No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DRAVION SANCHEZ WARE, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

ON PETITION FOR A WRIT OF CERTORIARI TO

THE ELEVENTH CIRCUIT COURT OF APPEALS

/s/ Leigh Ann Webster
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QUESTION PRESENTED

I. As held by other Circuits, the physical restraint enhancement in U.S.S.G. § 2B3.1(b)(4)(B) requires more than pointing a gun at someone, and the Eleventh Circuit's decision to the contrary should be reversed, as it is clearly out of line with the other Circuits.

I. A law enforcement officer should not be permitted to identify a defendant from surveillance videos where he is only familiar with the defendant based on his post-arrest interview, at which time the officer has already plainly determined that the defendant is the perpetrator.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Dravion Sanchez Ware respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The opinion of the Eleventh Circuit affirming the decision of the district court is reproduced in the Appendix at Appendix A. The Eleventh Circuit's final opinion was published. *United States v. Ware*, 69 F.4th 830 (11th Cir. 2023).

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on June 1, 2023. Mr. Ware filed a Petition for Panel Rehearing and for En Banc Consideration on June 22, 2023. The Petition was denied on July 28, 2023; that order is included as Appendix B. This Petition is being filed within 90 days of that Order, pursuant to Supreme Court Rule 13.1. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

U.S.S.G. § 2B3.1(b)(4)(B) – "[I]f any person was physically restrained to facilitate commission of the offense or to facilitate escape, increase by 2 levels."

STATEMENT OF THE CASE

I. Procedural History

In a third superseding indictment, Mr. Ware and Tabyron Rashad Smith were charged with: (1) conspiracy to commit Hobbs Act Robbery, in violation of 18 U.S.C. § 1951(a) (Count 1); (2) Hobbs Act Robbery, in violation of 18 U.S.C. § 1951(a) (Counts 2, 4, 6, 8, 10); and (3) brandishing or discharging of a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c) (Counts 3 (brandishing), 5 (discharging), 7 (discharging), 9 (brandishing), 11 (brandishing)). (Doc. 173 at 1-10). Mr. Ware was also charged with possession of ammunition by a convicted felon, in violation of 18 U.S.C. § 922(g)(1) (Counts 12, 14). (*Id.* at 10-11). After trial, Mr. Ware was convicted on Counts 1-11. (Doc. 209). The remaining counts were dismissed pursuant to Standing Order 07-04. (Doc. 279). Mr. Ware was sentenced to life in custody. (Doc. 279 at 3).

Relevant here, Mr. Ware argued on appeal that (1) the district court abused its discretion by admitting identification testimony from law enforcement officers, when that identification was based only on those officers' post-arrest interviews with Mr. Ware; and (2) the district court clearly erred by imposing the two-level restraint enhancement in U.S.S.G.

§ 2B3.1(b)(4)(B). The Eleventh Circuit affirmed Mr. Ware's convictions and sentences. (App. A).

II. Statement of the Facts

a. Pre-Trial Proceedings

This case stems from a string of robberies of businesses in the metro-Atlanta area: Spring Spa, Cedar Massage, Qi Clay Sauna, Lush Nails and Spa, Kochi Maru, Royal Massage, Empress Massage II, BD Spa and Wellness Massage, and New You Massage. (Doc. 173). The substantive counts were for the robberies of Cedar Massage (Counts 2-3), Qi Clay Sauna (Counts 4-5), Kochi Maru (Counts 6-7), Empress Massage II (Counts 8-9), and New You Massage (Counts 10-11). (*Id.* at 5-10).

Prior to trial, Mr. Ware filed a supplemental motion in limine, arguing that the law enforcement officers who investigated the case should not be allowed to testify that Mr. Ware was the person in the surveillance videos, under Federal Rule of Evidence 701(a). (Doc. 183). The parties addressed that motion at a pre-trial conference, and the district court concluded that the jury should be able to hear the law enforcement officers' testimony that Mr. Ware was the person in the videos, even though they only became

familiar with Mr. Ware's appearance after he had been arrested. (Doc. 293 at 17).

b. Trial

At trial, the government presented the victims associated with the robberies, who described the robberies and what happened to them during the robberies. (Doc. 294 at 13-28, 30-39, 66-71, 71-83, 84-86; Doc. 295 at 119-24, 133-34, 135-37, 167-76; 176, 180-92, 214-22, 223-29; Doc. 296 at 345-56).[1] None of the victims were ever asked to identify Mr. Ware. (*Id.*). The government admitted surveillance video of some of the robberies. At the Kochi Maru robbery, the robbers shot three women. (Doc. 295 at 120, 123, 131).

The detective for the Kochi Maru robbery pulled screenshots from the surveillance videos to produce a BOLO ("Be on the lookout") alert. (Doc. 295 at 145). The detective also gathered the menu handled by the robber and projectiles from the bullets. (*Id.* at 146). The detective also collected surveillance video from another restaurant that appeared to capture the car that was being driven by the robbers. (*Id.* at 149-52). However, none of the

[1] Page numbers for the trial transcripts refer to the numbers in black print on the top-right corner of each page, not the blue CM/ECF numbering.

victims from that robbery were able to identify the car or the perpetrators. (*Id.* at 161-62).

From Qi Clay Sauna, the crime scene investigator collected blood and a gun magazine, but did not ultimately collect any fingerprints. (Doc. 294 at 44-45). At Cedar Massage, one of the robbers, who was wearing a gray hoodie, opened a piece of candy with his mouth and then left the wrapper in the dish. (*Id.* at 90). Law enforcement gathered the wrapper from the candy dish, which was sent off for DNA testing. (*Id.* at 91-92). Two cell phones that were stolen at the Cedar Massage robbery were recovered at locations unrelated to Mr. Ware. (*Id.* at 94).

In most of the robberies with surveillance videos, there were two robbers, one of whom was left handed, but in at least one, there were three robbers. (Doc. 294 at 22-23; Doc. 295 at 145, 188-89, 219). A witness at the New You robbery saw the three robbers flee in a red car, as did a witness at the Spring Spa robbery. (DOC. 295 at 194, 218). One victim's cell phone was stolen during the robbery, and she helped locate it using Find My Iphone. (*Id.* at 186, 191-92, 196-97). A fingerprint was located on the cell phone. (Doc. 295 at 204-07).

During the testimony of Special Agent Matthew Winn, Mr. Ware renewed his objection to the law enforcement identification of Mr. Ware as the robber based on his interactions with him after Mr. Ware's arrest and during his post-arrest interview. (Doc. 295 at 282). The court overruled the objection, and the government was allowed to ask Winn if he had spent time with Mr. Ware after his arrest and if he had "a basis to recognize him." (*Id.*). Winn identified Mr. Ware from the pictures in the phone that the government seized from him at the time of his arrest. (*Id.* at 284-85). The government also elicited identification testimony via Special Agent Paul Costa, which was objected to at trial. (Doc. 296 at 438-43). The government repeatedly asked Costa if he recognized Mr. Ware from the surveillance videos of the robberies, and Costa testified that the robber was Mr. Ware. (*Id.*).

Mr. Ware was convicted on all counts at trial. (Doc. 298 at 669).

c. Sentencing

Relevant here, the probation officer—after objection from the government—imposed the two-level physical restraint enhancement, pursuant to U.S.S.G. § 2B3.1(b)(4)(B), because Mr. Ware "held victims at gunpoint while demanding money." (PSR ¶¶ 102a,110a, 118a, 126a, 134a,

142a, 150a, 158a, and 166a). Mr. Ware objected to the enhancement, arguing that the enhancement should not be based on merely pointing a gun, but the court applied that enhancement over objection. (Doc. 299 at 4-5). Mr. Ware's final guideline range was calculated as follows:

Group	Base	Firearm (b)(2)	Bodily injury (b)(3)	Physical restraint (b)(4)(b)	Total	Units
A Spring Spa	20	+5	0	0	25	0
B Cedar Massage	20	0	0	+2	22	0
C Qi Clay	20	0	+2	+2	24	0
D Lush	20	+6	+2	+2	30	.5
E Kochi Maru	33 Pursuant to §2A2.	n/a	+4 Pursuant to §2A2.1.	n/a	37	1
F Royal Massage	20	+6	+2	+2	30	.5
G Empress	20	0	0	+2	22	0
H BD Spa	20	+6	+2	+2	30	.5
I New You	20	0	+2	+2	24	0

With a criminal history category of IV, Mr. Ware's guideline range was 360 months to life, with an additional 41 years for the § 924(c) counts, for a total range of 727 to 785 months. (*Id*).

The government requested a sentence of 71 years, plus 41 consecutive years for the § 924(c) counts. (Doc. 299 at 11-16). Mr. Ware argued that the 18 U.S.C. § 3553(a) factors supported a sentence of 41 years. (*Id.* at 17-24). He described the "nightmare and normalization of that nightmare" that was Mr. Ware's childhood, and noted that 41 years was sufficient for general and specific deterrence. (*Id.* at 18-19). He also argued that the government's requested sentence would create an unwarranted disparity between his sentence and the 27-year sentence his codefendant received. (*Id.* at 23). Finally, Mr. Ware noted that he was only 26 years old and thus had the capacity for change. (*Id.* at 23-24).

The court imposed a sentence of life in prison. (*Id.* at 27-29). Mr. Ware objected on procedural and substantive reasonableness grounds. (*Id.* at 32).

REASONS FOR GRANTING THE WRIT

This Court should grant the writ of certiorari pursuant to Supreme Court Rule 10(c) because the Eleventh Circuit has decided Petitioner's case, which involves important federal questions. First, as to the sentencing enhancement based on the physical restraint of victims, the Eleventh Circuit conceded that it was bound to apply the enhancement, but that in most other Circuits, the enhancement would not have applied. Yet, because of the prior panel precedent rule, the Court was bound to apply the enhancement. Because the Eleventh Circuit's law conflicts with that of the other Circuits and because the Eleventh Circuit's decision is not true to the text of the Sentencing Guidelines, this Court's guidance is necessary.

Second, the Eleventh Circuit held that a law enforcement officer can identify Mr. Ware as the perpetrator in surveillance videos, based exclusively on the officer's post-arrest interview—at which point the officer obviously believed Mr. Ware was the perpetrator due to the prior investigation. This is improper testimony, and the Eleventh Circuit's decision conflicts with the decisions of other Circuits, which plainly require additional familiarity with the defendant before being able to identify him based on photographs or videos. This Court's guidance is necessary to

protect the rights of criminal defendants and to ensure that Courts are reliably enforcing the Federal Rules of Evidence.

ARGUMENT AND AUTHORITY

I. As held by other Circuits, the physical restraint enhancement in U.S.S.G. § 2B3.1(b)(4)(B) requires more than pointing a gun at someone, and the Eleventh Circuit's decision to the contrary should be reversed, as it is clearly out of line with the other Circuits.

The Eleventh Circuit agreed that there was a clear Circuit split between its cases and other Circuits' application of the physical restraint enhancement.

> Ware relies heavily on a Third Circuit test under which it is quite probable that the sentencing enhancement would not apply to these three robberies. *See United States v. Bell*, 947 F.3d 49 (3d Cir. 2020). *Bell*, which further relies on cases from other circuits, directly conflicts with established Eleventh Circuit precedent. It goes without saying that Third Circuit precedent cannot supersede contrary Eleventh Circuit precedent in appeals to this Court.

(App. A at 49). This Court should grant this Petition to bring uniformity to the Circuit Courts.

Under U.S.S.G. § 2B3.1(b)(4)(B), a two-level enhancement is appropriate "if any person was physically restrained to facilitate commission of the offense or to facilitate escape." The Commentary notes that the guideline provides for an enhancement where the victim "was physically restrained by being tied, bound, or locked up." U.S.S.G. § 2B3.1, comment. (Background). The Commentary to U.S.S.G. § 1B1.1 notes that

physically restrained means "the forcible restraint of the victim such as by being tied, bound, or locked up." U.S.S.G. § 1B1.1, comment. n.(1)(L).

The Eleventh Circuit has held that the enhancement applies "when the defendant's conduct ensured the victims' compliance and effectively prevented them from leaving a location" and "where a defendant creates circumstances allowing his victims no alternative but compliance." (Manuscript Op. at 46-48) (cleaned up) (citing *United States v. Victor*, 719 F.3d 1288, 1290 (11th Cir. 2013); *United States v. Jones*, 32 F.3d 1512, 1519 (11th Cir. 1994); *United States v. Whatley*, 719 F.3d 1206, 1223 (11th Cir. 2013)). Effectively, these decisions hold that a defendant who points a gun at someone and tells them not to move should get the enhancement. The Court applied this precedent in this case to sustain the enhancement.

The law from other Circuits clearly reveals a split. In *United States v. Bell*, 947 F.3d 49 (3d Cir. 2020), the Third Circuit reviewed its sister Circuits' decisions regarding this enhancement and then ascertained five factors for district courts to consider in determining whether the enhancement should apply: (1) use of physical force; (2) exerting control over the victim; (3) providing the victim with no alternative but compliance; (4) focusing on the victim for some period of time; and (5) placement in a confined space. *Id.* at

56. In so holding, the Third Circuit conducted an exhaustive survey of the law of its sister Circuits and determined that these were the relevant factors. *Id.* at 56-61. The Court specifically held that the restraint must be "more than pointing a gun at someone and ordering" the person not to move, and cited a Ninth Circuit decision to conclude that the enhancement required "more than briefly pointing a gun at a victim and commanding her once to get down to constitute physical restraint, given that nearly all armed bank robberies will presumably involve such acts." *Id.* at 56-59 (citing *United States v. Parker*, 241 F.3d 1114, 1118-19 (9th Cir. 2001).

In addition to the cases cited by *Bell*, a review of subsequent decisions from other Circuits compels the conclusion that the Eleventh Circuit is out of step with its sister Circuits. *See, e.g.*, *United States v. Taylor*, 961 F.3d 68 (2d Cir. 2020) (directing employees into inventory room or back room in order to steal merchandise is insufficient to sustain the enhancement; pointing gun at individuals and instructing them not to move or to get down is not enough); *United States v. Gahagen*, 44 F.4th 99, 111 (2d Cir. 2022) (restraining victims with zip ties sufficient); *United States v. Ziesel*, 38 F.4th 512 (6th Cir. 2022) (telling bank employees to get on the ground was insufficient to sustain the enhancement).

Even where other Circuits have held that pointing a gun at a victim can be sufficient, there are also other factors to counsel in favor of applying the enhancement. *See United States v. States v. Miera*, 539 F.3d 1232 (10th Cir. 2008) (defendant blocked victims' only exit (bank door) while pointing gun around and telling everyone not to move); *United States v. Wallace*, 461 F.3d 15 (1st Cir. 2006) (pointing gun at victims, but also blocking path to exit when victim tried to move). And while the Fourth Circuit has held that pointing a gun at someone and ordering them to get down behind a bank counter can be sufficient, it also has cases indicating that the defendant must restrain the victims for some period of time. *See United States v. Dimache*, 665 F.3d 603 (4th Cir. 2011) (bank robbery); *United States v. Mikalajunas*, 936 F.2d 153, 156 (4th Cir. 1991) (time duration requirement).

Because the Eleventh Circuit's line of cases is plainly out of step with the decisions of its sister Circuits, this Court's intervention is necessary to resolve the Circuit split and bring uniformity to the country's laws. Given that the Eleventh Circuit has already recognized that the enhancement would not apply if the laws of the other Circuits applied, it is critical for this Court to act, especially where Mr. Ware was sentenced to life in prison—a sentence he is unlikely to have received if this enhancement had not applied.

II. A law enforcement officer should not be permitted to identify a defendant from surveillance videos where he is only familiar with the defendant based on his post-arrest interview, at which time the officer has already plainly determined that the defendant is the perpetrator.

Mr. Ware argued that the district court should not have permitted the agents who arrested and interviewed Mr. Ware to identify Mr. Ware from surveillance videos of the robberies, based solely on their experience with him during his custodial interview. Mr. Ware argued that doing so was contrary to Federal Rule of Evidence 701(a)—and the Eleventh Circuit's decisions in *United States v. Pierce*, 136 F.3d 770, 774 (11th Cir. 1998) and *United States v. Knowles*, 889 F.3d 1251, 1256 (11th Cir. 2018)—and was improper summary testimony, relying on the Eleventh Circuit's decision in *United States v. Hawkins*, 934 F.3d 1251, 1265-67 (11th Cir. 2019).

The Eleventh Circuit held that the identification was admissible because the agents had spent sufficient time with Mr. Ware during the post-arrest interview. The Court did not address Mr. Ware's arguments that it was improper summary testimony, and the Court did not discuss in any way the problems that Mr. Ware identified from allowing case agents to identify the defendant, such as the bias inherent in those identifications or how the agent will encroach on the province of the jury by telling them what

conclusion to draw. This Court should grant this petition for a writ of certiorari because this decision creates a Circuit split, and violates Mr. Ware's due process rights.

Other Circuits have indicated that post-arrest familiarity with a defendant cannot be used to identify the defendant in surveillance videos. *United States v. Fulton*, 837 F.3d 281, 299 (3d Cir. 2016) ("Neither testified to any familiarity with Barnes or Fulton *apart from this case*." (emphasis added)). In *United States v. Contreras*, 536 F.3d 1167 (10th Cir. 2008), the Tenth Circuit held that a probation officer's identification was admissible where she knew the defendant from his prior probation. The identification was admissible because her repeated visits with the defendant allowed her "the opportunity to develop a more sophisticated mental picture of Contreras's appearance outside the sterile, one-dimensional atmosphere of the courtroom." *Contreras*, 536 F.3d at 1171.

In *United States v. Beck*, 418 F.3d 1008, 1015 (9th Cir. 2005), the Ninth Circuit emphasized various factors to determine if the person had the requisite personal knowledge, including the witness' familiarity with the defendant's appearance at the time the crime was committed, the familiarity with the defendant's customary manner of dress, whether the defendant

disguised his appearance or altered his appearance prior to trial, and "whether the witness knew the defendant *over time and in a variety of circumstances*, such that the witness's lay identification testimony offered to the jury a perspective it could not acquire in its limited exposure to the defendant." (quotation omitted, emphasis added).

Here, the law enforcement officers who testified only gained familiarity with Mr. Ware through their one-time interview of him, which was equally a "sterile, one-dimensional atmosphere." Neither Winn nor Costa saw Mr. Ware "over time and in a variety of circumstances." They did not have intimate familiarity with Mr. Ware based on an ongoing relationship with him. The Eleventh Circuit's decision therefore created a departure from the decisions of other Circuits.

The Eleventh Circuit relied on the natural consequences of aging to help justify the need for the agent's testimony—the fact that, at trial, Mr. Ware was two years older than he was at the time of the interview and the robberies. Specifically, the Court wrote that, "whether intentionally or not, Ware altered his appearance prior to trial. He had grown his hair out,[2]

[2] Mr. Ware's hair was not long or lengthy; it was maybe a few inches longer than his hair at the time of his arrest.

gained a little weight, and presumably looked two years older."[3] (Manuscript Op. at 39-40). Given the normal processes, it is not unusual—by any means—for a defendant to go to trial two or more years after his arrest. Disregarding the defendant's intent and permitting these sorts of identifications deprives the defendant of a fair trial.

Even setting aside these issues, the fact that the case agent—through whom extensive evidence was admitted at trial—was allowed to testify that Mr. Ware was the perpetrator is cause for reversal. Specifically, as the Eleventh Circuit held in *Hawkins*, "a case agent testifying as a lay witness may not explain to a jury what inferences to draw from recorded conversations involving ordinary language. **At that point, his testimony is no longer evidence but becomes argument**." *Id.* (quotation omitted and emphasis added). The government's witnesses cannot "draw[] inferences from the evidence that the jury must draw (or not draw) for itself." *Id.* at 1266. The Court emphasized that opinion testimony—whether lay or expert opinion—"is not properly received merely to tell the jury what result to reach." *Id.* at 1266 (quotations and alterations omitted). The Court noted

[3] The exact quote from the agent was that Mr. Ware ""looks like he has just gotten a little bit older and maybe put on a little bit of weight."(Doc. 296 at 440).

that interpreting clear statements was barred by the helpfulness requirement of Rule 701, for lay witnesses, and 702, in the expert context. *Id.*; *see also United States v. Haines,* 803 F.3d 713, 734 (5th Cir. 2015) (finding testimony was admitted in error where agent "offer[ed] his own interpretation of language that was well within the province of the jury to interpret" and "ventured into speculation, usurping the jury's function, which is to draw its own inferences from the evidence presented"); *United States v. Garcia*, 413 F.3d 201, 210 (2d Cir. 2005) (testimony that the defendant was a partner in the drug conspiracy was inadmissible under Rule 701, in part because the agent "was essentially telling the jury that he had concluded that Garcia was guilty of the crimes charged").

In *Hawkins*, the Court explained that it was forced to correct the error and to vacate the defendants' convictions:

> Were we to leave this plain error uncorrected, we would be suggesting to prosecutors in this circuit that overzealous presentation of improper testimony will be tolerated and to district courts that they need not be vigilant in ensuring the integrity of trials involving this type of testimony. **If such testimony were allowed, there would be no need for the jury to review personally any evidence at all. The jurors could be 'helped' by a summary witness for the Government, who could not only tell them what was in the evidence but tell them what inferences to draw from it. Fundamental notions of fairness and justice forbid us from countenancing such a procedure.**

Hawkins, 934 F.3d at 1268-69 (quotations omitted and emphasis added).

Yet, when confronted with similar problems in this context, the Court failed to engage with this argument in any way, although the evidence here was more damaging than the testimony at issue in *Hawkins* and related cases. There, the agents testified to the purported meaning of what appeared to be obvious statements. In this case, the agents identified Mr. Ware from the videos of the robberies in question—meaning that they were allowed to tell the jury expressly that Mr. Ware was the person committing the crimes on the videos of the robbery. This plainly tells the jury not just what the evidence is, but what inferences to draw and, in effect, which verdict to return. This violated the helpfulness requirement of Rule 701.

The concerns with this testimony are obvious: law enforcement officers are able to identify and arrest a defendant and then turn around and tell the jury that the defendant is the person on the videos, limiting the defendant's ability to explore the bias that could have led to an improper initial identification. This Court should grant this Petition to clarify the helpfulness requirement of Rule 710 and the circumstances in which the government can present identification testimony based on only on a single post-arrest interview.

In light of the arguments advanced in this Petition, Mr. Ware respectfully requests this Court grant his petition and vacate his convictions and sentence.

Dated: This 26th day of October, 2023.

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

This document contains 4,033 words, in compliance with all rules of this Court.

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing petition upon opposing counsel by United States Mail to:

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Dated: This 26th day of October, 2023.

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