No. _____

In the

Supreme Court of the United States

DARONNIE THOMPKINS, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Ninth Circuit

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

Whether Thompkins' incriminating statements were involuntary and should have been suppressed, where the interrogating officer: suggested that Thompkins' remaining silent could result in a harsher sentence, threatened to tell the judge that Thompkins wouldn't cooperate, implied that things would get worse for Thompkins if he waited to speak with a lawyer, and exerted relentless pressure about Thompkins' children.

Whether there was insufficient evidence to support Thompkins' conviction for armed bank robbery as opposed to insider bank larceny, where the district court found that the plan was that codefendant Toyrieon Sessions was supposed to come into the bank and meet codefendant Iris Lester, a bank employee, who would take Sessions to the bank vault, give him the money in the vault, and let him out of the bank before anyone else knew that he had been at the bank.

Whether the government met its burden of proving that a firearm was used in the offense, where Thompkins was not present during the offense, and where the district court found that the plan was that codefendant Sessions was supposed to come into the bank and meet codefendant Lester, a bank employee, who would take Sessions to the bank vault, give him the money in the vault, and let him out of the bank before anyone else knew that he had been at the bank.

Statement of Related Proceedings

- *United States v. Daronnie Thompkins*, 2:17-cr-767-AB-2 (C.D. Cal. December 10, 2018)

- *United States v. Daronnie Thompkins*, 18-50432 (9th Cir. April 27, 2021)

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In the

Supreme Court of the United States

DARONNIE THOMPKINS, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

Petition for Writ of Certiorari

Petitioner Daronnie Thompkins respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals of the Ninth Circuit in this case.

OPINION BELOW

The Ninth Circuit's April 27, 2021 Memorandum affirming the judgment of the district court in *United States v. Daronnie Thompkins*, Ninth Circuit Case No. 18-50432, is unreported. (See Appendix A, "Memorandum") No written opinions (other than a minute order) were issued by the district court when it issued the rulings which are the subject of this Petition.

JURISDICTION

The Ninth Circuit entered its judgment on April 27, 2021. The Ninth Circuit denied Thompkins' timely petition for rehearing on July 21, 2021. This petition is filed within 90 days of the Ninth Circuit's denial of Thompkins' petition for rehearing. (See Appendix B, "Order")

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The district court had jurisdiction pursuant to 18 U.S.C. §3231, and the Ninth Circuit had jurisdiction pursuant to 28 U.S.C. §1291 and 18 U.S.C. §3742.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fifth Amendment

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

A. Factual Background

On April 21, 2017, $325,000 was stolen from the Northrop Grumman Federal Credit Union ("NGFCU"). Shortly before the theft, NGFCU employee Iris Lester texted her new boyfriend Daronnie Thompkins. Thompkins was not at NGFCU during the offense. Lester then prevailed upon another employee, Bernal, to accompany Lester to the restroom. The restroom was in a secluded hallway at the back of the office building in which NGFCU was located. The restroom was accessed through the locked rear door of the credit union. Only Lester and two other employees possessed the keys. As Lester and Bernal left the women's restroom to return to the credit union, Toyrieon Sessions exited the nearby men's restroom, displayed a gun, and ordered them to take him to the vault. From the secluded hallway, they

could enter the rear door of the credit union and get to the vaultroom without being seen by the public or other employees at the credit union. Lester also had keys to the vaultroom. In the vaultroom, they realized they needed another key, so Lester called another employee, Sohel, into the vaultroom. After Sohel unlocked the vault, the three employees packed the money into bags and Sessions left with the money.

By the summer of 2017 Lester was furious with Thompkins. Thompkins had ended the relationship with Lester and became engaged to Dymon, the mother of his two children. Lester left violent and threatening messages for Dymon, assaulted her, and poured paint over Dymon's car. Lester displayed a picture of herself with a silver gun in her waistband.

On November 28, 2017, Thompkins was arrested. After being Mirandized, Thompkins denied involvement in the theft. However, after hours of interrogation in which agents used improper techniques, Thompkins broke down and made incriminating statements about his involvement.

B. Indictment

An indictment was filed against Lester, Thompkins and Sessions, alleging conspiracy, armed bank robbery, and aiding and abetting.

C. Motion to Suppress

Thompkins filed a motion to suppress his statements to the police, on the ground that they were involuntary. The court denied the motion to suppress.

D. Stipulated Facts Trial

Thompkins proceeded to court trial by a stipulation including facts, testimony and documents. The parties stipulated to the facts set forth above regarding the offense.

The parties stipulated that Lester would testify to the following. On the morning of the offense, Thompkins told Lester that the offense would occur that day. He was holding a handgun. During lunch that day, Thompkins met with Lester. Thompkins told Lester to text him when she was going to the bathroom and his "cousin" "Phat" would be waiting for Lester. Later that afternoon, Lester texted Thompkins. Lester then insisted that Bernal accompany her to the women's restroom. When they left the women's restroom, a man left the men's restroom and yelled at them. Lester turned around and saw "Phat" holding the same gun she had seen Thompkins holding earlier that day.

The district court found Thompkins guilty of the charges in the indictment.

E. Sentencing

The PSR recommended a six-level enhancement for otherwise using a firearm under §2B3.1(b)(2)(B), on the ground that Sessions pointed the firearm at two bank employees. According to the PSR, the behavior involving Sessions' use of a weapon during the robberies was relevant conduct under U.S.S.G. §1B1.3(a)(1).

The PSR also recommended a two-level enhancement for physical restraint under §2B3.1(b)(4)(B), on the ground that Sessions used the firearm to direct Bernal into the vault and to bring Sohel into the vault.

Thompkins objected to the firearm and physical restraint enhancements. At sentencing, the district court stated that this was a planned organized robbery. It was surgical; just get in and get out. The court was having trouble understanding why it would be reasonably foreseeable that someone else would come in, and then be restrained:

> "this was a planned, orchestrated robbery between basically three people in the know -- one person driving around, one person goes in, meets another person they know, that person takes them to the money, he gets the money, walks out presumably before anyone knows what's happening."

The court said that this seemed to be surgical. The court queried whether, given that it was an inside job, it was designed to make it go as

cleanly as possible such that, by the time anyone realized there was a robbery, Sessions would have been long gone.

The court imposed the six-level gun enhancement, stating:

> "Reasonable minds will differ. The Ninth Circuit will tell me if I am wrong, but I see based on the evidence before me that includes the stipulated testimony that was presented to me before, I found Mr. Thompkins guilty, including the totality of the circumstances. Considering Miss Lester and her outside conduct, I think there is clear and convincing evidence that there was an agreement to commit an armed bank robbery. That's what I found Mr. Thompkins guilty of."

But the district court declined to impose the restraint enhancement. The court had questions whether there was adequate evidence to say that it was reasonably foreseeable, because "the plan it appears, based on the testimony, the stipulated facts testimony, and all the other things that I have read was for him to come in with -- Sessions was supposed to come in, meet her, walk to the bank, get the money, and get out." There was not enough evidence to believe that it was reasonably foreseeable that restraint would occur.

The court imposed a low-end sentence of 110 months. After imposing sentence, the court told Thompkins: "I don't know what your role is on this offense."

F. Ninth Circuit Memorandum

On April 27, 2021, the Ninth Circuit issued a Memorandum Disposition stating in pertinent part as follows:

> "2. Thompkins failed to establish that his statements to the interrogating agent were involuntary. The agent: (1) stated that he would report any cooperation by Thompkins to the arresting agency and that the cooperation might impress the judge; (2) stated that cooperation would help reduce his sentence; (3) urged Thompkins to cooperate to minimize time away from his children; and (4) represented that he would investigate whether Thompkins could talk to his kids. None of these statements interfered with Thompkins' right to remain silent, or demonstrated that his will was overborne. See *United States v. Leon Guerrero*, 847 F.2d 1363, 1366 (9th Cir. 1988) ("An interrogating agent's promise to inform the government prosecutor about a suspect's cooperation does not render a subsequent statement involuntary, even when it is accompanied by a promise to recommend leniency or by speculation that cooperation will have a positive effect.") (citations and footnote reference omitted). In any event, the weight of the evidence of guilt rendered any error in the admitting the confession harmless. See *Padilla v. Terhune*, 309 F.3d 614, 622 (9th Cir. 2002).
>
> 3. Under plain error review, there was sufficient evidence of Thompkins' guilt. See *United States v. Gadson*, 763 F.3d 1189, 1218 (9th Cir. 2014) ("review[ing] for plain error" when the defendant "did not move for acquittal at the close of trial"). "[V]iewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of [armed bank robbery and conspiracy to commit armed bank robbery] beyond a reasonable doubt." *United States v. Nevils*, 598 F.3d 1158, 1163–64 (9th Cir. 2010) (en banc) (articulating sufficiency of the evidence standard).
>
> Thompkins provided the gun used by his co-conspirator to commit the robbery. It was completely foreseeable that the co-conspirator would use the gun to coerce a bank employee to open the money vault. See *United States v. Carter*, 560 F.3d 1107, 1113 (9th Cir. 2009) (confirming that "it was foreseeable that a gun would be used in the bank robbery"). Thompkins' disputes all go to credibility and the weight of the evidence,

but the standard of review forecloses these arguments. See *Nevils*, 598 F.3d at 1163-64."

REASONS FOR GRANTING THE WRIT

A. Thompkins' Motion to Suppress Should Have Been Granted Because Thompkins' Incriminating Statements Were Involuntary and Should Have Been Suppressed

For nearly three hours Daronnie Thompkins would not admit his involvement in the offense. After FBI Special Agent Sanchez' prolonged questioning applied psychological pressure on Thompkins, he broke down and made incriminating statements about his involvement in the offense, including that he agreed to keep a lookout around the bank in exchange for money. Thompkins' statements were the result of several impermissible methods of coercing him to confess.

The Fifth Amendment guarantees that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." A defendant's involuntary statement violates his Fifth Amendment rights. See C*olorado v. Connelly*, 479 U.S. 157, 163 (1986). Even where, as here, the procedural safeguards of *Miranda* are satisfied, a defendant in a criminal case is deprived of due process of law if his conviction is founded on involuntary statements. *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991). The

government bears the burden of proving that statements are voluntary by a preponderance of the evidence. *Lego v. Twomey*, 404 U.S. 477, 483 (1972).

Courts consider the totality of the circumstances in determining whether the defendant's will was overborne. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 226-27 (1973). "Interrogation tactics need not be violent or physical in nature to be deemed coercive. Psychological coercion is equally likely to result in involuntary statements, and thus is also forbidden." *Collazo v. Estelle*, 940 F.2d 411, 416 (1991) (en banc), cert. denied, 502 U.S. 1031 (1992). Some police conduct is so psychologically coercive always to be unconstitutional. Id. at 416; *United States v. Harrison*, 34 F.3d 886, 892-93 (1994). Sanchez' conduct fit in that category.

Sanchez impermissibly coerced Thompkins to confess involvement in the offense. Sanchez threatened Thompkins that he would bring non-cooperation or "stubbornness" to the sentencing judge's attention; Sanchez implied that things would worsen for Thompkins if he spoke with a lawyer; and Sanchez played on Thompkins' fears of not seeing his children again if he didn't cooperate.

1. Sanchez' Suggestion That Remaining Silent Could Result In A Harsher Sentence Rendered Thompkins' Statements Involuntary

Sanchez' conduct violated Thompkins' Fifth Amendment rights. For example, in *United States v. Harrison*, 34 F.3d 886, 891-92 (9th Cir. 1994),

the Ninth Circuit held that "there are no circumstances in which law enforcement officers may suggest that a suspect's exercise of the right to remain silent may result in harsher treatment by a court or prosecutors." See also *United States v. Leon Guerrero*, 847 F.2d 1363, 1366 n. 5 (9th Cir. 1988) ("threatening to inform the prosecutor of a suspect's refusal to cooperate violates her fifth amendment right to remain silent."); *United States v. Tingle*, 658 F.2d 1332, 1336 n.5 (9th Cir. 1981) ("Refusal to cooperate is every defendant's right under the fifth amendment. Under our adversary system of criminal justice, a defendant may not be made to suffer for her silence. Because there is no legitimate purpose for the statement that failure to cooperate will be reported and because its only apparent objective is to coerce, we disapprove the making of such representations.").

In *Harrison*, the Ninth Circuit rejected the government's assertion that the statement was voluntary under the totality of the circumstances. Even though Harrison had some college education and experience with the criminal justice system, the Ninth Circuit held that even if she was "unusually resistant to psychological coercion," the officer's conduct was unconstitutional. 34 F.3d at 891-92; see also *Collazo*, 940 F.2d at 426 (Kozinski, J., concurring) (question for court "is whether the technique used here risks overcoming the will of the run-of-the mill suspect, even if it did not overcome the will of this particular suspect.").

Sanchez' conduct violated Thompkins' Fifth Amendment right to remain silent. The agent implicitly threatened Thompkins, saying that cooperation looked different to a judge than remaining stubbornly silent. Sanchez compounded his unconstitutional error later by elaborating that, "when you're sitting in front of a judge and it's time to you know pay up it can either look like you cooperated and were truthful [¶] Or you were playing a game and only giving half-truths and not being fully forthcoming with us." Sanchez then doubled-down: "I can tell you it looks like you're the latter right now. It doesn't look like you're being fully cooperative. Because understand when it comes time to be standing in front of the judge. They're going to have everything in front of them. Everything we've done."

Because Sanchez suggested that remaining silent would lead to harsher treatment, the Constitution required exclusion of Thompkins' incriminating statements as involuntary.

2. Sanchez Implied That Things Would Get Worse For Thompkins If He Waited To Speak With a Lawyer, Rendering Thompkins' Statements Involuntary

Sanchez also violated the prohibition against telling a defendant he would be penalized if he exercised his right to remain silent. See, e.g., *Collazo*, 940 F.2d at 417 (discouraging a defendant from speaking to a lawyer not compatible with system of justice that does not permit police coercion). The Ninth Circuit found that the officer "attempted to impose a penalty" on

the invocation of Fifth Amendment rights and held that the confession was involuntary. Id. at 417.

Each time Thompkins said he would be better off with a lawyer, rather than affirming Thompkins' right to stop talking and speak with a lawyer, Sanchez insinuated that getting a lawyer would make things worse. Like the officer in *Collazo*, Sanchez warned Thompkins that if he got a lawyer it would be too late to talk to the agent and could negatively impact his case. When Thompkins asked if he could wait until he got a lawyer to give information, Sanchez responded that this was Thompkins' best opportunity. When Thompkins asked what difference it made if Thompkins gave the information now or later, Sanchez responded that he might look at the information very differently later. Thompkins replied that was fine, so Sanchez became more threatening, saying that if Thompkins tried to talk to him later, it "may be too far down the line for that."

And although Thompkins did not unequivocally invoke his right to counsel like Collazo, Sanchez went even further than the officer in *Collazo*: Sanchez suggested that he would be more helpful to Thompkins than a public defender and that a public defender might misrepresent what Thompkins had to say to the agent; in other words, relying on a public defender would be worse than speaking directly to Sanchez with "[n]o one in between [them]." Sanchez' conduct "amounts to a serious infringement of [Thompkins'] Fifth

Amendment right." *Collazo*, 940 F.2d at 417. Thompkins' resulting involuntary statement should be suppressed.

3. Sanchez' Threats To Tell The Judge That Thompkins Wouldn't Cooperate And Suggestions That Getting A Lawyer Would Make Things Worse, Combined With His Relentless Pressure About Thompkins' Children, Overbore Thompkins' Will

Sanchez wove references to Thompkins losing his children throughout the interrogation. He found a vulnerable spot for Thompkins and kept pressing it. Whenever Sanchez seemed to be losing ground with Thompkins, Sanchez returned to the refrain of Thompkins' separation from his children. At some points, Sanchez combined two forms of psychological coercion; e.g., suggesting that he would inform the judge that Thompkins was uncooperative and that would negatively affect his children, or reminding Thompkins how much Thompkins cared about his children when he started talking about a lawyer. Sanchez went so far as to effectively extort cooperation, offering to try to arrange a phone call or meeting between Thompkins and his children, "[b]ut you gotta talk to me."

Sanchez, like the agent in *Tingle*, intended his statements to make Thompkins believe that failure to cooperate would separate him from his children for a long time, perhaps permanently.

Here, the government did not carry its burden of proving that Thompkins' statements were voluntary, given Sanchez' repeated barbs about

Thompkins "salvaging" his relationship with his children, being "present" for his children, "going away for longer than necessary and out of the lives" of his children, having to "answer to [his] kids through the glass when [he's] talking to them through the phone on visitation," and "never talk[ing] to [his] kids again" because he didn't cooperate, and Sanchez' explicit offers to help arrange a call or meeting with his children only in exchange for information.

The Ninth Circuit Memorandum stated that Thompkins failed to establish that his statements to the interrogating agent were involuntary. The Memorandum said that none of the agents' statements interfered with Thompkins' right to remain silent, or demonstrated that his will was overborne. (Memorandum, 2) However, the Memorandum erred because Sanchez' tactics violated Thompkins' Fifth Amendment rights. As the Ninth Circuit stated in *Harrison*, 34 F.3d at 891-92, "there are no circumstances in which law enforcement officers may suggest that a suspect's exercise of the right to remain silent may result in harsher treatment by a court or prosecutors."

Accordingly, Thompkins' motion to suppress evidence should have been granted.

B. There Was Insufficient Evidence To Support Thompkins' Conviction For An Armed Bank Robbery As Opposed To An Insider Bank Larceny

The critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318 (1979).

The government presented insufficient evidence to support a finding beyond a reasonable doubt that Thompkins conspired to commit armed robbery. As the district court found at sentencing, "the plan it appears, based on the testimony, the stipulated facts testimony, and all the other things that I have read was … Sessions was supposed to come in, meet [Lester], walk to the bank, get the money, and get out." Thus there was no plan for robbery, let alone armed robbery. As the district court found at sentencing, this was an inside job. Lester was supposed to notify Thompkins when it was safe to proceed. Lester would then use her keys to let Sessions into the vault room. The restroom was in a secluded hallway. And as the police report stated, someone entering the vault from the rear hallway could not be seen by anyone in the credit union, including the public or other bank employees working at teller windows.

Thompkins was convicted of violating 18 U.S.C. §2113(a), which requires the use of "force and violence," or intimidation. The evidence was

insufficient to show that any of those elements were planned here, when the court found that the plan was that coconspirator Lester would meet coconspirator Sessions, take him to the vault, give him the money, and let him out of the bank before anyone else knew he had been there.

The requirements of §2113(d) were not met because that section requires a conspiracy to assault or put in jeopardy the life of any person by the use of a dangerous weapon. The only evidence tying Thompkins to a gun was Lester's testimony. As a coconspirator, her testimony was suspect. In this case, her testimony was even more dubious because of her animosity toward Thompkins. Lester's testimony was insufficient to establish the requisite element. But even accepting Lester's trial testimony, given the district court's own findings at sentencing that the plan was for Sessions to get in and out without third party involvement, the purpose of the gun was not to assault or put anyone in jeopardy. Accordingly, the evidence was insufficient to support Thompkins' conviction.

Citing *United States v. Carter*, 560 F.3d 1107, 1113 (9th Cir. 2009), the Ninth Circuit Memorandum stated that Thompkins provided the gun and that it was completely foreseeable that the coconspirator would use the gun to coerce a bank employee to open the vault. The Memorandum stated that Thompkins' disputes went to credibility and the weight of the evidence, but the standard of review foreclosed these arguments. (Memorandum, 4)

However, the Memorandum erred because Thompkins' argument was based upon the district court's findings that the plan was that "Sessions was supposed to come in, meet [Lester], walk to the bank, get the money, and get out." Thus, according to the district court, the conspirators planned bank larceny. In the *Carter* case relied on in the Memorandum, the conspirators planned an armed bank robbery.

C. THE DISTRICT COURT ERRED IN CALCULATING THE ADVISORY GUIDELINE RANGE

1. Because The Firearm Enhancement Had an Extremely Disproportionate Effect on Thompkins' Sentence, the District Court Was Required to Apply the Clear and Convincing Evidence Standard

The six-level firearm enhancement had an extremely disproportionate impact on Thompkins' Sentencing Guidelines range (almost doubling the range from 63-78 months to 110-137 months), requiring that it be established by clear and convincing evidence. *United States v. Valle*, 940 F.3d 473, 479 (9th Cir. 2019).

2. The Government Did Not Meet Its Burden of Proving the Firearm Enhancement by Any Standard

The district court applied a six-level enhancement on the ground that a "firearm was otherwise used" under §2B3.1(b)(2)(B)1.

Thompkins was not present during the offense. Therefore Thompkins' culpability is limited to acts that were within the scope of the jointly undertaken criminal activity and reasonably foreseeable in connection with that criminal activity. U.S.S.G. §1B1.3(a)(1)(B).

The scope of the "jointly undertaken criminal activity" is not always coextensive with the scope of the entire conspiracy. Thus, relevant conduct is not necessarily the same for every participant. The district court must make "particularized findings" about both the scope of the defendant's agreement and reasonable foreseeability. *United States v. Campbell*, 279 F.3d 392, 400 (6th Cir. 2002); *United States v. Hunter*, 323 F.3d 1314, 1319-20 (11th Cir. 2003) (explaining that reasonable foreseeability is irrelevant to relevant conduct if the acts in question are not also within the scope of the criminal activity). Acts outside the scope of a defendant's agreement, even if they are

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1 According to the Application Notes, "otherwise used" is defined in §1B1.1 as "conduct [that] did not amount to the discharge of a firearm but was more than brandishing, displaying, or possessing a firearm or other dangerous weapon." Application Note 1(J).

If the purpose of the firearm were to make it appear on the surveillance cameras that Lester was an unwilling participant, that would not amount of "otherwise use" of a firearm under this standard.

reasonably foreseeable, do not constitute relevant conduct. See *United States v. Barona-Bravo*, 684 F. App'x 761 (11th Cir. 2017).

First, the only indication that Thompkins may have been aware that a firearm was contemplated was Lester's testimony that she had seen Thompkins with a firearm. That testimony was rendered unbelievable at sentencing by the voluminous evidence presented at sentencing of Lester's lack of credibility and motive to lie. The defense presented evidence of Lester herself posing with a silver firearm in her waistband. The defense presented voluminous evidence that by the summer of 2017 Lester had become so enraged with Thompkins that Lester assaulted Thompkins' fiancé, left threatening messages for Thompkins' fiancé, and vandalized the car of Thompkins' fiancé by throwing paint all over it. Lester was powerfully motivated to artificially enhance Thompkins' sentence.

But even accepting Lester's testimony, the district court still had to decide the scope of the jointly undertaken criminal activity. In rejecting the restraint enhancement, the district court concluded that this was an inside job; the plan was that Sessions would wait in the restroom until Lester appeared, Lester would take him to the vault, help him get the money, and he would leave without anyone knowing he had been there. The district court found that the scope of the jointly undertaken activity was that no third parties would be involved and therefore there was no reasonably foreseeable

restraint. In rejecting the restraint enhancement, the district court necessarily found that no one but Sessions and Lester would be present during the offense. For the same reason, there was no basis for the "otherwise use" of a firearm enhancement. If only Lester and Sessions were present, there would be no reason for otherwise use of a firearm. If restraint were not within the scope of the jointly undertaken criminal activity, then neither was otherwise use of a firearm. The firearm could have been used Notably, after imposing sentence the district court told Thompkins that the court did not know what Thompkins' role was in the offense. That meant that the government had not proved the enhancement.

The Ninth Circuit Memorandum upheld the enhancement on the ground that "the district court found that the gun's use was reasonably foreseeable under a clear and convincing evidentiary standard." (Memorandum, 4)

The Memorandum erred because, as discussed above, the district court found that the plan was that Sessions would come into the secluded rear hallway where he would meet Lester. Lester would take Sessions to the vault, and Sessions would get the money and get out of the bank without anyone else knowing that he had been there. For that reason the district court declined to impose the physical restraint enhancement. Since the plan was that Sessions would get in and get out of the bank without anyone but Lester knowing he had been there, there would be no reason for anyone to be

restrained. And for the same reason, there was no basis for the firearm enhancement. If the plan was for Sessions to get in and out undetected, then the plan did not contemplate that Sessions would otherwise use a firearm. Accordingly, the district court erred in imposing the enhancement.

CONCLUSION

For all the foregoing reasons, Petitioner Daronnie Thompkins submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

CUAUHTEMOC ORTEGA
Federal Public Defender

DATED: October 14, 2021

By: KATHRYN A. YOUNG
Deputy Federal Public Defender
Attorney for the Petitioner