



 NYU | LAW

MOOT COURT BOARD

Maximum Derek,
Appellant,

-against-

United States,
Appellee.

Record

Prepared by:
Lana Dziekonski

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WEST DAKOTA

United States of America,	:	
	:	
-against-	:	PRESENTENCE INVESTIGATION REPORT
	:	
Maximum Derek,	:	Docket No. CR 19-193-92-TGP
	:	
Defendant.	:	

Prepared for: The Honorable Doug L. Forcett
U.S. District Judge

Prepared by: Chip B. Driver
U.S. Probation Officer
Jackson, West Dakota 19402

Assistant U.S. Attorney
Mr. Trevor Bambadjan
47 Shellstrop Avenue
Jackson, West Dakota 19402

Defense Counsel
Mr. Jeremy Bearimy
30 Garnett Street
Jackson, West Dakota 19402

Sentence Date: September 17, 2020

Offense: Count 1: Armed Robbery (18 U.S.C. § 1951(a))
108-135 months

Release Status: Detained without bail since 02/04/2020

Detainers: None

Codefendants: None

Related Cases: None

Date Report Prepared: 06/20/2020

Identifying Data:

Date of Birth: 11/02/1972
Age: 47
Race: White
Sex: Male

SS #: [REDACTED]
FBI #: [REDACTED]
USM #: [REDACTED]
State ID #: [REDACTED]
PACTS ID #: [REDACTED]

Education: High school diploma
Dependents: 2
Citizenship: United States

Legal Address: 207 S Mantzoukas Street
Jackson, West Dakota 19402

Aliases: Max Derek,
"Chimes"

Codefendants: None

Related Cases: None

Restrictions on Use and Rediscovery of Presentence Investigation Report.
Disclosure of this presentence investigation report to the Federal Bureau of Prisons and rediscovery by the Bureau of Prisons is authorized by the United States District Court solely to assist administering the offender's prison sentence and other limited purposes, including deportation proceedings and federal investigations directly related to terrorist activities. If this presentence investigation report is rediscovered by the Federal Bureau of Prisons upon completion of its sentence administration function, the report must be returned to the Federal Bureau of Prisons or destroyed. It is the policy of the federal judiciary and the Department of Justice that further rediscovery of the presentence investigation report is prohibited without the consent of the sentencing judge.

PART A. THE OFFENSE

Charge(s) and Conviction(s)

1. Maximum Derek was arrested on February 4, 2020, by Officers D'Arcy Janet and Damon Shawn, and charged by Assistant United States Attorney Trevor Bambadjan on February 6, 2020.
2. Count One charges that on February 2, 2020, the above-named Defendant committed an armed robbery of Michael's Neighborhood Grocery in the State of West Dakota in violation of 18 U.S.C. § 1951(a).
3. Maximum Derek entered a guilty plea before the Honorable Judge Doug L. Forcett on May 20, 2020. The Honorable Judge Doug L. Forcett accepted the guilty plea and set the sentencing hearing for September 17, 2020.

The Offense Conduct

4. On February 2, 2020, Maximum Derek entered Michael's Neighborhood Grocery in the State of West Dakota at about 9:30 PM, shortly before closing. Derek was wearing a mask and gloves and carrying a .38 caliber automatic pistol. Derek kept his weapon drawn the entire time he was inside the grocery store.
5. When Derek entered the building, there were only two employees still in the store, Chidi Anagonye and Jason Mendoza, who were in the process of cleaning the store in preparation for closing. Anagonye and Mendoza hid behind a produce stand when they saw Derek enter. Derek initially went straight to the cash registers and attempted to open them. After finding them locked, he turned his attention to Anagonye and Mendoza. Pointing his gun toward the produce section where they were hiding, he shouted, "I see you back there! Don't move." Keeping his gun trained on them, Derek walked over to Anagonye and Mendoza's hiding place and ordered them to get up and put their hands in the air. He then forced them, at gunpoint, to walk in front of him to the cash registers at the front of the store.
6. Keeping his gun trained on Anagonye and Mendoza, Derek ordered them to open each of the four cash registers and put all the cash into bags. Derek retrieved the bags from Anagonye and Mendoza and then ordered them to back away from the registers with their hands in the air, and not to move as he left. Derek continued to point his gun at them as he exited the building. Once Derek reached the door he turned and ran, rounding the corner and passing out of sight of the employees in the store.

7. As soon as Derek was out of sight, Anagonye summoned the police. Mendoza heard a car door slam and ran to the window, where he saw a car driving away. The driver was not wearing a mask but Mendoza thought it could be the man who had just been in the store, and he managed to make a note of the license plate number.
8. Officers D'Arcy Janet and Damon Shawn took witness statements from both Anagonye and Mendoza. Officer Janet was able to obtain Maximum Derek's name and DMV photo based on the license plate number Mendoza had seen. Mendoza confirmed that he thought the DMV photo resembled the robber.
9. Officer Janet was able to obtain an arrest warrant for Maximum Derek based on the above information, and on February 4, 2020, she and Officer Shawn went to Derek's registered address. They observed a car in the driveway with the same license plate number given to them by Mendoza. When the officers knocked on the door, it was answered by a woman, Mindy St. Claire, who said she had not seen Derek recently. Ms. St. Claire consented to a search of her house and the officers quickly found Derek in a back room. In a hall closet the officers found a mask, gloves, and a bag of cash, which they believed to be from the Michael's Neighborhood Grocery robbery. The officers arrested Derek and took him and the physical evidence they had found into custody.

Victim Impact

10. Chidi Anagonye and Jason Mendoza are both victims in this case. Maximum Derek held Anagonye and Mendoza at gunpoint, placing them in fear of serious bodily harm or death to facilitate his crime. Both Anagonye and Mendoza underwent a traumatic experience and have been in counseling since the incident.
11. Michael Architect, the owner of Michael's Neighborhood Grocery, is also a victim in this offense, having suffered a loss of property.

Adjustment for Obstruction of Justice

12. The probation officer has no information to suggest that Defendant impeded or obstructed justice in connection with this prosecution.

Adjustment for Acceptance of Responsibility

13. The probation officer interviewed Defendant in the presence of Defendant's attorney, Jeremy Bearimy. Upon advice of counsel, Defendant declined to discuss the circumstances surrounding his conviction in view of a planned appeal.

Offense Level Computation

- 14. The 2005 edition of the Federal Sentencing Guidelines Manual has been used in this case.
- 15. **Base Offense Level:** The guideline for an 18 U.S.C. § 1951(a) offense is found in section 2B3.1(a) of the Federal Sentencing Guidelines Manual. That section provides that the base offense level for robbery shall be 20.
- 16. **Specific Offense Characteristics:** In furtherance of his robbery, Defendant brandished and threatened victims Chidi Anagonye and Jason Mendoza with a firearm. Therefore, pursuant to section 2B3.1(b)(2)(C) of the Federal Sentencing Guidelines Manual, five levels are added to the base offense level. In addition, using the threat of his firearm, Defendant forced victims to accompany him to a different location. Therefore, pursuant to section 2B3.1(b)(4)(A), a further four levels are added to the base offense level.
- 17. **Victim-Related Adjustment:** None
- 18. **Adjustment for Role in the Offense:** None
- 19. **Adjustment for Obstruction of Justice:** None
- 20. **Total Offense Level:** 29

PART B. DEFENDANT CRIMINAL HISTORY

Juvenile Adjudication(s)

- 21. None

Adult Criminal Conviction(s)

- 22. Defendant was represented by legal counsel for each criminal conviction.

23.

<u>Date of Arrest</u>	<u>Conviction/Court</u>	<u>Date Sentence Imposed/Disposition</u>	<u>Guideline/Points</u>
04/02/1998 (Age 25)	Criminal Possession of a Weapon/Jackson Criminal Court, Jackson, West Dakota	06/25/1998, Indefinite term of probation	4A1.1(c) / <u>1</u>

24.

<u>Date of Arrest</u>	<u>Conviction/Court</u>	<u>Date Sentence Imposed/Disposition</u>	<u>Guideline/Points</u>
05/31/2002 (Age 29)	Criminal Possession of a Weapon/Jackson Criminal Court, Jackson, West Dakota	07/26/2003, 5 years' probation	4A1.1(c) / <u>1</u>

Criminal History Computation

25. The above criminal convictions result in a subtotal criminal history score of 2. In addition, Defendant was under probation supervision in Jackson Supreme Court when he committed the instant offense, and pursuant to section 4A1.1(d) of the Federal Sentencing Guidelines Manual, two points are added.

26. The total of the criminal history points is 4. According to the sentencing table, Ch. 5, Pt. A, 4 to 6 criminal history points establish a criminal history category of III.

[PARTS C - F OF THIS REPORT OMITTED FROM THE RECORD]

Respectfully submitted,

CHIEF U.S. PROBATION OFFICER

Chip B Driver

Chip B. Driver
U.S. Probation Officer

Reviewed and Approved:

Tahani Al-Jamil

Tahani Al-Jamil
Supervising U.S. Probation Officer

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WEST DAKOTA

United States of America,	:	
	:	
-against-	:	Docket No. CR 19-193-92-TGP
	:	
Maximum Derek,	:	DEFENDANT’S OBJECTIONS TO
	:	PRESENTENCE INVESTIGATION
	:	REPORT
Defendant.	:	
	:	

COMES NOW Defendant, Maximum Derek, by and through his attorney of record, Jeremy Bearimy, of the Federal Defenders of West Dakota, and presents herewith, his Objections to the Presentence Investigation Report.

INTRODUCTION

Mr. Derek objects to Paragraph 16: “Specific Offense Characteristics” insofar as it states, “Defendant forced victims to accompany him to a different location. Therefore, pursuant to section 2B3.1(b)(4)(A), a further four levels are added to the base offense level.” Section 2B3.1(b)(4)(A) reads, “[i]f any person was abducted to facilitate commission of the offense or to facilitate escape, increase by 4 levels.” U.S.S.G. § 2B3.1(b)(4)(A). The basis given for this enhancement is the fact that, when Mr. Derek entered Michael’s Neighborhood Grocery on February 2, 2020, he directed the employees who were then working in the store, Mr. Chidi Anagonye and Mr. Jason Mendoza, to move from the produce section to the front of the store to unlock the cash registers. It is respectfully submitted that Mr. Derek’s conduct does not constitute “abduction” within the meaning of this section and that the four (4) level abduction enhancement should not be applied in this sentence.

ARGUMENT

I. The Abduction Enhancement Does Not Apply to Movement Within the Same Building

The language of the Federal Sentencing Guidelines (“the Guidelines”) should, like all statutes and regulations enacted by Congress, be given its plain and ordinary meaning. The word “abduction” is defined in Black’s Law Dictionary to mean, “1. The act of leading someone away by force or fraudulent persuasion 3. Loosely, KIDNAPPING.” *Abduction*, Black’s Law Dictionary (11th ed. 2019). This definition is consistent with the plain meaning of the definition of “abducted” given in

section 1B1.1 of the Guidelines, which states, “[a]bducted’ means that a victim was forced to accompany an offender to a different location. For example, a bank robber’s forcing a bank teller from the bank into a getaway car would constitute an abduction.” § 1B1.1 cmt. n.1 (A). These definitions, as well as the common understanding of the word “abduct,” are inapplicable to Mr. Derek’s conduct in this case. After he entered the store and determined that the cash registers were locked, Mr. Derek, without injuring or otherwise touching Mr. Anagonye or Mr. Mendoza, directed them to move approximately thirty feet from behind a produce display stand to the checkout counters at the front of the store to unlock the cash registers. Mr. Derek did not attempt to force Mr. Anagonye or Mr. Mendoza to exit the premises, he did not hold either of them as a hostage, he did not force them to accompany him to his car, he did not isolate them from each other—he did not so much as require them to pass through any doorways. In other words, Mr. Derek did not engage in any behavior which could reasonably be interpreted as an “abduction.”

Although this Court has never directly addressed this issue, the Sixth, Seventh, and Eleventh Circuits have expressly held that conduct like Mr. Derek’s does not meet the definition of “abduction” under section 2B3.1(b)(4)(A). The Sixth Circuit recently stated in *United States v. Hill*, 963 F.3d 528, 533 (6th Cir. 2020) that “the phrase ‘different location’ in this context generally should refer to a place other than the store being robbed, not to a separate area or spot within that store.” Likewise, the Eleventh Circuit in *United States v. Whatley*, 719 F.3d 1206, 1222 (11th Cir. 2013) found that movement between different rooms or offices within the same local bank branch did not constitute movement to a “different location” under section 2B3.1(b)(4)(A), and the Seventh Circuit held in *United States v. Eubanks*, 593 F.3d 645, 654 (7th Cir. 2010) that movement from a back room to the front of a store was not movement to a “different location” within the meaning of this enhancement, finding that “transporting the victims from one room to another is simply not enough for an abduction.” The facts of this case are even less supportive of an abduction enhancement than *Whatley* and *Eubanks*, since in those cases the defendants moved victims between different rooms of a bank or store and, in the facts at issue here, Mr. Derek merely directed Mr. Anagonye and Mr. Mendoza to move a few feet on the main floor of the store.

Not all courts that have addressed the issue of whether movement within the same building can trigger the abduction enhancement have reached the same categorically negative conclusion of *Hill*, *Whatley*, and *Eubanks*. However, even under the “flexible” approach articulated by the Fifth Circuit in *United States v. Hawkins*, 87 F.3d 722, 727–28 (5th Cir. 1996), and adopted by the Third Circuit in *United States v. Reynos*, 680 F.3d 283, 290 (3d Cir. 2012), *reh’g granted*, 682 F.3d 1053 (3d Cir. 2012), the Fourth Circuit in *United States v. Osborne*, 514 F.3d 377, 389–90 (4th Cir. 2008), and the Tenth Circuit in *United States v. Archuleta*, 865 F.3d 1280, 1288 (10th Cir. 2017), Mr. Derek’s conduct does not justify the imposition of the abduction enhancement. The flexible analysis of these circuits turns on whether a

defendant forced a victim to accompany them to “a different location,” a term which the *Hawkins* court deemed to be “flexible and thus susceptible of multiple interpretations, which are to be applied case by case to the particular facts under scrutiny.” *Hawkins*, 87 F.3d at 727–28.

The flexible analysis determination of whether a given course of conduct constitutes movement to a “different location” is likely to be highly fact specific. However, some of the factors that may be considered include whether a defendant crossed a threshold or property line, *see Hawkins*, 87 F.3d at 727, as well as the level of danger to victims involved in defendant’s conduct, *Reynos*, 680 F.3d at 287. This is a highly fact specific analysis, and Mr. Derek’s conduct is easily distinguishable from the facts of the cases where these circuits have found that movement within the same property does satisfy the requirements of an abduction enhancement. For example, the Fifth Circuit in *Hawkins*, in finding that victims were abducted although they had only been moved about fifty feet, relied on the district court finding that the defendants “were moving the victims toward the van in an effort to kidnap them” and that “but for the fact that [the victim] broke and ran away, the abduction would have been carried out ‘even more fully than was done.’” *Hawkins*, 87 F.3d at 726. Likewise, in finding that moving from a rear pharmacy section to the front of a large store constituted movement to a “different location,” the Fourth Circuit in *Osborne* heavily relied upon the fact that the defendant in that case had to force his victim to leave the pharmacy through a secured door and accompany him on a winding path throughout the aisles of the store to reach the front. 514 F.3d at 390. The court found this particularly significant because these actions had “rendered [the victims] potential hostages” and subjected them to dangers from “isolation,” which the court stated were precisely the sorts of harms targeted by the abduction enhancement. *Id.*

Mr. Derek’s conduct on February 2, 2020, does not resemble the sort of behavior that section 2B3.1(b)(4)(A) is meant to address. Mr. Derek did not move the Michael’s Neighborhood Grocery employees through any doors or through the store’s aisles, he did not isolate either of the employees, and he plainly never had any intention of kidnapping anyone. Thus, to hold that he abducted Mr. Anagonye and Mr. Mendoza by forcing them to a “different location,” would be directly contrary to the plain meaning of the Federal Sentencing Guidelines.

II. Application of the Abduction Enhancement to These Facts Renders the Physical Restraint Enhancement Superfluous

The Federal Sentencing Guidelines for robbery contain a number of Specific Offense Characteristics, setting out a scale of enhancements for varying severity of conduct. Mr. Derek’s conduct should warrant, at most, a two (2) level physical restraint enhancement. The physical restraint enhancement reads, “[I]f any person was physically restrained to facilitate commission of the offense or to facilitate escape, increase by 2 levels.” U.S.S.G. § 2B3.1(b)(4)(B). The commentary to section 1B1.1

defines “physically restrained” as “the forcible restraint of the victim such as by being tied, bound, or locked up.” § 1B1.1 cmt. n. 1(K). It is difficult to imagine a scenario where a victim could be “tied, bound, or locked up” during the course of a robbery without requiring them to move at all from their original position. Thus, to apply the abduction enhancement to actions like Mr. Derek’s where he merely directed employees to move a few feet, without more, would impermissibly blur the distinction between the abduction and physical restraint enhancements. As the Sixth Circuit pointed out in *United States v. Hill*, “movements within a store typically will occur whenever a robber ‘physically restrains’ a victim.” 963 F.3d 528, 535 (6th Cir. 2020). Therefore, such an application would leave the physical restraint enhancement virtually without application and render a portion of the Federal Sentencing Guidelines effectively meaningless and superfluous.

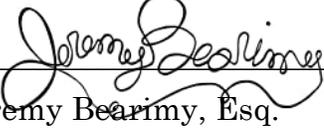
Several circuits have applied the physical restraint enhancement to conduct similar to or more severe than Mr. Derek’s. *See, e.g., United States v. Coleman*, 664 F.3d 1047, 1050 (6th Cir. 2012) (applying the physical restraint enhancement where defendant pointed a pistol at a bank manager and ordered him to leave his office and sit on the floor of the lobby); *United States v. Nelson*, 137 F.3d 1094, 1112 (9th Cir. 1998) (“order[ing] a jewelry store employee and customer to the back room at gunpoint . . . constitutes physical restraint”); *United States v. Jones*, 32 F.3d 1512, 1519 (11th Cir. 1994) (applying the physical restraint enhancement where defendant forced credit union employees and customers into the safe room and ordered them to lie on the floor); *United States v. Schau*, 1 F.3d 729, 730 (8th Cir. 1993) (per curiam) (applying the physical restraint enhancement where armed bank robbers ordered their victims into the bank vault). This emphasizes that merely ordering employees to change position during the course of a robbery as Mr. Derek did cannot, without more, be grounds for application of the abduction enhancement without effectively eradicating the distinction between abduction and physical restraint. Thus, the physical restraint enhancement, not the abduction enhancement, should be applied to Mr. Derek’s conduct.

CONCLUSION

The Presentence Investigation Report currently lists Mr. Derek’s total offense level resulting from the events of February 2, 2020 as twenty-nine (29), with a resulting sentencing range of 108-135 months. This conclusion is reached by the erroneous application of a four (4) level abduction enhancement pursuant to section 2B3.1(b)(4)(A) of the Federal Sentencing Guidelines. The Presentence Investigation Report should be amended to apply a two (2) level physical restraint enhancement pursuant to section 2B3.1(b)(4)(B) instead of the abduction enhancement, which would result in an amended total offense level of twenty-seven (27) and a resulting sentencing range of 87-108 months.

WHEREFORE, the Defendant, Maximum Derek, respectfully requests that this Court sustain the within objection to the Presentence Investigation Report and direct the United States Probation Office to amend the Report as requested herein.

Respectfully submitted,

/s/  _____

Jeremy Bearimy, Esq.
Attorney for the Defendant
Federal Defenders of West Dakota
30 Garnett Street
Jackson, West Dakota 19402

Dated: July 18, 2020

UNITED STATES DISTRICT COURT
DISTRICT OF WEST DAKOTA

United States of America,	:	
	:	
-against-	:	Docket No. CR 19-193-92-TGP
	:	
Maximum Derek,	:	GOVERNMENT'S RESPONSE TO
	:	OBJECTIONS TO PRESENTENCE
	:	REPORT
Defendant.	:	
	:	

COMES NOW the United States of America, through Trevor Bambadjan, Assistant United States Attorney in and for the District of West Dakota, and presents herewith the State's response to Defendant Maximum Derek's Objections to Presentence Investigation Report dated June 20, 2020.

INTRODUCTION

Defendant's dispute with the Presentence Investigation Report concerns the U.S. Probation Office's determination of the Specific Offense Characteristics of Defendant's violation of 18 U.S.C. § 1951(a) under U.S. Sentencing Guideline Manual section 2B3.1(b)(4). Defendant disputes the Probation Office's determination that his offense conduct triggered a four (4) level enhancement under U.S. Sentencing Guidelines Manual section 2B3.1(b)(4)(A) (U.S. Sent'g Comm'n 2018). However, Mr. Derek forced his victims, Mr. Chidi Anagonye and Mr. Jason Mendoza, to accompany him to a different location within the store in order to facilitate the commission of his crime, keeping them under constant threat of violence from his firearm. This is precisely the kind of behavior that triggers the abduction enhancement, and the application of the enhancement to this case is supported by precedent from other jurisdictions. Thus, the Office's determination was reasonable, and this Court should adopt the Presentence Investigation Report without change.

ARGUMENT

I. The Plain Language of the Abduction Enhancement Applies to Defendant's Conduct in This Case.

Defendant maintains that the abduction enhancement cannot be applied to forced movement within the same building. However, the definition of "abducted" provided in the U.S. Sentencing Guidelines ("U.S.S.G.") plainly encompasses Defendant's conduct. According to this definition, "[a]bducted' means that a victim was forced to accompany an offender to a *different location*. For example, a bank

robber's forcing a bank teller from the bank into a getaway car would constitute an abduction." U.S.S.G. § 1B1.1 cmt. n.1(A) (U.S. Sent'g Comm'n 2018) (emphasis added). The Oxford English Dictionary defines "location" as "[t]he particular place or position occupied by a person or thing; precise situation." *Location*, Oxford English Dictionary (3d ed. 2015). The court in *United States v. Archuleta* specifically confronted this plain language question and found that the abduction enhancement "simply requires proof that the victims were forced by the defendant to move from one position to another." 865 F.3d 1280, 1288 (10th Cir. 2017) (citing Oxford English Dictionary (online ed. 2017)).

When Defendant entered Michael's Neighborhood Grocery on February 2, 2020, and found the cash registers locked, he immediately trained his gun on his victims, Chidi Anagonye and Jason Mendoza, who he spotted in their hiding place in the produce section. Keeping them under the constant threat of his firearm and following close behind them, he forced them to get up from their hiding place behind a produce stand, walk out of the produce section, pass in front of the store's grocery aisles, and accompany him to the checkout section at the front of the store. He then ordered them at gunpoint to fill bags with cash from each of the four cash registers and hand them over to him. By doing so, he unquestionably forced both of his victims to accompany him to a different location, thus satisfying the requirements of the abduction enhancement.

Defendant's contention that applying the four-level abduction enhancement to this conduct would render the physical restraint enhancement superfluous is entirely baseless. The physical restraint enhancement—which establishes a two-level enhancement "if any person was physically restrained to facilitate commission of the offense or to facilitate escape," U.S.S.G. § 2B3.1(b)(4)(B)—would still apply to any conduct where the offender did not accompany his victims, or where he restrained them but did not require them to move. For example, in *United States v. Coleman*, 664 F.3d 1047, 1048 (6th Cir. 2012), the court applied the physical restraint enhancement where the defendant, while standing in the lobby of a local bank branch, spotted a bank employee in an office adjacent to the lobby, pointed his gun at him, and ordered him to come out of the office and sit on the floor of the lobby. Physical restraint cases like this can easily be distinguished from cases like Defendant's, where the abduction enhancement properly applies. In physical restraint situations, offenders merely prevent their victims from moving or interfering with their crime. However, where the offender accompanies their victims from one position to another under constant threat of imminent injury, and in furtherance of their crime, as Defendant did here, the abduction enhancement properly applies. The mere fact that certain conduct may satisfy the requirements of more than one Guideline does not render the other Guidelines superfluous. In fact, it is so common for more than one enhancement to fit a given set of facts under the Sentencing Guidelines, that comment 5 of U.S.S.G. section 1B1.1 provides, "[w]here two or more guideline provisions appear equally applicable, but the guidelines authorize the application of only one such provision, use the provision that results in the greater offense level."

Accordingly, the fact that the physical restraint enhancement may also be applicable to the facts currently before this Court has no bearing on whether the abduction enhancement may apply.

II. Precedent from Other Jurisdictions Favors the Application of the Abduction Enhancement.

A majority of circuits that have reached the issue of whether the abduction enhancement applies to movement within the same building have held that it does. The Third, Fourth, Fifth, and Tenth Circuits have all concluded that the abduction enhancement applies under facts similar to this case. *See United States v. Archuleta*, 865 F.3d 1280, 1288–89 (10th Cir. 2017) (applying abduction enhancement where defendant forced bank employees to accompany him from the lobby area around a corner to a separate vault area); *United States v. Reynos*, 680 F.3d 283, 286 (3d Cir. 2012) (applying abduction enhancement where pizza restaurant employee was forced to move from the bathroom to the cash register); *United States v. Osborne*, 514 F.3d 377, 390–91 (4th Cir. 2008) (applying abduction enhancement where victims were forced to move from the pharmacy section of a Walgreens to the front door); *United States v. Hawkins*, 87 F.3d 722, 728 (5th Cir. 1996) (applying abduction enhancement where victims were forced to move approximately 40 feet across a parking lot). Though they have not applied the abduction enhancement, the Sixth, Seventh, and Eleventh Circuits have both adopted a “case-by-case” approach, leaving open the possibility that there may be some circumstances in which movement within the same building may properly require an abduction enhancement. *See United States v. Hill*, 963 F.3d 528, 536 (6th Cir. 2020) (“the phrase ‘different location’ is context dependent and so we do not foreclose the ‘case-by-case approach’ that other courts have taken”); *United States v. Whatley*, 719 F.3d 1206, 1222 (11th Cir. 2013) (“[A]ll of our sister circuits have taken a case-by-case approach to the application of the enhancement. We too decline to adopt a categorical rule”); *United States v. Eubanks*, 593 F.3d 645, 654 (7th Cir. 2010) (“[T]here may well be situations in which an abduction enhancement is proper even though the victim remained within a single building”).

In *Reynos*, 680 F.3d at 286–87, the Third Circuit identified three predicates that must be met for the abduction enhancement to apply:

First, the robbery victims must be forced to move from their original position; such force being sufficient to permit a reasonable person an inference that he or she is not at liberty to refuse. Second, the victims must accompany the offender to that new location. Third, the relocation of the robbery victims must have been to further either the commission of the crime or the offender’s escape.

This three-part test was explicitly adopted by the Tenth Circuit in *Archuleta*, 865 F.3d at 1288, where the court found this test to be most consistent with the plain language of the Sentencing Guidelines.

Defendant's conduct in this case meets all three prongs of the Third Circuit's test. First, Defendant forced Mr. Anagonye and Mr. Mendoza to move from their original positions where they were hiding behind the produce display to a new location by the cash registers at the front of the store. Second, Defendant forced his victims to accompany him between locations, closely following them while threatening them with his gun. Third, the relocation of the victims was done in furtherance of the commission of Defendant's crime, as he required Mr. Anagonye and Mr. Mendoza to unlock the cash registers and turn over all the money to him.

Even if this Court does not adopt the Third Circuit's three-part test, the flexible, case-by-case approach applied by other circuits also requires the imposition of the abduction enhancement to these facts. This flexible interpretation, articulated in *Hawkins*, 87 F.3d at 728, notes that the term "different location" as used in the Sentencing Guidelines is "susceptible of multiple interpretations, which are to be applied case by case to the particular facts under scrutiny, not mechanically based on the presence or absence of doorways, lot lines, thresholds, and the like." Here, Defendant forced his victims to accompany him at gunpoint from one section of the store to another, thereby forcing them to move to a "different location." By doing so, Defendant "engaged in conduct plainly targeted by the abduction enhancement: keeping victims close by as readily accessible hostages." *Osborne*, 514 F.3d at 390. By closely following his victims at gunpoint, Defendant "'provided himself with a potential hostage' and thereby placed his victim 'at risk of harm'" *Id.* (quoting *United States v. Whooten*, 279 F.3d 58, 61 (1st Cir. 2002)). Therefore, the abduction enhancement was properly applied.

CONCLUSION

The United States respectfully requests that this Court adopt the findings of the Presentence Investigation Report as presented by the United States Probation Office without alteration.

Respectfully submitted,

Trevor Bambadjan

Trevor Bambadjan, Esq.
Assistant United States Attorney
47 Shellstrop Avenue
Jackson, West Dakota 19402

Dated: August 14, 2020

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WEST DAKOTA

Sentencing Transcript/Colloquy
September 17, 2020 Proceedings (On the record at 1:30 p.m.)
United States v. Maximum Derek

Assistant United States Attorney: Trevor Bambadjan
Attorney for Defendant: Jeremy Bearimy
Interpreter: None
Before the Honorable Judge Doug L. Forcett

1 THE COURT: Call docket number CR 19-193-92-TGP, United States versus
2 Maximum Derek.

3 Good afternoon, Mr. Bambadjan, Mr. Bearimy, Mr. Derek. I see that
4 Mr. Derek has previously entered a guilty plea. Are we ready to proceed to
5 sentencing today?

6 MR. BEARIMY: We are, Your Honor.

7 MR. BAMBADJAN: Yes, Your Honor.

8 THE COURT: Alright, now, I've reviewed the presentence investigation report
9 dated June 20, 2020, and the sentencing recommendations set forth there. I've also
10 reviewed Defendant's objections to the report, dated July 18, 2020, and the State's
11 response to Defendant's objections, dated August 14, 2020.

12 Now, Mr. Bambadjan, I understand that the Government's position is that
13 the presentence investigation report should be adopted without change, is that
14 correct?

15 MR. BAMBADJAN: Yes, Your Honor.

16 THE COURT: Okay. And, Mr. Bearimy, have you reviewed the report and the

17 State's reply to your objections?

18 MR. BEARIMY: Yes, we have.

19 THE COURT: And have you had a chance to go over all these submissions with your
20 client?

21 MR. BEARIMY: Yes, Your Honor, in great detail.

22 THE COURT: Good. And do either of you have any other issues you'd like to raise
23 now that haven't been raised in your written submissions?

24 MR. BEARIMY: No, Your Honor, we do not.

25 THE COURT: Okay. And, Mr. Bambadjan, you have reviewed all the submissions
26 and have no further issues you'd like to raise?

27 MR. BAMBADJAN: That's correct, Your Honor.

28 THE COURT: So as far as I can tell, the only contested issue at this point is
29 whether there should be a four-level or a two-level enhancement under
30 section 2B3.1(b)(4) of the Sentencing Guidelines, is that correct?

31 MR. BEARIMY: That is correct, Your Honor. We feel that the four-level
32 enhancement is aimed at much more serious conduct than Mr. Derek's behavior
33 here, and that "abduction" should mean something more than moving a few feet
34 within the store.

35 THE COURT: Right, so I understand from your submissions. Now, this is an
36 interesting case because authorities seem to be divided on the issue, so I end up
37 with a lot of discretion in deciding which way to go. Defense counsel seems to place
38 a lot of weight on saying that Mr. Derek only moved his victims about thirty feet.

39 And, certainly, that doesn't sound much like a kidnapping when you put it that
40 way, but I'm afraid I'm just not prepared to agree with defense counsel's assessment
41 that this conduct isn't serious enough for the four-level enhancement.

42 The physical restraint enhancement, it seems to me, is meant to get at when
43 a defendant uses some degree of force or threat of force to just incapacitate the
44 robbery victims—to make sure that they can't interfere with him. But that's not
45 what happened here. Mr. Derek actually went back to where his victims were
46 hiding and forced them under threat of violence to come with him and participate in
47 his crime. That's a lot more serious and dangerous to the victims, and I'm just more
48 convinced by the State's argument that this is the type of conduct targeted by the
49 abduction enhancement.

50 MR. BEARIMY: Respectfully, Your Honor, surely moving thirty feet across a
51 grocery store floor can't really be considered movement to a different location
52 enough to call it an abduction.

53 THE COURT: Counselor, I did say I had reviewed your submissions. I understand
54 your argument on this point, but I can't say that I agree with you that the language
55 of the statute requires the movement to be out of a building or into a car. I find—
56 and I'm following the majority of existing precedent on this point—that deciding
57 whether or not to apply this enhancement is much more about the effect of a
58 defendant's conduct on his victims than about exactly where they moved. Here,
59 Mr. Derek got up close to his victims, threatened them with a gun, and made them
60 move with him to the front of the store to help him commit his crime. I think this is

61 pretty clearly the type of conduct that we want to discourage with a four-level
62 enhancement and goes beyond just restraining somebody, which would get the two-
63 level enhancement. So, with that in mind, I'm going to adopt the sentencing range
64 from the presentence investigation report without change. So, that's a range of 108
65 to 135 months. I do understand that this isn't the most severe conduct that could be
66 covered by this sentencing range, but, at the same time, this is very dangerous
67 conduct that could easily have become violent. Furthermore, I see from the
68 presentence investigation report that Mr. Derek committed this offense while still
69 under probation supervision. Now, Mr. Derek, in my mind that spells a disregard
70 and a disrespect for the law, and I have to take that into account with sentencing.
71 So, I'm imposing a sentence of 130 months because at this point, I feel that you're a
72 threat to society and that you've shown yourself incapable of complying with the
73 conditions required for you to live in society on probation.

74 If you intend to appeal, you must do so before December 17, 2020.

75 MR. BEARIMY: Understood, Your Honor.

76 MR. BAMBADJAN: Thank you, Your Honor.

-END OF TRANSCRIPT-

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WEST DAKOTA

United States of America, :
 : Case No.: 04-0053
 :
 -against- :
 :
 Maximum Derek, : **JUDGMENT IN A CRIMINAL CASE**
 :
 Defendant. :
 :

Defendant pleaded guilty to Count 1.

Defendant is adjudicated GUILTY of these offenses:

<u>Title and Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. § 1951(a)	Armed robbery		1

Defendant is sentenced as provided in pages 2 through 8 of this document. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ORDERED that Defendant must notify the United States Attorney for this District within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, Defendant must notify the Court and the United States attorney of material changes in economic circumstances.

09/17/2020

Date of Imposition of Judgment

Doug L. Forcett

Signature of Judge

Honorable Doug L. Forcett

Name and Title of Judge

DEFENDANT: Derek
CASE NUMBER: 04-0053

IMPRISONMENT

Defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: **One Hundred Thirty Months.**

The court makes the following recommendations to the Bureau of Prisons:

- Defendant shall surrender to the United States Marshal for this district:
 - at _____ a.m. / p.m. (circle one) on _____.
 - as notified by the United States Marshal.
- Defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
 - before 2 p.m. on 09/31/2020.
 - as notified by the United States Marshal.
 - as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on 09/31/2020 to Marshal Turic Froschmann
at Void Penitentiary, with a certified copy of this judgment.

Turic Froschmann

United States Marshal

By: *Vicky Tenfel*

Deputy United States Marshal

**[SHEETS 3 THROUGH 7 HAVE BEEN INTENTIONALLY OMITTED FROM
THE RECORD]**

DEFENDANT: Derek
CASE NUMBER: 04-0053

STATEMENT OF REASONS

I. COURT FINDINGS ON PRESENTENCE INVESTIGATION REPORT

- The court adopts the presentence investigation report without change.
- The court adopts the presentence investigation report with the following changes:

- _____.
- The record establishes no need for a presentence investigation report pursuant to Fed. R. Crim. P. 32.

II. COURT FINDING ON MANDATORY MINIMUM SENTENCE

- One or more counts of conviction carry a mandatory minimum term of imprisonment and the sentence imposed is at or above the applicable mandatory minimum term.
- One or more counts of conviction carry a mandatory minimum term of imprisonment, but the sentence imposed is below a mandatory minimum term because the court has determined that the mandatory minimum does not apply based on:
 - findings of fact in this case:

- _____.
- substantial assistance (18 U.S.C. § 3553(e)).
- statutory safety valve (18 U.S.C. § 3553(f)).
- No count of conviction carries a mandatory minimum sentence.

III. COURT DETERMINATION OF GUIDELINE RANGE:

Total Offense Level: 29
Criminal History Category: III
Guideline Range: 108 to 135 months
Supervised Release Range: 1 to 5 years
Fine range: \$ _____ to _____

- Fine waived or below the guideline range because of inability to pay.

UNITED STATES CIRCUIT COURT
FOR THE FOURTEENTH CIRCUIT

United States of America,	:	
	:	
-against-	:	20-CR-0453
	:	
Maximum Derek,	:	ORDER SETTING
	:	BRIEFING SCHEDULE
Defendant.	:	

The parties are directed to file briefs addressing whether movement within the same building constitutes movement to a “different location” for the purposes of the four-level abduction sentencing enhancement under the Federal Sentencing Guidelines.

Appellant’s brief is to be filed with the Clerk and served upon opposing counsel on or before noon, January 5, 2021. Appellee is to file its return on or before noon, February 15, 2021.



Gwendolyn Kellen, Clerk

Dated: November 30, 2020

End of Record