NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

CRAIG ALAN MORRISON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Sentencing Guidelines provide for an enhancement when "a victim was physically restrained in the course of the offense." But while the Guidelines define 'physically restrained' by way of narrow examples such as "the victim . . . being tied, bound, or locked up," the Tenth Circuit has long countenanced an interpretation of that definition that is, by its own recognition, "very broad[]" and inconsistent with the approach taken by other circuits. Because the Tenth Circuit's interpretation is contrary both to the approach taken by other circuits and divorced from the plain text of the Guidelines, and also because the Sentencing Commission has allowed this circuit split to fester for decades, this Court should grant certiorari to address the following question:

Whether a defendant should receive an increased sentence under U.S.S.G. § 3A1.3 for having "physically restrained" a victim, where the conduct at issue is nothing like the narrow examples the Guidelines use to define that term, such as "the victim . . . being tied, bound, or locked up"?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Sentencing Guidelines

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Craig Alan Morrison, respectfully petitions for a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered on July 24, 2023.

OPINION BELOW

The published decision of the United States Court of Appeals for the Tenth Circuit in *United States v. Walker*, 74 F.4th 1163 (10th Cir. July 24, 2023),[1] is found in the Appendix at A1.

JURISDICTION

The United States District Court for the District of Colorado had jurisdiction in this criminal case under 18 U.S.C. § 3231. The Tenth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. The circuit entered judgment on July 24, 2023, and denied Mr. Morrison's petition for rehearing en banc on October 13, 2023 (Appendix at A1, A28.) On December 21, 2023, this Court extended the time in which to file a petition for writ of certiorari to February 12, 2024. (*Id.* at A29.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

[1] The decision below bears the name of co-defendant Amanda Walker. Ms. Walker's petition for a writ of certiorari, which raised different grounds than presented here, was denied by this Court on January 8, 2024. *See* Case No. 23-6119.

FEDERAL PROVISION INVOLVED

U.S.S.G. § 3A1.3 and commentary note 1, provides in part:

> Restraint of Victim
>
> If a victim was physically restrained in the course of the offense, increase by **2** levels.
>
> . . .
>
> 1. "Physically restrained" is defined in the Commentary to §1B1.1 (Application Instructions).

U.S.S.G. § 1B1.1 commentary note 1(L), in turn, provides in pertinent part:

> "Physically restrained" means the forcible restraint of the victim such as by being tied, bound, or locked up.

STATEMENT OF THE CASE

Mr. Morrison and his girlfriend, Amanda Walker, were tried together and each convicted of two state child-abuse counts under the Assimilated Crimes Act, 18 U.S.C. § 13. (Vol. I at 14-18, 83-84.)[2] The charges concerned injuries Ms. Walker's minor child, R.T., suffered in December 2019 and February 2020. (*See id.*)

At sentencing, Mr. Morrison's PSR recommended—and the district court applied—a two-level enhancement under U.S.S.G. § 3A1.3, which guideline applies "[i]f a victim was physically restrained in the course of the offense." (Vol. V at 7.) The application notes for § 3A1.3 refer to the definition of "physically restrained" under USSG § 1B1.1, which, in turn, defines "physically restrained" as "the forcible restraint of the victim such as by being tied, bound, or locked up." USSG § 1B1.1, comment, n.1(L) (emphasis added).

In support of the enhancement, the district court relied not on any restraint involved in the abusive acts of conviction in December 2019 and February 2020, but on one occasion months earlier, in August 2019. During this incident, it had been alleged that Mr. Morrison wanted R.T. to eat pizza, but R.T. was resisting and Mr.

[2] Citations are to the record on appeal in the Tenth Circuit and the page number at the bottom, right-hand side of each page. The citations are provided for the Court's convenience in the event this Court deems it necessary to review the record to resolve this petition. *See* Sup. Ct. R. 12.7.

Morrison shoved the pizza into R.T.'s mouth. (Vol. III at 26-27, 193; Vol. V at 7, 21.) The court found that Mr. Morrison had briefly held R.T.'s wrist and chin while trying to force him to eat the pizza, and that this had caused R.T. to squirm and choke on the pizza. (Vol. III at 26-27; Vol. V at 7.)

Mr. Morrison objected that these facts were not legally sufficient to warrant applying the two-level physical restraint enhancement. He further observed that he could identify no cases in which the enhancement had been applied in a case similar to his. (Vol. I at 86-87.)

The district court overruled Mr. Morrison's objection. (Vol. III at 23-27.) Like the PSR, the court looked to the August 2019 incident. (Vol. III at 26-27; Vol. V at 7.) While acknowledging that the guideline's definition contemplates "the forcible restraint of the victim such as by being tied, bound, or locked up," U.S.S.G. § 1B1.1 cmt. n.1(L); § 3A1.3 cmt. n.1, the district court noted that the Tenth Circuit's case law did not require much in the way of restraint. (Vol. III at 27.) In doing so, it pointed to *United States v. Checora*, 175 F.3d 782, 790-91 (10th Cir. 1999), in which the court had adopted a broad definition of the phrase "forcible restraint" as used in 1B1.1, as mere use of "physical force or another form of compulsion to achieve the restraint," which means only conduct that "hold[s] the victim back from some

action, procedure, or course, prevent the victim from doing something, or otherwise keep the victim within bounds or under control."

Looking to this broad definition, the court concluded that Mr. Morrison's actions, "however brief they may have been, prevented R.T. from moving from the impediment to his breathing, that [is], the pizza the defendant was force-feeding him." (*Id.*) Accordingly, the court applied the two-level enhancement under § 3A1.3, raising Mr. Morrison's advisory guideline range to 84 to 105 months. Without that enhancement, his range would have been 70 to 87 months. (Vol. III at 40-43; Vol. I at 100.)

On appeal, Mr. Morrison pressed his challenge to application of § 3A1.3, arguing that the court's factual findings were insufficient as a matter of law to warrant the enhancement. Specifically, he explained, when Mr. Morrison placed his hands on R.T.'s wrist and chin and fed him pizza in a way that caused R.T. to choke, the action was not sufficient in magnitude and duration to constitute "physical restraint" as defined in § 1B1.1. Under *de novo* review, the Tenth Circuit rejected Mr. Morrison's claim, specifically observing that "the district court's factual findings fall within our definition of physical restraint." *United States v. Walker*, 74 F.4th 1163, 1196-97 (10th Cir. 2023). Thereafter, Mr. Morrison urged the en banc court to reconsider *Checora* and related cases as having articulated an exceedingly-broad

definition of physical straight that was unmoored from the text of the Guidelines and inconsistent with the approach taken by other circuits. That request was denied, and this petition follows.

REASONS FOR GRANTING THE WRIT

The United States Sentencing Guidelines provide for an enhancement when "a victim was physically restrained in the course of the offense." But while the Guidelines define 'physically restrained' by way of narrow examples such as "the victim . . . being tied, bound, or locked up," the Tenth Circuit has long countenanced an interpretation of that definition that is, by its own recognition, "very broad[]," and inconsistent with the view of other circuits that "have limited their interpretation of the phrase to acts that are similar to the listed examples." *United States v. Joe*, 696 F.3d 1066, 1071 (10th Cir. 2012). Because this split has existed for decades—without intervention by the Sentencing Commission—and because the Tenth Circuit's reading is divorced from the plain text of the Guideline, this Court's review is necessary to ensure uniformity in federal sentencing.

A. The circuits are split on how to interpret the Guidelines' definition of "physically restrained."

The first reason warranting this Court's review is that the circuits are divided over the meaning of "physical restraint" as used in the Sentencing Guidelines, and the Tenth Circuit's exceedingly broad view is increasingly an outlier.

To recap, the definition of "physically restrained" appears in U.S.S.G. § 1B1.1, which defines the term as "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) (emphasis added). As the Sixth Circuit has observed, the "seemingly tautological definition [of physical restraint] has produced considerable confusion among courts tasked with deciding the full range of conduct subject to the physical-restraint enhancements." *United States v. Smith-Hodges*, 527 F. App'x 354, 356 (6th Cir. 2013) (unpublished).

On one end, the Tenth Circuit has long countenanced an interpretation of the physical restraint definition in § 1B1.1 that is, by its own recognition, "very broad[]," and inconsistent with the view of other circuits that "have limited their interpretation of the phrase to acts that are similar to the listed examples." *United States v. Joe*, 696 F.3d 1066, 1071 (10th Cir. 2012). As the panel below acknowledged, Mr. Morrison was correct that "the court's prior decisions have often involved either a stronger use of force, typically holding a victim with some form of

deadly weapon, or lengthier restraint," than the incident with the pizza that formed the basis for the enhancement here. But, the court concluded after recounting the broad definition employed in the Tenth Circuit, such findings nonetheless "fall within our definition of physical restraint." *Walker*, 74 F.3d at 1196.

This same result would not have occurred in other circuits. That's because, in contrast, "[o]ther circuits have adopted varying approaches to cabining the physical restraint enhancement to avoid excessive application," and to ensure it is read and applied in a way that aligns with and gives meaning to § 1B1.1's examples of a victim being "tied, bound, or locked up." *United States v. Taylor*, 961 F.3d 68, 78 (2d Cir. 2020). The Second Circuit, for instance, applies three factors in determining whether the enhancement may be applied: (1) that the restraint is "physical,' that (2) restraint, not merely force" be employed, and (3) that the restraint "facilitate rather than constitute the offense." *See id.* at 78-79. The Third Circuit, in contrast, utilizes a five-factor test, considering the same and additional factors. *United States v. Bell*, 947 F.3d 49, 56 (3d Cir. 2020) (identifying five such factors, namely the "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."). The Ninth and Sevent Circuits, in turn, require a "sustained focus" on a victim over a period of time. *United States v. Parker*, 241 F.3d

1114, 1118 (9th Cir. 2001); *see also United States v. Herman*, 930 F.3d 872, 876 (7th Cir. 2019) (instructing focus on the defendant's action rather than the victim's reaction).

Here, Mr. Morrison's case would have come out differently in these circuits because, for example, the momentary force-feeding of pizza and holding of the victim did not facilitate the offense at issue here, nor did it involve sustained focus or placement in a confined space. Moreover, beyond just the facts of *this case* plainly resulting in different outcomes outside the Tenth Circuit, other frequently-encountered scenarios also have well-established splits under the circuits' varying definitions of physical restraint.

For example, in some circuits (including the Tenth), pointing a gun and issuing orders such as "don't move" or "get down," without more, qualifies as physically restraining a victim and warrants an increased sentence *See, e.g.*, *United States v. Victor*, 719 F.3d 1288, 1291 (11th Cir. 2013); *United States v. Coleman*, 664 F.3d 1047, 1049-51 (6th Cir. 2012); *United States v. Dimache*, 665 F.3d 603, 606-09 (4th Cir. 2011); *United States v. Fisher*, 132 F.3d 1327, 1329–30 (10th Cir. 1997). In others, such conduct is never enough because a restraint is only sufficient to trigger the application of a guidelines' enhancement if it is physical in a strict or literal sense, as in tying, binding, or locking up another. *See United States v. Garcia*, 857

F.3d at 708, 713 (5th Cir. 2017); *United States v. Drew*, 200 F.3d 871, 880 (D.C. Cir. 2000); *United States v. Anglin*, 169 F.3d 154, 164–65 (2d Cir. 1999). And in others still, such conduct may or may not count, depending on the "sustained focus" of a defendant on a victim. *See United States v. Albritton*, 622 F.3d 1104, 1107-08 (9th Cir. 2010); *United States v. Carter*, 410 F.3d 942, 954 (7th Cir. 2005); *see also United States v. Stevens*, 580 F.3d 718, 721-22 (8th Cir. 2009) (distinguishing between ordering victims to move somewhere (a circumstance to which the guideline applies) and ordering victims to stay still (a circumstance to which the guideline doesn't apply)).

This patchwork of tests undermines consistency in federal sentencing, and, unsurprisingly, has led to persistent and entrenched differences in outcomes across the country when the physical restraint guideline is applied. Accordingly, this Court's intervention is warranted to resolve this circuit split.

B. The Tenth Circuit's interpretation is unmoored from the plain text of the Guidelines.

Second, the Tenth Circuit has recognized that it has defined the term 'physical restraint' "very broadly," and to include conduct far beyond the types of examples provided in § 1B1.1 cmt. n.1(L). *See Joe*, 696 F.3d at 1071. In fact, it has defined the term *too* broadly, and the panel decision below makes clear how

divorced from the Circuit's approach has become, not just from the approach of other circuits, but from the text of the Guidelines itself.

Again, the definition of "physically restrained" is "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) (emphasis added). A few years after this provision's enactment, the Tenth Circuit concluded that being "tied, bound, or locked up" are simply some examples of physical restraint, and that § 1B1.1 (and thus § 3A1.3, which utilizes the former's definition) is not precisely limited to these factual scenarios. *United States v. Roberts*, 898 F.2d 1465, 1470 (10th Cir. 1990). Accordingly, in *Roberts* the court had "no difficulty in concluding that a victim who is held around the neck at knifepoint is denied freedom of movement so as to be physically restrained." *Id.* Mr. Morrison has no quibbles with that determination.

But nearly a decade later, the circuit took a detour beyond what *Roberts*' uncontroversial holding contemplated. Specifically, in *United States v. Checora*, the court looked again at § 1B1.1 and, as the decision below put it, to "further interpret this definition" adopted the plain meaning of 'forcible' and 'restraint.' *See Walker*, 74 F.4th at 1196 (discussing *Checora*, 175 F.3d at 790-91). Specifically, *Checora* held that 'forcible' means the "use [of] physical force or another form of compulsion to achieve the restraint," and 'restraint' means "the defendant's conduct must hold the

victim back from some action, procedure, or course, prevent the victim from doing something, or otherwise keep the victim within bounds or under control." *Checora*, 175 F.3d at 790–91. Left unsaid, however, was *any* analysis of how those definitions intersected with the rest of § 1B1.1's definition—that is, those non-exclusive, but nonetheless expressly-delineated, examples that forcible restraint involves actions like "being tied, bound, or locked up."

Applying *Checora*, the decision below concluded that "[t]he district court's factual findings fall within our definition of physical restraint." *Walker*, 74 F.4th at 1196. That is, under *Checora*, an action need simply "prevent the victim from doing something, or otherwise keep the victim within bounds or under control," 175 F.3d at 791, actions that the district court's finding "that Mr. Morrison held R.T.'s wrist and chin, prevented him from moving, and force fed him to the point of choking" satisfied.

Checora, however, establishes too low a threshold, and one that interprets the phrase "forcible restraint" in § 1B1.1 in isolation, ignoring the illustrative examples that follow that term and illuminate the manner and magnitude of such actions that the Guideline covers.

As with any act of statutory interpretation, interpretation of the Guidelines begins with an examination of the plain language at issue. *Quintana v. Sessions*, 137

S. Ct. 1562, 1568 (2017). To be sure, no one would understand § 1B1.1's definition as restricting 'forcibl[e] restrain[t]' *only* to instances of tying, binding, and locking up. *Roberts* is plainly correct that the examples (which follow a "such as") are illustrative, not exclusive.

But that is not the end of the matter. Because any reader of the provision also would—and should—understand that the types of 'forcible restraint' that the guideline contemplates must be similar in kind and character to those examples. It is, after all, a basic precept of statutory interpretation that when general terms are associated with specific terms, the general is construed to embrace only that which is similar in nature to that enumerated by the specific. *See generally* CSX *Transp., Inc. v. Alabama Dept. of Revenue,* 562 U.S. 277, 295, 131 (2011) ("We typically use *ejusdem generis* to ensure that a general word will not render specific words meaningless."). Similarly, ambiguous terms are routinely informed by the content of associated words, and, moreover, the expression of "one item of an associated group or series excludes another left unmentioned." *N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 940 (2017)) (internal punctuation omitted); *United States v. Stevens*, 559 U.S. 460, 474 (2010) (discussing *noscitur a sociis* canon, which "refers to the rule that an ambiguous term may be given more precise content by the neighboring words with which it is associated") (internal punctuation omitted).

Take for example a provision outlawing the ownership of "dangerous animals such as lions, tigers, and bears." Such an act would not naturally be understood to forbid beekeeping, even though a bee is an "animal" that can be "dangerous." In the same way, a "restraint" that is "forcible," as occurred here, is not inherently "forcible restraint" akin to "being tied, bound, or locked up." Indeed, as the Second Circuit has explained, the examples in § 1B1.1 "all "involve a restraint of movement by the use of some artifact by which the victim is 'tied' or 'bound' . . . or by the use of a space where the victim is 'locked up' . . . ." *United States v. Taylor*, 961 F.3d 68, 78 (2d Cir. 2020). Put simply, the examples matter, and provide the interpretive baseline for like things to be treated alike—and for unlike things to be excluded.

Checora—and the panel's application of it below—went astray because it interpreted the phrase "forcible restraint" in isolation, ignoring these examples that follow the phrase. And while they may not be exclusive, they're also not interpretively irrelevant.

Accordingly, because *Checora* and the Tenth Circuit's related precedent not only permits, but as the panel below concluded *compels* an expansive reading of § 1B1.1 that is divorced from the Guidelines' text, this Court also should grant review to both correct that interpretation and also to reaffirm the interpretive

principle that "when a statutory examination yields a clear answer, judges must stop." *Food Mktg. Inst. V. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019).

C. This case is a good vehicle to address an important and recurring issue, one which the Sentencing Commission has permitted to exist for decades.

Third, this case is a good vehicle to address an important and recurring issue, which the Sentencing Commission has failed to resolve for decades. This is so for at least four reasons.

For one thing, the decision below has created a new outlier. As the decision below recognized, applying § 3A1.3 in this case stands in stark contrast to prior decisions of even the Tenth Circuit applying the already-broadly-articulated standard, and which "have often involved either a stronger use of force . . . or lengthier restraint." *Walker*, 74 F.4th at 1196-97. That's to say nothing, of course, to the tension it creates with other circuits, as detailed above. Indeed, neither in the district court nor on appeal did the government identify any authority applying § 3A1.3 to remotely similar facts. Put simply, the decision below, even though it may flow from the logic of prior Tenth Circuit cases, presents an outlier even using that circuit's broad standard. And with the boundaries now broadened, this issue will continue to reoccur in the Tenth Circuit and beyond.

For another thing, the issue here affects many cases. That's because, in addition to § 3A1.3, which is one of five "victim related adjustments" that can apply a two-level enhancement to *any* offense under the Guidelines, *see* U.S.S.G. Ch. 3 Part A, the robbery guideline and two different extortion guidelines *also specifically* call for an increased sentence where a victim was physically restrained. *See* U.S.S.G. §§ 2B3.1(b)(4), 2B3.2(b)(5), 2E2.1(b)(3)(B). In 2022 alone, this accounted for nearly 500 cases. *See U.S. Sentencing Comm'n, 2022 Guideline Application Frequencies* (recounting 109 applications of physical restraint enhancement under 3A1.3 and 361 under 2B3.1(b)(4)), *available at* https://www.ussc.gov/research/data-reports/guideline/2022-guideline-application-frequencies.

For another, the fact that Mr. Morrison ultimately received an upward variance sentence from his guideline range also does not weigh against review. As this Court has repeatedly reaffirmed, calculating the Guidelines correctly matters, and an error in calculating the guidelines range, even when, as here, the court varies upward, "can, and most often will, be sufficient to show" that the defendant was prejudiced. *Molina-Martinez v. United States*, 578 U.S. 189, 198 (2016) (explaining that "[e]ven if the sentencing judge sees a reason to vary from the Guidelines, if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, then the Guidelines are in a real sense the basis for the sentence.").

And finally, this case is a good vehicle because while the Sentencing Commission theoretically could address this circuit split, that theoretical possibility does not counsel denial of certiorari under the particular circumstances of this case.

In *Braxton v. United States*, this Court observed that Congress "contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." 500 U.S. 344, 348 (1991). This, the Court suggested, "might induce us to be more restrained and circumspect in using our certiorari power as the primary means of resolving such conflicts." *Id.* But, because the Commission has failed to act on this important circuit split for over two decades, any presumption of abstention should not govern here. *See Early v. United States*, 502 U.S. 920, 920 (1991) (White, J., dissenting from the denial of certiorari) (suggesting that *Braxton*'s presumption against certiorari is inapplicable where "[t]he United States Sentencing Commission has not addressed [a] recurring issue" that has divided the circuits).

The Sentencing Commission does not appear to have ever even formally considered amending the definition of "physically restrained." And while Congress charged the Sentencing Commission with periodically reviewing and revising the Guidelines, it also imposed a duty on the courts "to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of

similar conduct." 18 U.S.C. § 3553(a)(6). This Court has recently reaffirmed that important function, and the intolerability of approaches to sentencing approaches that undermine the purposes of the Sentencing Reform Act and Sentencing Guidelines "to create a comprehensive sentencing scheme in which those who commit crimes of similar severity under similar conditions receive similar sentences." *Hughes v. United States*, 584 U.S. 675, 688 (2018).

At some point, where the Sentencing Commission has failed to act for many years, this Court must intervene to ensure that sentencing courts can fulfill their statutory mandate to avoid unwarranted sentencing disparities. That time has come with the physical restraint guidelines. Thousands of defendants, over a period of decades, have received disparate sentences based on nothing more than the lower courts' disagreement over what "physically restrained" means. Because the Sentencing Commission has not acted, this Court should put a stop to this arbitrariness in federal sentencing.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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