No. 23-5946

IN THE SUPREME COURT OF THE UNITED STATES

DRAVION SANCHEZ WARE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court permissibly applied the sentencing enhancement for physical restraint, Sentencing Guidelines § 2B3.1(b)(4)(B) (2018), where petitioner and his accomplices used physical force and pointed guns at victims to restrain their movement.

2. Whether the district court abused its discretion under Federal Rule of Evidence 701 in allowing two federal agents, who were familiar with petitioner's appearance at the time of the offense as a result of post-arrest interactions, to give lay testimony identifying him in various photos and videos.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Ga.):

United States v. Ware, No. 17-CR-447 (Feb. 10, 2021)

United States Court of Appeals (11th Cir.):

United States v. Ware, No. 21-10539 (June 1, 2023)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A50) is reported at 69 F.4th 830.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 2023. A petition for rehearing was denied on July 28, 2023 (Pet. App. B1-B2). The petition for a writ of certiorari was filed on October 26, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted on one count of conspiring to commit Hobbs Act robbery, in violation of 18 U.S.C. 1951(a); five counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) and 2; three counts of brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii) and 2; and two counts of discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(iii) and 2. Judgment 1. Petitioner was sentenced to life in prison. Judgment 3. The court of appeals affirmed. Pet. App. A1-A50.

1. Petitioner participated in a spate of nine violent robberies targeting businesses in the greater Atlanta, Georgia area from October 7, 2017 to November 10, 2017. Pet. App. A2.

On October 7, 2017, at around 1:15 a.m., petitioner and two other men robbed the Spring Spa in Atlanta. Pet. App. A3. One of the robbers carried a pistol, and they stole an employee's cellphone. Ibid.

On October 10, shortly after 10:00 p.m., petitioner and Tabyron Smith (later petitioner's codefendant) robbed Cedar Massage in Atlanta. Pet. App. A3. Smith drew his gun and shoved it into two of the employees' faces, forced them into a corner behind the welcome counter while he opened the cash drawer, and then led them to the back of the establishment at gunpoint. Ibid.

Petitioner and Smith stole wallets, cellphones, and $100 in cash. Id. at A3-A4.

On October 13, around 11:15 p.m., petitioner and Smith robbed Qi Clay Sauna in Doraville, Georgia. Pet. App. A4. After both men drew their guns, petitioner stuck his gun in the manager's face and threatened to kill him. Ibid. When the manager put his hands up and stated that he did not have any money, petitioner "began pistol whipping him in the head multiple times." Ibid. Petitioner then continued to point his gun at the manager's head while the latter cowered on the ground in a corner behind the welcome counter. Ibid. Petitioner took $100 from the cash drawer, and Smith stole the owner's purse, which contained close to $1000 along with the owner's personal belongings. Id. at A4-A5.

On October 20, in the evening, petitioner and another man robbed Lush Nails & Spa in Buckhead, Georgia. They entered the spa with their guns drawn, and one of them put his gun to the side of a customer's head and directed: "Nobody moves." Pet. App. A5. They next struck an employee in the head, robbed the staff, and kicked a woman in the face. Ibid. One of the robbers hit the customer in the back of the head with his gun, causing her to fall and strike her face on the tile floor. Ibid. While she was on the floor, one of the robbers thought that she was trying to make a call, so he kicked her, "put the gun to [her] head," and threatened to kill her. D. Ct. Doc. 295, at 111 (May 14, 2021); see Pet. App. A5-A6, A48-A49. In response, she "just laid still"

until someone told her they were gone. D. Ct. Doc. 295, at 111. The robbers stole items from customers and cash from the drawer. Pet. App. A6.

On October 24, around 11:30 p.m., petitioner and Smith robbed the Kochi Maru restaurant in Doraville, Georgia. Pet. App. A6. Petitioner jammed his gun in the owner's face, threatened a table of female customers, and shot two of the women in the leg. Id. at A6-A7. Meanwhile, Smith grabbed the owner and forced her behind the counter at gunpoint, so that he could access the cash drawer. Id. at A7. He continued pointing the gun at the owner while she crouched in the corner covering her face. Ibid. When leaving the restaurant, petitioner went out of his way to where the owner remained on the floor and shot her in the back at close range. Ibid.

On November 3, around 6:00 p.m., petitioner and Smith robbed Royal Massage in Norcross, Georgia. Pet. App. A7. After entering the business, they pulled out their guns and demanded money. Ibid. Smith grabbed an employee around the neck, pointed his gun at her head, and brought her first around the front counter and then to the back of the store. Id. at A8, A49. When he momentarily released her, she escaped out the back door. Id. at A8. Meanwhile, petitioner forced the owner to the ground at gunpoint and then to the back of the store. Id. at A8, A49. The robbers stole around $2000 in cash and various personal items. Id. at A8.

On November 8, around 8:00 p.m., petitioner and Smith robbed Empress Massage II in Duluth, Georgia. Pet. App. A8. When they pulled out their weapons, the employees scattered. Ibid. Petitioner pursued one of the employees around a divider, then pointed his gun at others down a hallway leading to the back of the store. Id. at A8-A9. Meanwhile, Smith shoved his gun in a customer's face, took her bag, and rummaged behind the front counter. Id. at A9. They left with around $600 from the store. Ibid.

Later that same night, at 8:40 p.m., petitioner and Smith robbed BD Spa in Stone Mountain, Georgia. Pet. App. A9. When an employee greeted them, petitioner drew his gun, forced the employee toward the back of the spa by pushing her and pointing his gun at her, and then shoved her to the ground. Id. at A9, A49; D. Ct. Ex. 128, Clip 1. He then entered a room with a customer, enabling the employee to escape out the back door. Pet. App. A9. The robbers fled soon after. Ibid.

On November 10, around 8:50 p.m., petitioner, Smith, and another accomplice robbed New You Massage in Roswell, Georgia. Pet. App. A9. The robbers pulled out guns, and one of them pressed his gun into the owner's head and demanded money. Id. at A10. Smith rummaged behind the counter while pointing his gun at the manager and then forced the manager out from behind the counter and along the ground at gunpoint. Ibid. At the same time, petitioner and the third robber went to the back of the store,

forced one of the employees to the ground at gunpoint, and struck a woman in the head with the butt of a gun. Ibid. They stole $1100 and various personal belongings. Ibid.

FBI agents arrested petitioner on November 22, 12 days after the last robbery. Pet. App. A10.

2. A grand jury in the Northern District of Georgia returned an indictment charging petitioner with one count of conspiring to commit Hobbs Act robbery (based on all nine robberies), in violation of 18 U.S.C. 1951(a); five counts of Hobbs Act robbery (for the robberies of Cedar Massage, Qi Clay Sauna, Kochi Maru, Empress Massage II, and New You Massage), in violation of 18 U.S.C. 1951(a) and 2; three counts of brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii) and 2; and two counts of discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(iii) and 2. Third Superseding Indictment 1-10.[1]

a. Petitioner proceeded to trial, and the jury found him guilty on all counts. Pet. App. A23.

The government presented extensive evidence connecting petitioner to the robberies, including fingerprint evidence; eyewitness testimony from nearly every robbery; modus operandi evidence; surveillance footage; evidence about the getaway car;

[1] Petitioner was also charged, but ultimately not tried, on two counts of possessing ammunition as a felon. Indictment 10-11; see Gov't C.A. Br. 3 & n.1.

incriminating cellphone history and location data; and DNA evidence. See Pet. App. A18-A22, A24-A25.

The government also presented lay identification testimony from the two lead FBI agents, who spent one and four hours, respectively, with petitioner shortly after his arrest, which occurred approximately two years before trial. Pet. App. A13-A15. Petitioner moved to exclude the agents' testimony under Federal Rule of Evidence 701, which authorizes opinion testimony from a lay witness if it is "rationally based on the witness's perception" and "helpful to clearly understanding the witness's testimony or to determining a fact in issue." Fed. R. Evid. 701(a) and (b); see Pet. App. A13, A17; D. Ct. Doc. 183 (Sept. 22, 2019). The district court overruled the objection, allowing the agents to identify petitioner in certain photographs and videos found on petitioner's phone and in surveillance videos from the robberies. See Pet. App. A13-A20.

b. The district court sentenced petitioner to life imprisonment. Judgment 3.

The district court calculated a total guidelines range of 852 months to life imprisonment. See Gov't C.A. Br. 27. Over petitioner's objection, the court included in its calculation a two-level enhancement for physical restraint under Sentencing Guidelines § 2B3.1(b)(4)(B) (2018)[2] -- which provides for such an

[2] All references in this brief to the U.S. Sentencing Guidelines as applied to petitioner are to the 2018 Manual. See Presentence Investigation Report ¶ 99.

enhancement "if any person was physically restrained to facilitate commission of the offense or to facilitate escape" -- for each of the robberies except for the Spring Spa robbery. Sent. Tr. 3-7. The court sentenced petitioner to 240 months each on the Hobbs Act counts to run concurrently with each other, and life custody on the firearms counts to run concurrently with each other and consecutively to the Hobbs Act counts. Judgment 3.

3. The court of appeals affirmed. Pet. App. A1-A50.

a. The court of appeals found that the district court did not abuse its discretion in admitting the FBI agents' lay testimony identifying petitioner. Pet. App. A34-A40. The court explained that "lay opinion identification testimony may be helpful to the jury where . . . 'there is some basis for concluding that the witness is more likely to correctly identify the defendant from a photograph or video than is the jury.'" Id. at A34 (quoting United States v. Pierce, 136 F.3d 770, 774 (11th Cir.), cert. denied, 525 U.S. 974 (1998)) (brackets omitted). And the court further explained that to determine whether such testimony is appropriate in a particular case, courts should look to "factors such as the witness's familiarity with the defendant's appearance at the time the surveillance photographs were taken" and "whether the defendant had either disguised his appearance at the time of the offense or altered his appearance prior to trial." Id. at A35 (citation omitted).

Applying that framework to the facts of this case, the court of appeals observed that "[b]oth agents had first-hand knowledge of [petitioner's] appearance outside the courtroom setting," and that the time the agents spent with petitioner gave them "greater familiarity than other circuit courts have required to produce admissible lay identification testimony." Pet. App. A38-A39. The court also observed that the agents "familiarized themselves with [petitioner] less than two weeks after the last robbery," whereas the jury was viewing him almost two years later. Id. at A39. And it noted that petitioner's appearance had changed in the intervening period: "[h]e had grown his hair out, gained a little weight, and presumably looked two years older." Id. at A39-A40. The court accordingly found that the agents "added a level of familiarity contemporaneous to the charged offenses that the jury could not hope to attain." Id. at A40.

b. The court of appeals also affirmed application of the physical-restraint sentencing enhancement under Sentencing Guidelines § 2B3.1(b)(4)(B). Pet. App. A46-A50. The court noted that, while the Guidelines commentary refers to cases in which a victim is "'physically restrained by being tied, bound, or locked up,'" the enhancement "is not limited to those specific examples," and applies whenever the defendant's conduct "ensured the victims' compliance and effectively prevented them from leaving a location." Id. at A46 (citations and some internal quotation marks omitted).

Petitioner challenged the enhancement's application to three robberies: Lush Nails & Spa, Royal Massage, and BD Spa. Pet. App. A47 n.18. In petitioner's view, applying the enhancement to those robberies meant that it would effectively apply "to every instance of robbery with a firearm." Id. at A48. The court of appeals rejected that view because petitioner and his accomplices had, in fact, actively restrained their victims in each instance. Ibid.

The court of appeals observed that when robbing Lush Nails & Spa, the robbers brandished their weapons and instructed everyone not to move, and that petitioner "pointed a gun in a customer's face while she was on the floor and threatened to kill her." Pet. App. A48-A49. The court explained that this "constituted restraint as the threat of death and the instruction to not move ensured the victims' compliance." Id. at A49. Similarly, the court observed that when robbing Royal Massage, Smith "grabbed an employee with his arm around her neck and pointed his gun at her head, moving her behind the front counter," and petitioner "forced a victim to the ground at gunpoint." Ibid. The court explained that Smith thus "literally restrained an employee by the neck" and both robbers "ensured compliance and movement at the point of a gun." Ibid. And the court observed that when robbing BD Spa, petitioner "forced an employee down the hall of the establishment at gunpoint." Ibid. The court explained that this was "certainly restraint as well," noting that "[j]ust as [petitioner] tying the

victim up and carrying her down the hallway would have constituted restraint, so does him forcing her down the hallway with the point of his gun." Ibid.

The court of appeals deemed it "quite probable," Pet. App. A49, that the enhancement would not apply under the Third Circuit's decision in United States v. Bell, 947 F.3d 49 (2020), upon which petitioner relied. But the court concluded that Bell "cannot supersede contrary Eleventh Circuit precedent." Pet. App. A49.

ARGUMENT

Petitioner renews his contention (Pet. 12-15) that the physical-restraint enhancement in Sentencing Guidelines § 2B3.1(b)(4)(B) does not apply to his conduct. Because that issue turns on the proper interpretation of the Guidelines, it does not warrant this Court's review. In any event, the court of appeals correctly applied the enhancement to the facts of this case, and any disagreement in the circuits is narrow. Petitioner also renews his contention (Pet. 16-21) that the district court abused its discretion in allowing two FBI agents to provide lay identification testimony. The court's decision was correct and any error would have been harmless. No further review is warranted.

1. The guidelines issue does not warrant this Court's review. The Court has recently and repeatedly denied certiorari on a similar issue concerning the scope of the four-level enhancement for "abduct[ing]" a robbery victim under the adjacent subparagraph, Sentencing Guidelines § 2B3.1(b)(4)(A). See Walker

v. United States, 143 S. Ct. 450 (2022) (No. 22-5404); Carter v. United States, 143 S. Ct. 371 (2022) (No. 21-8247); Buck v. United States, 138 S. Ct. 149 (2017) (No. 16-9520); Whatley v. United States, 571 U.S. 965 (2013) (No. 13-6170); Osborne v. United States, 553 U.S. 1075 (2008) (No. 07-10594); Hawkins v. United States, 519 U.S. 974 (1996) (No. 96-6179). The same outcome is appropriate here.

a. This Court ordinarily does not review decisions interpreting the U.S. Sentencing Guidelines, because the U.S. Sentencing Commission (Commission) can amend the Guidelines to eliminate any conflict or correct any error. See Braxton v. United States, 500 U.S. 344, 347-349 (1991). Congress has charged the Commission with "periodically review[ing] the work of the courts" and making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." Id. at 348; see United States v. Booker, 543 U.S. 220, 263 (2005) (similar). By conferring that authority on the Commission, Congress indicated that it expects the Commission, not this Court, "to play [the] primary role in resolving conflicts" over the interpretation of the Guidelines. Buford v. United States, 532 U.S. 59, 66 (2001). Review by this Court of guidelines decisions is particularly unwarranted in light of United States v. Booker, which rendered the Guidelines advisory only. 543 U.S. at 245.

No sound reason exists to depart from that practice here. The Commission currently has a quorum, see U.S. Sent. Comm'n,

ORGANIZATION, https://www.ussc.gov/about/who-we-are/organization, and has announced "[r]esolution of circuit conflicts" as one of its priorities, U.S. Sent. Comm'n, Final Priorities for Amendment Cycle, 88 Fed. Reg. 60,536, 60,537 (Sept. 1, 2023). Moreover, the Office of the General Counsel of the Commission recently issued a report on robbery offenses that notes somewhat differing practices in the courts of appeals in applying the physical-restraint enhancement, suggesting that the Commission is aware of the question presented here. See Office of the General Counsel, U.S. Sent. Comm'n, Primer on Robbery Offenses 29-30 (Aug. 2023), https://www.ussc.gov/sites/default/files/pdf/training/primers/2023_Primer_Robbery.pdf. Indeed, the report indicates awareness of the decision below in this very case. See id. at 29 n.194.

Deference to the Commission is particularly appropriate in this case given that Sentencing Guidelines § 2B3.1(b)(4)(B), in defining the phrase "physically restrained," cross-references the definitions of "general applicability" in the Commentary to Section 1B1.1. Sentencing Guidelines § 1B1.1, comment n.1; § 2B3.1, comment n.1 (emphases omitted). Three other guidelines provisions use that same definition. See Sentencing Guidelines § 2B3.2(b)(5)(B) and comment n.1 (extortion by force or threat); § 2E2.1(b)(3)(B) and comment n.1 (credit extortion); § 3A1.3 and comment n.1 (restraint of victim). The Commission is best positioned to resolve a question, like this one, with broader implications for the Guidelines.

b. In any event, the court of appeals' decision is correct. Section 2B3.1(b)(4)(B) provides for a two-level enhancement "if any person was physically restrained to facilitate commission of the offense or to facilitate escape." Sentencing Guidelines § 2B3.1(b)(4)(B). The phrase "physically restrained" is defined as "the forcible restraint of the victim such as by being tied, bound, or locked up." Id. § 1B1.1, comment n.1(L) (emphasis omitted); see Sentencing Guidelines § 2B3.1, comment (backg'd) (similar). The courts of appeals agree that the three examples in that definition are illustrative rather than exhaustive. See, e.g., United States v. Bell, 947 F.3d 49, 55 (3d Cir. 2020) (citing cases).

In this case, the court of appeals correctly determined that the enhancement applies to the three robberies as to which petitioner contested it. In each, at least one victim was "physically restrained," Sentencing Guidelines § 2B3.1(b)(4)(B), when one of the robbers forced that victim to the floor or another part of the establishment by holding a gun to the victim and physically pushing, grabbing, or hitting the victim.

During the Lush Nails & Spa robbery, one of the robbers put his gun to the side of a customer's head and told everyone not to move. Pet. App. A5. The robbers struck an employee on the back of the head to force him to open the cash drawer, and kicked another woman in the face. Ibid.; D. Ct. Doc. 295, at 110-111. A robber also struck a customer in the back of the head with his

gun, causing her to fall to the ground and hit her face on the tile floor. D. Ct. Doc. 295, at 111. While she was on the floor, a robber "put [his] gun to [her] head and said, 'I will fucking kill you bitch. I will fucking kill you. Are you on the phone?'" Ibid.; see Pet. App. A5-A6, A48-A49. After opening her hand and telling him she was not on the phone, she "just laid still" until someone said the robbers had left. D. Ct. Doc. 295, at 111. At the very least, by physically forcing the customer to the ground and putting a gun against her head while threatening her, the robbers restricted the victim's physical movement.

During the Royal Massage robbery, petitioner and Smith drew their guns and demanded money. Pet. App. A7. Smith "grabbed an employee with his arm around her neck and pointed his gun at her head," first "moving her behind the front counter" and then to the back of the store. Id. at A49; see id. at A8. As the court below correctly recognized, Smith "literally restrained an employee by the neck." Id. at A49. Petitioner also "forced a victim to the ground" and then to the back of the store "at gunpoint," similarly restraining her movement. Ibid.; see id. at A8.

At the BD Spa robbery, petitioner forced an employee down the hall of the spa by pushing her from behind and pointing his gun at her back. See Pet. App. A49; D. Ct. Ex. 128, Clip 1. He then shoved her to the ground. See ibid. By using physical force to dictate the victim's movements, petitioner physically restrained her within the meaning of the Guideline.

Petitioner contends that the physical-restraint enhancement "requires more than pointing a gun at someone," Pet. 12 (emphasis omitted), but the enhancement in this case was not based solely on that fact. Indeed, the court of appeals expressly distinguished a situation in which a robber merely threatens an employee at gunpoint to obtain money. Pet. App. A48. The court explained that what petitioner "actually did" "is not analogous to this hypothetical situation." Ibid.

c. Petitioner asserts (Pet. 12-15) that the Second, Third, Sixth, and Ninth Circuits have all rejected application of the enhancement in circumstances like those here. See Pet. 13-14 (citing Bell, supra (3d Cir.); United States v. Parker, 241 F.3d 1114 (9th Cir. 2001); United States v. Taylor, 961 F.3d 68 (2d Cir. 2020); United States v. Ziesel, 38 F.4th 512 (6th Cir. 2022)). Petitioner's assertions of a conflict are overstated.

In United States v. Bell, the defendant, carrying a fake weapon, assaulted a store employee, who resisted. 947 F.3d at 52-53. In deeming the defendant's conduct insufficient to warrant the physical-restraint enhancement, the court balanced five factors: whether the defendant (1) used physical force, (2) exerted control over the victim, (3) provided the victim with no alternative but compliance, (4) focused on the victim for some period of time, and (5) placed the victim in a confined space. Id. at 56-60. Applying those factors, the court emphasized that "the victim twice attempted to thwart the robbery" (suggesting

there was an alternative to compliance) and "the physical restraint was quite limited in time." Id. at 61.

Although Bell may be in tension with the decision below in certain respects, see Pet. App. A49, there is no square conflict. Several of the Bell factors -- such as whether the defendant used physical force, exerted control over the victim, and provided the victim with no alternative but compliance -- counsel in favor of applying the enhancement here. Unlike in Bell, petitioner used a real firearm; he succeeded in subduing his victims; and he and his accomplices repeatedly coerced victims to move from one location to another. See Bell, 947 F.3d at 59 (favorably citing a case "concluding that the sustained focus requirement was met where the defendant directed the victim around the premises").

In United States v. Parker, the Ninth Circuit affirmed the defendant's physical-restraint enhancement on one count of conviction and reversed it on another. 241 F.3d at 1118-1119. As to the first, one of the defendant's accomplices "grabbed a [bank] teller by her hair and pulled her up from the floor," and the court found "little doubt that this conduct constituted physical restraint." Id. at 1118. The facts in this case are similar. As to the second, one of the robbers merely "pointed a gun at a bank teller and yelled at her to get down on the floor." Ibid. But in finding that conduct insufficient, the court distinguished a situation where (as here) a defendant restrains a person "long

enough for the robber to direct the victim into a room or order the victim to walk somewhere." Ibid.

In United States v. Taylor, the Second Circuit considered various factors, including (1) whether the conduct was physical, (2) whether the defendant restrained the victim, rather than merely using force, and (3) whether the restraint involved "more than a 'direction to move that is typical of most robberies.'" 961 F.3d at 79 (brackets and citation omitted); see id. at 78-79. The court concluded the record did not sustain the enhancement where it showed only that the defendant "herd[ed] customers, as well as employees, into a back room." Id. at 79.

Like Bell, Taylor may be in tension with the decision below in certain respects. See Pet. App. A49 (finding enhancement appropriate where petitioner "forced an employee down the hall of the establishment at gunpoint"). At the same time, at least some of the facts here appear to satisfy the Second Circuit's factors -- such as Smith grabbing an employee with his arm around her neck. Ibid. As with Bell, then, any delta between the decision in this case and Taylor is highly factbound and would appear to matter only at the margins.

Lastly, in United States v. Ziesel, the Sixth Circuit found that an unarmed defendant "ordering the tellers 'to the ground,' without more," was not sufficient to sustain the enhancement. 38 F.4th at 516. That is consistent with the decision in this case,

which involves armed robbers using physical force to coerce their victims.

d. Ultimately, petitioner's assertion that the courts of appeals are divided about whether the physical-restraint enhancement applies when a defendant "point[s] a gun at someone" rests on a false premise. Pet. 12 (emphasis omitted). The court below expressly distinguished this case from one in which a defendant entered a business, "pointed a gun at the victim behind the welcome counter, demanded, 'Your money or your life,' obtained money from the victim, and left without further incident." Pet. App. A48. And the various circuit decisions, while employing different formulations, vary only marginally in the conduct they treat as satisfying the enhancement. Those differences do not warrant this Court's review, especially given the Commission's authority to resolve them.

2. Petitioner independently contends (Pet. 16-21) that the district court abused its discretion in allowing two FBI agents to provide lay identification testimony. This Court has recently denied review on a similar question, see Walker v. United States, 141 S. Ct. 2823 (2021) (No. 20-7183), and the same outcome is appropriate here.

a. Federal Rule of Evidence 701 authorizes opinion testimony by a lay witness if it is "rationally based on the witness's perception" and "helpful to clearly understanding the witness's testimony or to determining a fact in issue." Fed. R.

Evid. 701(a) and (b). Here, the district court permissibly exercised its discretion to allow two FBI agents to identify petitioner in surveillance videos and images from his phone, while "the jury retained the ultimate duty to decide if the agents were credible and to analyze the surveillance footage and photographs themselves." Pet. App. A40.

As the court of appeals observed, "lay opinion identification testimony may be helpful to the jury where . . . 'there is some basis for concluding that the witness is more likely to correctly identify the defendant from a photograph or video than is the jury.'" Pet. App. A34 (quoting United States v. Pierce, 136 F.3d 770, 774 (11th Cir.), cert. denied, 525 U.S. 974 (1998)) (brackets omitted). And in determining whether that criterion was satisfied, it naturally looked to "factors such as the witness's familiarity with the defendant's appearance at the time the surveillance photographs were taken" and "whether the defendant had * * * altered his appearance prior to trial." Id. at A35 (quoting Pierce, 136 F.3d at 774-775). Petitioner does not dispute that basic approach, which is plainly satisfied here.

The agents observed petitioner 12 days after the last robbery, whereas the trial occurred nearly two years later. Pet. App. A39. The officers interacted with petitioner for a meaningful amount of time: one and four hours, respectively. Id. at A38. And in the nearly two-year interval between those interviews and the trial, petitioner's appearance had changed, insofar as his hair had grown

longer and he had gained weight. Id. at A39-A40. Even if there were some doubt about whether the agents' testimony would be helpful given those facts, however, a factbound dispute of that variety -- on a matter within the discretion of the district court, see General Elec. Co. v. Joiner, 522 U.S. 136, 141 (1997) -- would not warrant this Court's review.

b. Petitioner errs in asserting (Pet. 16-18) that the decision below conflicts with decisions from other circuits addressing similar circumstances. As the court of appeals explained, the FBI agents here had "greater familiarity" with petitioner "than other circuit courts have required to produce admissible lay identification testimony." Pet. App. A39.

Petitioner relies principally (Pet. 17) on United States v. Fulton, 837 F.3d 281 (3d Cir. 2016), cert. denied, 139 S. Ct. 214 (2018), where two officers testified that the perpetrator in surveillance footage looked more like the defendant than another suspect. Id. at 295. In accord with the decision here, the Third Circuit explained that "lay witness testimony is permissible where the witness has had sufficient contact with the defendant to achieve a level of familiarity that renders the lay opinion helpful." Id. at 297 (citation omitted). The Third Circuit went on to conclude that the facts of Fulton itself, where one officer's interactions with the two suspects was "very limited" and the other officer's "familiarity with [them] was even more attenuated," did not warrant the admission of such testimony. Id. at 299. But

those "minimal relations," which "provided neither [officer] with familiarity with the defendant's appearance at the time the crime was committed," ibid., stand in contrast to the facts here, where the agents interacted with petitioner within two weeks of the final robbery for a total of five hours.

Petitioner discusses two other cases where the courts upheld the admissibility of lay opinion testimony. See Pet. 17-18 (citing United States v. Contreras, 536 F.3d 1167, 1171 (10th Cir. 2008), cert. denied, 555 U.S. 1117 (2009); United States v. Beck, 418 F.3d 1008, 1015 (9th Cir. 2005)). The fact that the testimony in those cases was admissible does not suggest that the testimony in this case was not. Petitioner also suggests (Pet. 16, 19) that the decision below is inconsistent with other precedents from the Eleventh Circuit. But even assuming petitioner were correct on that point, this Court ordinarily does not grant review to resolve intracircuit conflicts, and petitioner offers no reason to do so here. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.")

c. Even if the district court had erred in admitting the officers' testimony, any error would have been harmless. Apart from the officers' testimony, there was overwhelming evidence of guilt, including fingerprint evidence; eyewitness testimony from nearly every robbery; modus operandi evidence; surveillance footage; evidence pertaining to the getaway car; incriminating

cellphone history and location data; and DNA evidence. See Pet. App. A18-A22, A24-A25. There was also significant evidence apart from the officers' testimony linking petitioner to the phone in particular, including that the phone contained a text message addressed to petitioner by name; that agents had used the phone number to track petitioner; and that the phone's log reflected numerous calls between petitioner and Smith. See D. Ct. Doc. 295, at 166-172. Thus, even if the Court were to reverse the district court's evidentiary decision, it would not affect the outcome.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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