the Finger robbery was gone, so Thompson and defendant would drive around West Tennessee where defendant would case other banks. *Id*. at PageID 860-61. One of the banks was in Reagan, Tennessee. *Id*. at PageID 861.

On October 14, 2017, branch manager Teresa Camper came to work at the People's Bank, in Reagan, Tennessee. *Id*. at PageID 714-17. After meeting her co-worker in the parking lot before the bank opened, the two ladies had just walked into the bank and entered the teller area, when the defendant came in behind them. *Id*. at PageID 717-20. Fortunately, Ms. Camper's co-worker had locked the door to the teller area, because she looked at Ms. Camper and said, "we're being robbed." *Id*. at PageID 720. Defendant was pointing a gun at the co-worker. *Id*. at PageID 750. Ms. Camper initially thought it was a Halloween prank, and went up to the window in the locked door and looked through it. *Id*. at PageID 720-21. She saw defendant's mask, glasses, and the shape of his face, which was narrow and long. *Id.* at PageID

721. Defendant told her twice to "open the damn door," and began shaking the door. *Id*.

Defendant then shot the gun, and Ms. Camper didn't know if the bullet would penetrate the window, or the door lock would fail. *Id*. at PageID 722. Defendant shot at the small glass window in the door. *Id*. at PageID 752. At the time defendant shot, Ms. Camper was right in front of the door. *Id*. at PageID 722-23. She described the gun as a black pistol. *Id*. Ms. Camper and her co-worker crawled to the end of the bank, out of fear defendant would shoot again. *Id*. The window in the door was about Ms. Camper's height, and defendant had bent down to see through it. *Id*. at PageID 727.

An investigator with the Henderson County Sheriff's Department recovered bullet fragments and a spent .45 caliber cartridge at the bank. *Id*. at PageID 744-45; Exh. 32. Surveillance cameras in and around the bank captured video of the attempted robbery. *Id*. at PageID 728-29; Exh. 29.[2]

[2] The United States is providing this exhibit, Exhibit 29 – a disc with 10 video files on it – to the Court. The videos were unable to be converted into an mp4 format; however, there is an embedded player on the exhibit, titled "FilePlayer.exe," which will play the 10 videos. All of the videos are from less than a minute before and during the attempted robbery. The videos in the folder "camera_1," and "camera_3" show different angles from the interior of the bank. The videos in the folders "camera_2," "camera_6," "camera_7," and "camera_8" show different angles from the exterior of the bank.

Thompson had dropped defendant off in Reagan, and he had taken a gun with him to rob the bank. RE-159, Trial T., at PageID 873. She was waiting a minute's drive away, when defendant called her to pick him up. *Id*. Defendant told her the attempted robbery had "went bad," and that "he didn't get any money." *Id*. at PageID 874. Defendant told Thompson he had "shot the gun at the glass, because they would not open the door." *Id*. Defendant was angry with Thompson, blamed her for the robbery failing, and beat her until she could not see. *Id*. at PageID 875. They went to Mississippi, and on October 24, 2017, Thompson and Howell were arrested together on a traffic stop. They were the only two people in the vehicle, and defendant gave law enforcement a false name. *Id*. at PageID 609-10. In the vehicle, law enforcement located a Springfield .45 caliber pistol, a Taurus 9 mm caliber pistol, and a box of .45 caliber ammunition in a bag behind defendant. *Id*. at PageID 599, 604. The .45 caliber pistol was loaded. *Id*. at PageID 600.

An analyst with the FBI compared the spent .45 cartridge found at the Reagan bank with the .45 caliber pistol found in defendant's possession, and gave the opinion the cartridge was fired from the same pistol. *Id*. at PageID 799-800.

Personnel with the FBI served search warrants on Thompson's Jeep, as well as a Nissan Maxima, the car defendant had purchased following the Finger robbery. *Id*. at PageID 615. In the Jeep, agents located a jacket, camouflage mask, receipts and papers, and a round of .45 caliber ammunition *Id*. at PageID 618-32. In the other

car, they located a pair of black gloves, another camouflage mask, a green bag with a dollar sign on it, a hotel receipt, records, and a round of 9mm ammunition. *Id*. at PageID 633-42. The jacket, masks, and clothes were consistent with those worn during the robberies. *Id*. at PageID 634, 638, 649. Defendant fit the description of the perpetrator of the robberies. *Id*. at PageID 644.

b. Procedural History

A federal grand jury returned a superseding indictment against defendant on April 1, 2019, which charged defendant with a count of bank robbery, a count of attempted bank robbery, and two counts of 18 U.S.C. § 924(c), as well as adding a count of being a felon in possession of a firearm in Count Five. RE-79, Superseding Indictment, PageID 130-32. On September 16, 2019, a federal grand jury returned a second superseding indictment that added a knowledge requirement to defendant's status as a felon, to comply with the Supreme Court's decision in *Rehaif v. United States*, 139 S. Ct. 2191 (June 21, 2019). RE-101, Second Superseding Indictment, PageID 158-60.

Before trial, defendant filed three motions in limine. RE-118, 119, 120. One motion addressed whether defendant's prior convictions could be used for impeachment purposes. RE-118, Motion in Limine, PageID 210-12. The next motion asked the district court to bifurcate Count Five, the felon in possession count, from Counts One through Four. RE-119, Motion in Limine, PageID 213-14. The

third motion requested the district court to exclude Ms. Talbott's identification of defendant as the bank robber, based on it being improper opinion and unduly prejudicial. RE-120, Motion in Limine, PageID 215-16.

The district court denied the third motion in limine by written order. RE-127, Order, PageID 319-22. The court found Ms. Talbott's testimony was not opinion testimony; rather, it was factual and based on her prior interactions with defendant, and her observation of the robber during the robbery. *Id*. The court found her testimony would be admissible also under Fed. R. Evid. 701, because it met the Rule's three factors. *Id*. The district court also found Ms. Talbott's identification of defendant was probative as to identifying the robber, yet not unfairly prejudicial under Fed. R. Evid. 403. *Id*.

Defendant raised his two other motions in limine at the beginning of trial. RE-158, Trial T., PageID 564. The district court took the motion regarding defendant's prior convictions being used for impeachment purposes under advisement, and explained why: "As to the motion in limine regarding prior convictions, I'm going to take that one under advisement. In large part whether Mr. Howell testifies. And quite frankly, if he does testify, what he testifies to…" *Id*. at PageID 574. The court denied the motion to bifurcate Count Five, and found the charges were properly joined under Rule 8 of the Federal Rules of Criminal Procedure. *Id*. at PageID 575-76.

The jury trial commenced, and after the government rested its case in chief, the district court heard from defendant under oath that he did not wish to testify, and he had made the decision, freely, knowingly and voluntarily. RE-160, Trial T., PageID 916, 920-22. Defendant called no witnesses. *Id*. at PageID 923. The jury convicted defendant of all counts. *Id*. at PageID 1030-33; RE-139, Jury Verdict, PageID 371-73.

c. Sentencing

At sentencing, the district court initially applied a two-level enhancement under U.S.S.G. § 2B3.1(b)(4)(B), for physically restraining a victim to commit the offense. RE-196, Sent. Hr'g Tr., PageID 1232-36. The court then decided to apply a cross reference to attempted first degree murder under U.S.S.G. § 2A2.1(a), and explained why it was doing so. *Id*. at PageID 1244-47. The court set defendant's base offense level at 33, and after grouping the counts, adjusted the base offense level to 34. *Id*. at PageID 1247-48. With an offense level of 34, and a criminal history category of III, the guidelines range of imprisonment on Counts One, Three and Five was 210 to 262 months, followed by consecutive sentences of 84 months on Count Two and 120 months imprisonment on Count Four, for a total effective guidelines sentence of 414 to 466 months. *Id*. at PageID 1248-49.

The district court addressed the 18 U.S.C. § 3553(a) sentencing factors and imposed a high-end guidelines sentence of 466 months imprisonment. *Id*. at PageID

1257-70; RE-189, Judgment, PageID 1193-1203. Defendant filed a timely appeal. RE-191, Notice of Appeal, PageID 1214.

SUMMARY OF THE ARGUMENT

This Court should affirm the judgment below. First, the issue of whether defendant could be impeached by prior convictions was not preserved and is not reviewable on appeal. In any event, the district court did not abuse its discretion in taking defendant's motion in limine regarding impeachment of defendant by prior convictions under advisement until if and when defendant testified.

Second, the district court did not abuse its discretion in allowing the victim to testify defendant robbed her, as this testimony was factual and she was subjected to cross examination. Even if the testimony were opinion, it was proper under Fed. R. Evid. 701, in that her testimony met the Rule's factors and fell outside the scope of Rule 702.

Third, the district court did not abuse its discretion in denying defendant's motion to bifurcate Count Five, and finding joinder of the offenses was proper. Any issue of prosecutorial vindictiveness was not raised below, and there is no plain error.

Fourth, the district court did not clearly err in imposing a cross reference under the guidelines for attempting murder. Further, the district court did not clearly err in imposing a two-level guidelines enhancement for physical restraint of a victim.

Even if the district court did err, the physical restraint enhancement had no bearing on defendant's guidelines level.

ARGUMENT

I. The defendant's claim about whether he could be impeached by prior convictions is unreviewable on appeal, but even if the claim could be reviewed, the district court did not abuse its discretion.

a. The issue of whether defendant could be impeached by prior convictions was not preserved and is not reviewable on appeal.

A defendant must testify to challenge whether his impeachment by prior convictions was legally proper, otherwise the issue is not preserved for appeal. *Luce v. United States*, 469 U.S. 38, 43 (1984). In *Luce*, a case arising from the Western District of Tennessee, the district court had denied a motion in limine by that defendant seeking to prevent the government from impeaching him with a prior conviction. *Id*. at 39-40. The defendant in *Luce* did not testify. *Id*. The Supreme Court held that when a defendant elects not to testify, this issue is not preserved. *Id*. at 43.

Here, the district court did not even deny defendant's motion in limine as the court did in *Luce*. Rather, the district court reserved ruling on the issue, to determine if defendant chose to testify. The district court was well aware of the pending motion, and even raised it with the parties before the government's last witness in the following exchange:

The Court: Now let's talk about this aggravated assault conviction.

The Government: Yes

The Court: There was still that pending motion on the prior convictions.

RE-159, Trial T., PageID 812.

The next day, defendant chose not to testify, and after answering his attorney's and the court's questions, never mentioned the possible impeachment by prior convictions as motivating his decision. RE-160, Trial T., PageID 920-22.

If the district court had denied the motion, and signaled it would allow the government to impeach defendant with his prior convictions, the issue would still not be preserved because defendant did not testify. But it did not even reach that point. As such, the issue is unreviewable on appeal.

b. Even if this issue was reviewable on appeal, the district court did not abuse its discretion, and any error would be harmless.

Standard of Review

A district court's evidentiary decisions are reviewed for abuse of discretion, and this Court "should only reverse when 'such abuse of discretion has caused more than harmless error.'" *United States v. Warshak*, 631 F.3d 266, 324 (6th Cir. 2010) (quoting *McCombs v. Meijer, Inc.*, 395 F.3d 346, 358 (6th Cir. 2005)). "An error is harmless 'unless it is more probable than not that the error materially affected the verdict.'" *Id.* (quoting *United States v. Martin*, 897 F.2d 1368, 1372 (6th Cir. 1990)).

Analysis

Fed. R. Evid. 609 governs the use of prior convictions for impeachment purposes. "Under Rule 609(a), crimes that are less than ten years old and not considered crimes of dishonesty are admissible if the probative value outweighs the prejudicial effect. *United States v. Ray*, 803 F.3d 244, 261 (6th Cir. 2015) (citations omitted. A district court '"has broad discretion to admit evidence of prior convictions after conducting the probative value/prejudicial effect inquiry."' *Id.* (quoting *United States v. Sloman*, 909 F.2d 176, 181 (6th Cir. 1990)).

Defendant argues that the district court abused its discretion when it "refused to rule" on defendant's motion in limine regarding the impeachment issue. "A ruling on a motion in limine is no more than a preliminary, or advisory opinion that falls entirely within the discretion of the district court." *United States v. Yannott*, 42 F.3d 999, 1007 (6th Cir. 1994) (citations omitted). A "district court may change its ruling at trial for whatever reason it deems appropriate." *Id*.

Here, the district court appropriately reserved ruling. It was entirely within its discretion whether to even issue a ruling. But to make a ruling on the impeachment issue, the court had to evaluate the strength of the case to assess the probative value of the prior convictions, as well as the prejudicial effect. At the time defense made its motion in limine, the district court had not heard any evidence, and

defendant had not testified or decided whether to testify. And had the court ruled on the motion, it could have changed its ruling at any time.

Also, any error would have been harmless. First, defendant stipulated he was a prior felon, so the jury knew of his status. And the case against defendant was a strong one as to both robberies. Both robberies were captured on the bank's surveillance cameras, and the jury saw the videos. Defendant was arrested in Mississippi with two pistols, including the one used in the Reagan robbery, ammunition, and the clothing worn in the robbery including a camouflage mask. In his other car, another camouflage mask was found, as were gloves, ammunition, and a bag. Defendant made exorbitant purchases shortly after the robbery, including buying a car, tires, rims, stereos, speakers, shoes, staying at hotels, enough methamphetamine to support a daily habit, and renting a house. Ms. Talbott identified him as the robber. Thompson, his codefendant, testified against him in great detail. If defendant had testified, and the court had allowed the government to impeach him with the prior convictions—again, neither of these things happened—any reference to the nature of his prior convictions would have been harmless as a matter of law. *See United States v. Scisney*, 885 F.2d 325, 327 (6th Cir. 1989) (finding mention of defendant's prior convictions harmless under a Rule 609 analysis when case against the defendant was strong in a bank robbery trial).

II. The district court properly denied defendant's motion to bifurcate (sever) Count Five.

Standard of Review

A district court's denial of a motion to sever is generally reviewed for abuse of discretion, but whether counts are properly joined under Federal Rule of Criminal Procedure 8(a) is a question of law based on the allegations on the face of the indictment. *United States v. Chavis*, 296 F.3d 450, 456 (6th Cir. 2002). Misjoinder is subject to harmless-error review under Federal Rule of Criminal Procedure 52(a) and requires reversal "'only if the misjoinder results in actual prejudice because it had substantial and injurious effect or influence in determining the jury's verdict.'" *Chavis*, 296 F.3d at 461 (quoting *United States v. Lane*, 474 U.S. 438, 449 (1986)).

Analysis

a. The counts were properly joined under Rule 8(a) because the offenses were of similar character and involved overlapping proof.

Federal Rule of Criminal Procedure 8(a) governs the joinder of offenses against a single defendant; it provides that a defendant may be charged in a single indictment with multiple offenses if the offenses charged "are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan." *See also Chavis*, 296 F.3d at 460-61 (quoting Fed. R. Crim. P. 8(a)). Rule 8(a) explicitly permits joinder of offenses that are "'of the same or similar character' but unrelated." *Id*. (discussing *United States v. Reynolds*, 489 F.2d 4, 6 (6th Cir. 1973)); *see also United States v. Coleman*, 22

F.3d 126, 134 (7th Cir. 1994) (stating that joinder of offenses is permissible if offenses are of a "like class," even though unconnected temporally or evidentially); *United States v. Werner*, 620 F.2d 922, 926 (2d Cir. 1980) (stating that joinder does not require "too precise an identity between the character of the offenses," but only that offenses have "a general likeness" (citations and internal quotation marks omitted)).

Whether joinder is appropriate is "determined by the allegations on the face of the indictment." *Thomas v. United States*, 849 F.3d 669, 675 (6th Cir. 2017). And Rule 8(a) should be "construe[d] [] broadly to 'promote the goals of trial convenience and judicial efficiency.'" *United States v. Graham*, 275 F.3d 512, 512 (6th Cir. 2001) (quoting *United States v. Wirsing*, 719 F.2d 859, 862 (6th Cir. 1983)). Joinder of other counts with a felon-in-possession count is appropriate where charges involve "overlapping proof." *United States v. Moreno*, 933 F.2d 362, 370 (6th Cir. 1991). "Joinder is proper where two crimes – and their proof – are intertwined." *United States v. Carnes*, 309 F.3d 950, 957 (6th Cir. 2002) (citing *United States v. Jacobs*, 244 F.3d 503 (6th Cir. 2001)). "A trial court may construe Rule 8(a) broadly to further trial convenience and judicial efficiency." *United States v. Wagner*, 193 F. App'x 463, 467 (6th Cir. 2006) (citing *Graham*, 275 F.3d at 512). "Rule 8(a) does not require that all evidence relating to each charge be admissible in separate trials. Rather, '[w]hen the joined counts are logically related, and there is a

large area of overlapping proof, joinder is appropriate.'" *Wirsing*, 719 F.2d at 863 (citing *United States v. Anderson*, 642 F.2d 281, 284 (9th Cir. 1981)). Where a defendant stipulates to his prior felony conviction, thus keeping from the jury the nature of his previous conviction, prejudice is minimized. *United States v. Atchley*, 474 F.3d 840, 853 (6th Cir. 2007)). A limiting instruction given by the court will further alleviate any potential prejudice. *Jacobs*, 244 F.3d at 507.

This Court, and other circuits, repeatedly have allowed felon-in-possession charges to be tried with other charges when there is "overlapping proof." *Moreno*, *supra*; *see also Atchley*, *supra* (finding no prejudice in joinder of felon-in-possession count with § 924(c) count); *United States v. McLaurin*, 764 F.3d 372, 385-86 (4th Cir. 2014) (joinder of conspiracy and felon-in-possession would have been admissible in separate trial of conspiracy charge); *United States v. Scott*, 732 F.3d 910, 916 (8th Cir. 2013) (joinder of felon-in-possession and bank robbery charges proper because "based on the same act or transaction" and "occurred over a 'relatively' short period of time").

Here, the district court correctly found the proof on the felon-in-possession count was intertwined with the proof on Counts Three and Four. It was during the attempted bank robbery, and during defendant's discharging a firearm during that event, that defendant possessed the firearm as charged in Count Five. Had the district court ordered an additional trial on Count Five, proof of the attempted bank

robbery and defendant's discharge of the firearm would have been necessary to explain to a jury how he possessed it. In other woods, two separate juries would have considered the same proof.

Also, defendant stipulated that he knowingly was a convicted felon, and the jury was instructed on this. RE-158, Trial T., PageID 587; Exh. 3; RE-137, Jury Instructions, PageID 365. As such, any potential prejudice was minimized.

b. Any misjoinder was harmless error.

Even if the offenses were improperly joined, any error would be harmless because trying the offenses together did not have a "substantial and injurious effect or influence in determining the jury's verdict.'" *Chavis*, 296 F.3d at 461 (quoting *Lane*, 474 U.S. at 449). The jury was unlikely to be confused, especially because the district court gave an appropriate limiting instruction, expressly requiring them to consider each charge separately:

> The defendant has also been charged with several crimes. The number of charges is no evidence of guilt, and this should not influence your decision in any way. It is your duty to separately consider the evidence that relates to each count charged in the indictment and return a separate verdict for each one. For each charge you much decide whether the government has presented proof beyond reasonable doubt that the defendant is guilty of each particular charge. Your decision on one charge, whether it is guilty or not guilty, should not influence your decision on any other charges.

RE-137, Jury Instructions, PageID 373.

A jury is presumed to follow such an instruction. *Chavis*, 296 F.3d at 462; *see also United States v. Cope*, 312 F.3d 757, 781 (6th Cir. 2002). This Court has repeatedly held that "[m]isjoinder is almost always harmless if the court issues a careful limiting instruction to the jury concerning possible prejudice." *Thomas*, 849 F.3d at 677 (citing *Cody*, 498 F.3d at 587-88); *Chavis*, 296 F.3d at 462. For these reasons, any misjoinder in this case would have been harmless.

b. The additional charge of felon in possession was not vindictive.

Standard of Review

The government does not interpret defendant's brief to raise a stand-alone constitutional claim of prosecutorial vindictiveness or that his due process rights were violated; however, he has referenced the issue in his argument regarding the severance of the counts, so the government will briefly address it. The defendant did not raise a vindictiveness argument below, so therefore it is reviewed for plain error. *See United States v. Meda*, 812 F.3d 502, 510 (6th Cir. 2015).

Plain error entails four prongs. *United States v. Johnson*, 403 F.3d 813, 815 (6th Cir. 2005). First, error must have occurred. *Id.* Second, "the error must be plain…[and] clear under current law." *Id.* (citation omitted). Third, "the error must 'affect substantial rights,' which in most cases…mean[s] that the error must have been prejudicial.'" *Id.* (citation omitted). If the error had no impact or effect on the outcome of a proceeding, then this condition is not satisfied. *Id.* Finally, plain error

review is permissive; that is courts "must determine whether the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings…before it may exercise its discretion to correct the error." *Id.* (internal quotation marks and citation omitted). Under plain error review, reversal is warranted "only in exceptional circumstances." *United States v. Gardiner*, 463 F.3d 445, 459 (6th Cir. 2006) (citation omitted). Defendant bears the burden of demonstrating plain error under Fed. R. Crim. P. 52(b).

Analysis

The Supreme Court has held that due process prohibits an individual from being "punished for exercising a protected statutory or constitutional right." *United States v. Goodwin*, 457 U.S. 368, 372 (1982). The purpose of the vindictive prosecution doctrine is to prevent prosecutors from retaliating against defendants by charging them with more severe charges because defendants asserted a protected right. *See Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978).

Due process, however, "is not offended by all possibilities of increased punishment." *Blackledge v. Perry*, 417 U.S. 21, 27 (1974). Rather, it protects against only those actions that evince either "actual vindictiveness" or "a realistic likelihood of vindictiveness." *United States v. Dupree*, 323 F.3d 480, 489 (6th Cir. 2003) (internal citation omitted). A defendant can show "actual vindictiveness" by producing "objective evidence that a prosecutor acted in order to punish the

defendant for standing on his legal rights"; however, such a showing is "exceedingly difficult" to make. *Id.* Alternatively, a defendant can demonstrate "a realistic likelihood of vindictiveness" by showing: "(1) exercise of a protected right; (2) a prosecutorial stake in the exercise of that right; (3) unreasonableness of the prosecutor's conduct; [and] (4) the intent to punish the defendant for exercise of the protected right." *United States v. Suarez*, 263 F.3d 468, 479 (6th Cir. 2001).

The Supreme Court has recognized "a defendant before trial is expected to invoke procedural rights that inevitably impose some 'burden' on the prosecutor" and "[i]t is unrealistic to assume that a prosecutor's probable response to such motions is to seek to penalize and to deter." *Goodwin*, 457 U.S. at 381. Thus, the mere existence of a superseding indictment "bringing additional charges is not sufficient to be presumptively unreasonable." *Suarez*, 263 F.3d at 480 (citations omitted).

There was no vindictiveness here. In this case, the additional charge was presented to the grand jury April 1, 2019, which was nearly six months before trial. The maximum penalty for the felon in possession count was ten years imprisonment, while the maximum penalties for Count One and Three were 25 years per count, and Counts Two and Four were life imprisonment. Thus, under the prior or subsequent indictments, defendant was facing life imprisonment anyway.

The lab report regarding the firearm, which was introduced at trial, indicates the examination was completed and the report was prepared September 6, 2018, well after the initial indictment in this case. RE-159, Trial Tr., PageID 784-85; Exh. 4. The initial indictment was returned November 20, 2017. RE-1, Indictment, PageID 1-3. The felon-in-possession statute, 18 U.S.C. § 922(g)(1), has an element – interstate commerce – that is not found in Counts One through Four. As such, it was important that the firearm found in defendant's possession on October 24, 2017 in Mississippi was the same firearm used on October 14, 2017. Mr. Chavez's report confirmed it was. As such, there was no vindictiveness by the United States because the lab analysis was new evidence in the case.

And there was no threat in this case, or retaliation. In *Bordenkircher*, *supra*, the Supreme Court found no due process violation where a prosecutor made an actual threat to reindict a defendant on more serious charges if the defendant does not plead guilty and goes to trial.

Defendant cites *United States v. LaDeau*, 734 F.3d 561 (6th Cir. 2013), in support of his position. *LaDeau* differs greatly from this case. In that case, the defendant successfully litigated a motion to suppress. *Id*. at 564. The government obtained a superseding indictment five days before trial, adding the defendant's brother as a codefendant, added charges that doubled the maximum sentence defendant faced, and added a five-year mandatory minimum sentence. *Id*. at 564-

65. The district court found, after a hearing, there was a presumption of prosecutorial vindictiveness the government had not rebutted. *Id*. The district court dismissed the indictment, and this Court affirmed on an abuse-of-discretion standard. *Id*.

This case is different. As previously stated, the vindictiveness issue was not raised below. There were no motions to suppress in this case, and defendant did not prevail in any pretrial litigation. The government did not retaliate against defendant because there was nothing to spark retaliation. The district court never considered this matter, and there was no error, much less plain error.

III. Allowing Ms. Talbott to identify defendant was not an abuse of the district court's discretion.

Standard of Review

This Court reviews for abuse of discretion a district court's evidentiary rulings. *United States v. White*, 846 F.3d 170 (6th Cir. 2017) (citing *United States v. Freeman*, 730 F.3d 590, 595 (6th Cir. 2013)). This includes rulings on opinion testimony by lay witnesses under Fed. R. Evid. 701. *See United States v. White*, 492 F.3d 380, 398 (6th Cir. 2007). Reversal is in order "only where the district court's erroneous admission of evidence affects a substantial right of the party." *Id.*; *see also* Fed. R. Evid. 103(a). This Court "will leave rulings about the admissibility of evidence undisturbed unless [it is] left with the definite and firm conviction that the [district] court…committed clear error of judgment in the conclusion it reached.

White, 846 F.3d at 174 (quoting *United States v. Wagner*, 382 F.3d 598, 616 (6th Cir. 2004)).

Analysis

a. Ms. Talbott's identification of defendant was admissible.

The district court did not abuse its discretion in determining that Ms. Talbott's testimony as the identity of the robber was not opinion testimony; rather, it was factual. Ms. Talbott identified defendant in Court and testified he was the man who robbed her. The district court's order on this issue correctly characterized this testimony as largely factual: "The Court agrees with the Government that this is fact testimony which is not covered under Rule 701." RE-127, Order Denying Motion, PageID 321.

Ms. Talbott's testimony regarding who robbed her was identification, and she identified defendant in court. And the district court carefully and properly instructed the jury on her identification of defendant:

> You have also heard the testimony of Dianne Talbott who identified the person who committed the crimes alleged in Counts 1 and 2.
>
> You should carefully consider whether this identification was accurate and reliable. In deciding this, you should especially consider if the witness had a good opportunity to see the person at that time. For example, consider the visibility, the distance, whether the witness had known or seen the person before, and how long the witness had to see the person.
>
> You should also consider the circumstances of the earlier identification that occurred outside of court. For example, consider how that earlier

> identification was conducted, and how much time passed after the alleged crime before the identification was made.
>
> You may take into account any occasion in which the witness failed to make an identification of defendant or made an identification that was inconsistent with his (or her) identification at trial.
>
> Consider all these things carefully in determining whether the identification was accurate and reliable.

RE-137, Jury Instructions, PageID 364.

This Court agreed with the use of a similar instruction when identity is a crucial issue in *United States v. Scott*, 578 F.2d 1186 (6th Cir. 1978). In *Scott*, this Court approved the instruction from *United States v. Telfaire*, 469 F.2d 552, 558-59 (D.C. Cir. 1972), and agreed with other circuits that the instruction "need be given only when the issue of identity is crucial, i.e., either where no corroboration of the testimony exists, or where the witness' memory has faded by the time of trial, or where there was limited opportunity for observation." *Id*. at 1191. Implicit in the decision, however, is that any issue with identification is a credibility matter for the jury to decide.

Here, the instruction was given. Ms. Talbott explained her identification of defendant (and failure to immediately identify him) to the jury. She said the bank robbery seemed personal, and she felt like the robber knew her. She saw a video of the Regan bank robbery on television, and told her husband that was the same robber. Later, when defendant was arrested, she remembered her past experiences with him,

and told the jury he had robbed her. The district court believed Ms. Talbott's testimony was factual after hearing her testimony, when it denied defendant's request for an opinion jury instruction in the final instructions. "But there was nothing to distinguish between what she testified to regarding the facts as she believed them to be and her ultimate identification of Mr. Howell." RE-160, Trial T., PageID 938. Ms. Talbott was subject to cross examination, and the jury believed her. As such, her identification of defendant was tested, submitted, and decided through the fact-finding process. It was not opinion testimony under Rule 701.

Assuming *arguendo*, that the Court decides Ms. Talbott's identification of defendant was opinion testimony, it also meets the criteria of Rule 701, for lay opinion. Fed. R. Evid. 701 states:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Lay testimony that is permissible under Rule 701 is such testimony that "results from a process of reasoning familiar in life, whereas an expert's testimony results from a process of reasoning which can be mastered only by specialists in the field." *White*, 492 F.3d at 401 (citations and internal quotation marks omitted). For example, a lay witness could testify that "a footprint in snow looked like someone had slipped, or that a substance appeared to be blood," but the witness could not testify "that skull

trauma caused the bruises on a victim's face," because such testimony calls for "specialized skill or expertise." *Id.* (citation and internal quotation marks omitted).

The district court accurately found that Ms. Talbott's testimony identifying defendant as the robber was admissible as fact or opinion. RE-127, Order Denying Motion, PageID 321-22. The court noted Ms. Talbott had multiple prior encounters with defendant. *Id*. at PageID 321. She did, and on at least the second occasion when defendant could not qualify for an account at her bank, she knew him well enough to hug him. The district court found that Ms. Talbott observed the robber up close for several minutes during the robbery. *Id*. Regardless of the time, as Ms. Talbott stated, "…it seemed like forever to me." RE-159, Trial. T., PageID 679. The district court correctly found the identification testimony was helpful to understanding Ms. Talbott's testimony and the determination of the robber's identity, and not based on scientific, technical, or other specialized knowledge, thus it also was proper under Rule 701. RE-127, Order Denying Motion, PageID 322.

This Court has found lay opinion is helpful on a variety of issues, including "whether a suspect depicted in a photograph is the defendant where 'there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury.'" *United States v. Dixon*, 413 F.3d 540, 545 (6th Cir. 2005) (quoting *United States v. Farnsworth*, 729 F.2d 1158, 1160 (8th Cir. 1984)). In *United States v. Perkins*, 470 F.3d 150, 153 (4th Cir. 2006), police

officers testified about the kicks a fellow officer administered to a motorist fleeing a traffic stop. Over objection, the officers testified that, in their opinion, the kicks were unreasonable and were not justified by any law enforcement reason. *Id.* The court held this was acceptable under Rule 701, because the officers' opinions were based on their observation of the incident and required such a limited amount of expertise. *Id.* at 156.

The evidence at issue in this case did not even approach the level of "expertise" that was approved as proper lay testimony in *Perkins*. The testimony included simple observations that anyone could make having experienced what Ms. Talbott did, by noticing something familiar about the robber, and later coming to the realization that it was defendant who had done it. This was not an opinion that resulted from a process of reasoning that can be mastered only by specialists or experts in a field. *Cf. White*, 492 F.3d at 403-04 (holding that Medicare auditors who testified about "highly specialized" Medicare reimbursement procedures should have been qualified as experts); *United States v. Ganier*, 468 F.3d 920, 922 (6th Cir. 2006) (holding that computer specialist's testimony about running and interpreting particular forensic software fell outside bounds of Rule 701). In addition to being factual, Ms. Talbott's identifying defendant as the robber met the requirements as lay opinion under Rule 701.

b. Even if the district court erred in allowing Ms. Talbott's identification of defendant, such error was harmless.

Even if the Court does find some error in Ms. Talbott's identification of defendant, there was ample other proof as to defendant's commission of the Finger robbery. The robbery was captured on the bank's surveillance cameras, and the jury saw it for themselves. As defendant was present in court, they could see the build and relative height of the robber in the Finger video, and compare it to defendant's appearance, build and height in court. A camouflage mask was found in his car, as was ammunition, and a bag. Defendant made exorbitant purchases shortly after the robbery, including buying a car, tires, rims, stereos, speakers, shoes, staying at hotels, enough methamphetamine to support a daily habit, and renting a house. He did not have a steady job, a fact he confirmed in his presentence report. RE-163, Presentence Report, PageID 1085.

Contrary to defendant's claim that Thompson was the only link to the Finger robbery, an additional witness saw him driving the stolen side-by-side the night before the robbery. The jury could also see the video from the Reagan bank, which showed a man of similar height and build. And while defendant attacks Thompson's credibility, she put defendant squarely in the planning, commission and aftermath of the robbery, including his detailed description of threatening to shoot Ms. Talbott and mocking her for it. Thompson's testimony was corroborated by all the other evidence in the case. Thompson's credibility was a matter for the jury to decide,

who believed her even after being admonished in the district court's jury instructions. For these reasons, any error was harmless.

IV. The district court did not clearly err by applying the cross-reference to attempted murder, and an enhancement for physical restraint of a victim.

Standard of Review

This Court reviews a district court's calculation of an advisory sentencing guideline range as part of its "obligation to determine whether the district court imposed a sentence that is procedurally unreasonable." *See United States v. Bullock*, 526 F.3d 312, 315 (6th Cir. 2008).

> In reviewing a district court's application of the Sentencing Guidelines, this Court will "accept the findings of fact of the district court unless they are clearly erroneous and [will] give due deference to the district court's application of the Guidelines to the facts." *United States v. Williams*, 355 F.3d 893, 897-98 (6th Cir. 2003); 18 U.S.C. § 3742(e). A factual finding is clearly erroneous "when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Tran v. Gonzales*, 447 F.3d 937, 943 (6th Cir. 2006). We review a district court's legal conclusions regarding the Sentencing Guidelines de novo. *United States v. Latouf*, 132 F.3d 320, 331 (6th Cir. 1997).

United States v. Moon, 513 F.3d 527, 539-40 (6th Cir. 2008). Even if the district court does not make detailed findings as to supporting facts, this Court may look to the record to determine whether the decision was clearly erroneous. *See United States v. Miller*, 161 F.3d 977, 984 (6th Cir. 1998). Factual findings used to support a finding of criminal responsibility for a cross-referenced guideline provision are

reviewed for clear error. *See United States v. Brika*, 487 F.3d 450, 454 (6th Cir. 2007).

Analysis

a. The cross reference under U.S.S.G. § 2A2.1(a)(1)

The guideline for unlawful possession of a firearm states that "[i]f the defendant used or possessed any firearm...in connection with the commission or attempted commission of another offense....apply...§2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above." *See* U.S.S.G. § 2K2.1(c)(1)(A). "Another offense" means "any federal, state, or local offense...regardless of whether a criminal charge was brought, or a conviction obtained." *See id.* comment. (n.14(C)).

In turn, § 2X1.1(a) directs the district court to use the "base offense level from the guideline for the substantive offense, plus any adjustments from such guideline for any intended offense conduct that can be established with reasonable certainty." This cross-reference mechanism "allows a district court to consider what the defendant's sentence would have been for crimes other than the firearm possession, and use the higher of the two offense levels to compute the sentence." *United States v. Smith*, 196 F.3d 676, 685 (6th Cir. 1999). The cross-reference is not limited to "offenses charged in the indictment or that resulted in a conviction." *United States v. Cowan*, 196 F.3d 646, 649 (6th Cir. 1999). The government must show by a

preponderance of the evidence in the district court that a particular cross-reference or enhancement is appropriate under the guidelines. *See United States v. Barton*, 455 F.3d 649, 657-58 (6th Cir. 2006).

The government met its burden here. Section 2A2.1(a)(1) provides for a base offense level of 33 if the completed offense could have constituted first degree murder. The commentary to the guideline provides that first degree murder "means conduct that, if committed within the special maritime and territorial jurisdiction of the United States, would constitute murder under 18 U.S.C. § 1111." U.S.S.G § 2A2.1(a)(1). Murder is defined under § 1111, in pertinent part, as follows:

> Murder is the unlawful killing of a human being, with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or *attempt to perpetrate*, any…*robbery…is murder in the first degree*.

18 U.S.C. § 1111(a) (emphasis added). Second degree murder is defined as any other murder. *Id.* Black's Law Dictionary (9th ed. 2009) defines "premeditation" as "conscious consideration and planning that precedes some act (such as committing a crime)."

"To convict a defendant of attempt, the government must prove (1) the defendant's intent to commit the criminal activity; and (2) that the defendant committed an overt act that constitutes a 'substantial step' toward commission of the crime." *United States v. Wesley*, 417 F.3d 612, 618 (6th Cir. 2005). "The general

rule . . . is that attempt crimes require proof of a specific intent to complete the acts constituting the substantive offense." *United States v. Calloway*, 116 F.3d 1129, 1135-36 (6th Cir. 1997).

This Court has upheld findings of specific intent and premeditation in a variety of circumstances, including situations where a weapon was never fired. For instance, in *United States v. Vaught*, 133 F. App'x 229, 231-32, 234 (6th Cir. 2005), the defendant had gotten into a fight with his sister, who he had threatened before, and told others he was going to kill her. He later drove by her house with a gun, after which officers arrested him. *Id.* at 231-34. These circumstances were enough to justify a finding of specific intent to kill the victim. *Id.* at 234.

As argued in the district court below, two theories support the district court's application of the cross reference for attempted murder. The first theory is that defendant possessed the specific intent to kill Ms. Camper.

The case of *United States v. Dean*, 506 F. App'x 407 (6th Cir. 2012), is instructive on this point. In *Dean*, this Court found no clear error in the district court's cross reference to attempted murder where the defendant threatened to shoot the victim, chambered a round in his pistol, and stuck his arm through a hole in the security glass and shot at the victim. *Id*. at 409. Here, the district court relied upon *Dean*, and as shown through its questioning of defense counsel, believed the only

difference between *Dean* and the instant case was the victim in *Dean* was struck by the bullet. RE-196, Sent. Hrg. T, PageID 1243. That analysis was correct.

Indeed, the district court conducted a thorough, fact-intensive analysis in properly applying the cross reference. The court found that defendant was trying to open the door, while "Ms. Camper was standing near the door and was looking out of the glass at Mr. Howell." *Id*. at PageID 1245. Defendant ordered her to "open the damn door," and when she refused, defendant grew angry, raised his gun and shot the glass. *Id*. The court also paid special note to where the bullet was shot, and where Ms. Camper was standing, "where her face or her head or her upper body would have been located." *Id*. The district court also noted defendant did not shoot at the lock or lower part of the door, but where Ms. Camper was standing, and without the glass stopping the bullet, it was "certainly reasonable to conclude that Ms. Camper would have either been killed or very seriously injured, at the very least." *Id*.

Ms. Camper's testimony supports the district court's findings. She stated, "I walked up to the window, I walked up to the window, and I was looking at it." RE-159, Trial T., PageID 721. "And so I was, I really got close because—so I could see the mask. I could see his glasses. I could see the shape of his narrow face…" *Id*. "Then he – at that time, he shot, he shot the gun. I didn't know whether it was going to come through that window. I don't know – I didn't know, how strong it

was." *Id*. at PageID 722. Ms. Camper also testified about her location when the defendant fired the gun. "Well, I don't know if I had moved my head back or not. But yes, I was right there." *Id*. at PageID 723. Mrs. Camper was in fear for her life when the defendant fired the gun. *Id*. at PageID 734. Two photographs of the damaged door show the bullet-damaged window glass at approximately head height. RE-185-1, 185-2, Sentencing Exhibits, PageID 1126-27. Ms. Camper's victim impact statement in the presentence report also supports the application of the cross reference: "…I feel certain that had that glass not been bullet resistant I would no longer be here and am also certain he did not know that it was." RE-163, Presentence Report, PageID 1062, ¶ 54.

Like the defendant in *Dean*, here defendant made threats, pointed the gun, and shot it. Unlike the defendant in *Vaught*, here defendant actually fired the gun. Another case supporting the government's position is *United States v. White*, 27 F. App'x 584, 585 (6th Cir. 2001), where police found the defendant waiting outside a nightclub with a loaded gun. The defendant told police he intended to kill security guards at the club because they had struck him. *Id.* This Court held that the defendant's actions were sufficiently willful, deliberate, malicious and premeditated, and affirmed the application of the attempted murder cross-reference. *Id.* at 586. Here, defendant's shooting at Ms. Camper was more egregious than the facts giving rise to the cross-reference in *White*.

In the present case, the government showed by a preponderance of the evidence that defendant attempted to shoot Ms. Camper. There was no evidence defendant knew the glass was bullet resistant. The district court found that these actions constituted deliberate and premeditated conduct, and that the defendant had the specific intent to kill Ms. Camper and tried to do so. These were not clearly erroneous findings.

The second theory supporting the district court's application of the cross reference is that had Ms. Camper died, the offense would have constituted felony murder under § 1111. In a similar case, the Fourth Circuit affirmed the application of the attempted first-degree murder cross reference, where the defendant had shot at and struck a victim during an attempted robbery during a drug deal. *United States v. Campbell*, 669 F. App'x 169, 170 (4th Cir. 2016). The Fourth Circuit quoted the First Circuit's opinion in *United States v. Morales-Machuca*, 546 F.3d 13, 22 (1st Cir. 2008), to state that the malice element under § 1111 is satisfied when there is the intent to commit the underlying felony. *Id*.

Here, the defendant was convicted of attempted bank robbery, and using a firearm in furtherance of that crime. As such, the malice requirement under § 1111 would be satisfied. Had the defendant succeeded in killing Ms. Camper, he would have been guilty of first degree murder, and therefore, the cross reference is appropriate under U.S.S.G. § 2A2.1(a)(1).

Defendant speculates that the glass was the most vulnerable point in the door, and seems to imply that defendant was simply trying to gain access. But this is mere speculation. Had the district court believed this, things might be different, but the court did not. *See United States v. Wilson*, 992 F.2d 156, 157-58 (8th Cir. 1993) (affirming the cross-reference where defendant shot at a group of people (and hit a bystander) from a passing car, and noting that the district court did not clearly err in disregarding defendant's "claim that he fired the gun into the air"). Other cases from this Court demonstrate how difficult it is for a defendant to show that a district court clearly erred in finding facts that trigger application of the attempted murder cross-reference. For example, in *United States v. Helton*, 32 F. App'x 707, 711, 715 (6th Cir. 2002), the defendant shot at a victim three times after helping tie her to concrete blocks and throw her in a pond, but none of the shots hit the victim and the water was only waist-deep. The victim survived, but this Court refused to disturb as clearly erroneous the district court's finding that the defendant attempted to commit first-degree murder. *Id.* at 715. Likewise, in *United States v. Christian*, 404 F. App'x 989, 993-94 (6th Cir. 2010), application of the cross-reference was not clearly erroneous when the defendant "walked to his car, retrieved a loaded weapon, walked across the parking lot, and shot an unarmed man sitting inside his car numerous times, without evidence of physical provocation." *See also United States v. Rogers*, 261 F. App'x 849, 853 (6th Cir. 2008) (upholding cross-reference when defendant shot the

victim multiple times at close range and continued to shoot when others tried to intervene, and noting that "courts have applied the cross-reference…to similar, and in some instances less egregious conduct"); *United States v. Drew*, 200 F.3d 871, 875, 877-79 (D.C. Cir. 2000) (affirming the cross-reference where defendant pointed gun at his wife and pulled the trigger, but the gun did not discharge).

For all of these reasons, and based on the foregoing law, the district court did not clearly err in applying the attempted murder cross reference.

b. The enhancement under U.S.S.G § 2B3.1(b)(4)(B)

Section § 3A1.3 of the guidelines provides for a two-level enhancement "[i]f a victim was physically restrained in the course of the offense." Likewise, § 2B3.1(b)(4)(B) provides for a two-level enhancement "if any person was physically restrained to facilitate commission of the offense or to facilitate escape."[3] The commentary to § 2B3.1 states that the "guideline provides an enhancement for robberies where a victim was forced to accompany the defendant to another location, or was physically restrained by being tied, bound, or locked up." USSG § 2B3.1 cmt. Background. Section 1B1.1 defines physically restrained as "the forcible restraint of the victim such as by being tied, bound, or locked up." *Id*. § 1B1.1 cmt. n.1(K).

[3] Courts treat U.S.S.G §3A1.3 as virtually indistinct from §2B3.1(b)(4)(B). *United States v. Smith-Hodges*, 527 F. App'x 354, 356 (6th Cir. 2013).

This Court addressed the scope of the physical restraint sentencing enhancement in *United States v. Coleman*, 664 F.3d 1047 (6th Cir. 2012). In *Coleman*, the district court applied the physical restraint sentencing enhancement where a bank robber: (1) noticed a bank employee in an office adjacent to the bank lobby, (2) pointed a firearm at the employee, and (3) ordered him to come out of his office and sit on the floor in the lobby where the robbery was taking place. *Id*. at 1048.

In determining the propriety of the sentencing enhancement to this conduct, the Court in *Coleman* first noted that "[b]oth the plain language of the Guidelines and case law from other circuits suggest that the enhancement applies to [the robber's] conduct." *Id*. at 1049. The Court noted that the commentary to U.S.S.G. §1B1.1 defines "physical restraint" as "forcible restraint." *Id*. Furthermore, Black's Law Dictionary defines "force" as "compel[ling] by physical means or by legal requirement," with the illustrative example "Barnes used a gun to force Jillian to use her ATM card." *Id*. (quoting Black's Law Dictionary 718 (9th ed. 2009)). *Coleman* then went on to point out that restraint is commonly defined as "(1) the act of holding back from some activity or (2) by means of force, an act that checks free activity or otherwise controls." *Id*. (citing *United States v. Thompson*, 109 F.3d 639, 641 (9th Cir. 1997) (quoting *United States v. Foppe*, 993 F.2d 1444, 1452 (9th Cir. 1993)).

Next, the *Coleman* panel reviewed the law from other circuits and, in doing so, acknowledged that the Third, Seventh, Eighth, and Eleventh Circuits define physical restraint broadly by applying § 2B3.1(b)(4)(B) in circumstances whereby the defendant "leaves the person with no alternative to compliance." *Coleman*, 664 F.3d at 1049; *see United States v. Doubet*, 969 F.2d 341, 346-47 (7th Cir. 1992); *United States v. Kirtley*, 986 F.2d 285, 286 (8th Cir. 1993); *United States v. Copenhaver*,185 F.3d 178, 80-82 (3d Cir. 1999); *United States v. Jones*, 32 F.3d 1512, 1519 (11th Cir. 1994). In contrast, the Second, Fifth, and D.C. Circuits have determined that "the mere pointing of a firearm at a victim does not amount to physical restraint." *Coleman*, 664 F.3d at 1049-50; *see United States v. Drew*, 200 F.3d 871, 880 (D.C. Cir. 2000); *United States v. Anglin*, 169 F.3d 154, 163-65 (2d Cir. 1999); *United States v. Hickman*, 151 F.3d 446, 461-62 (5th Cir. 1998).

Also, this Court expressed disapproval of an approach requiring a "sustained focus on the restrained person" or a "physical component" to the restraint. *See Coleman*, 664 F.3d at 1050; *United States v. Parker*, 241 F.3d 1114, 1118 (9th Cir. 2001); *Thompson*, 109 F.3d at 641. Ultimately, in upholding the application of the physical restraint sentencing enhancement, this Court in *Coleman* stated that "[i]n this case, [the robber] used a pistol . . . to require [a bank employee] to go to a different place and maintain position in a different place. Imposing this restraint on

[the bank employee's] movement suffices for application of § 2B3.1(b)(4)(B)." *Coleman*, 664 F.3d at 1050-51.

Similarly, in *United States v. Smith-Hodges*, 527 F. App'x 354, 356 (6th Cir. 2013), this Court again upheld the application of the physical restraint enhancement. In *Smith-Hodges*, the defendant "walked [the victim] over to the passenger's side of the car and made [him] lay down on the sidewalk…at gunpoint" during the course of a robbery. *Id.* According to the Court, the district court did not abuse its discretion in holding as it did: that the defendant "physically restrained" the victim when he changed the victim's position at gunpoint and subsequently placed him "in a position of disadvantage" on the ground. *Id.* The court left open the question of whether the physical restraint enhancement is properly applied to a defendant who merely aims his gun at a stationary victim and orders the victim not to go anywhere, *see id.* at 357, but the instant case is not a case in which the defendant merely aimed his gun at a stationary victim, but one who was held at gunpoint on the floor and threatened with death.

Defendant argues the district court erred in applying the two-level physical restraint enhancement on the grounds that it did not consider the definition of physically restrained, i.e. Ms. Talbott was not tied up, bound or locked up. But Defendant's assertion that Ms. Talbott was free to move is not supported by the record. Further, Defendant's strict interpretation of "physical restraint" is not

supported in law. Not only was Ms. Talbott forced at gunpoint to lie on the floor, defendant threatened to shoot her multiple times and placed in a position where she was incapable of leaving. Further, there was a threatening component to this restraint. Defendant shouted that if the other tellers did not comply, he was "fixing to kill this bitch." The district court noted defendant's ordering the other tellers to open the safe also supported its finding. RE-196, Sent. Hrg. T., PageID 1236.

Ms. Talbott's testimony, and the court's subsequent factual findings, clearly demonstrate that she (and the other tellers) were physically restrained. Accordingly, the enhancement was properly imposed.

c. Even if the district court erred in imposing the physical restraint enhancement, such error was harmless.

Nevertheless, even if this Court were to find that the district court erred in applying the physical restraint enhancement, such error was harmless because the error did not cause the defendant to receive a more severe sentence. To establish harmless error such that this Court should let stand a defendant's sentence in spite of errors at sentencing below, the government must "prove that none of the defendant's substantial rights [has] been affected by the error." *United States v. Oliver*, 397 F.3d 369, 381 (6th Cir. 2005) (citing Fed. R. Crim. P. 52(a)); *United States v. Barnett,* 398 F.3d 516, 530 (6th Cir. 2005); *see also Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (noting that the government bears the burden of proof on harmless error); *United States v. Olano,* 507 U.S. 725, 734 (1993) (same). To carry

this burden, the government must demonstrate to this Court with certainty that the error at sentencing did not "cause[ ] the defendant to receive a more severe sentence." *Oliver,* 397 F.3d at 379 (internal citation omitted); *United States v. Hazelwood,* 398 F.3d 792, 801 (6th Cir. 2005) ("Under the harmless error test, a remand for an error at sentencing is required unless we are certain that any such error was harmless.") (emphasis added).

In this particular case, the cross reference for attempted murder made the application under U.S.S.G § 2B3.1(b)(4)(B) moot. Defendant's resulting guideline range was 33, which was significantly higher than the level 23 had the district court not applied the enhancement. In sum, the district court would have imposed the cross reference for attempted first degree murder (and did) with or without the enhancement. As such, even if the district court erred in applying the enhancement, the error was harmless.

CONCLUSION

For the foregoing reasons, this Court should affirm defendant's convictions and sentence.

Respectfully submitted,

JOSEPH C. MURPHY, JR.
Acting United States Attorney

/s/ Matthew J. Wilson
MATTHEW J. WILSON
Assistant United States Attorney
109 S. Highland Avenue, Suite 300
Jackson, Tennessee 38301
(731) 422-6220
matthew.j.wilson@usdoj.gov

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation provided in Rule 32(a)(7)(C)(i) of the Federal Rules of Appellate Procedure. The brief contains 11,068 words of Times New Roman (14-point) proportional type, from the Statement of Jurisdiction through the Conclusion. WordPerfect X4 is the word-processing software that I used to prepare this brief.

s/ *Matthew J. Wilson*
MATTHEW J. WILSON
Assistant United States Attorney

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Appellee, pursuant to Sixth Circuit Rules 28(c) & 30(b), hereby designates the following filings in the District Court's record as entries that are relevant to this appeal:

Description of Entry	Record Entry Number	Page ID
Indictment	1	1-3
Superseding Indictment	79	130-32
Second Superseding Indictment	101	158-60
Defendant's first motion in limine	118	210-12
Defendant's second motion in limine	119	213-14
Defendant's third motion in limine	120	215-16
Order denying third motion in limine	127	319-22
Jury Instructions	137	364-65, 373
Jury Verdict	139	371-73
Trial Transcript ("Trial T")	158	564, 574-76, 587
Trial Transcript ("Trial T")	159	599-600, 604, 609-10, 615, 618-44, 649, 664-82, 709-11, 714-23, 727-29, 734, 744-45, 750, 752, 765-77, 784-85, 799-800, 802-806, 812,

		817, 824, 832-61, 873-75
Trial Transcript ("Trial T")	160	916, 920-23, 938, 1030-33
Presentence Report	163	1062, ¶54, 1085
Sentencing Exhibits	185-1, 185-2	1126-27
Judgment	189	1193-1203
Notice of Appeal	191	1214
Sentencing Hearing Transcript	196	1232-36, 1243-49, 1257-70

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Plaintiff-Appellee United States was served upon counsel for the defendant/appeallant via electronic case filing, this 24th day of May, 2021.

s/ *Matthew J. Wilson*
MATTHEW J. WILSON
Assistant United States Attorney