NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

UNITED STATES OF AMERICA,

Respondent-Appellee,

vs.

ROBERT COTA, JR.,

Petitioner-Appellant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Did the Ninth Circuit violate the constitutional guarantee of Due Process and 28 U.S.C. §2255(b) when denying Appellant an evidentiary hearing, despite specific allegations that he was shackled during trial which were supported by sworn declarations attesting that he was visibly (and sometimes audibly) shackled throughout his jury trial?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner-Appellant, Robert Cota Jr, respectfully prays that a writ of certiorari issue to review the judgment of the Ninth Circuit Court of Appeals in *United States v. Cota*, U.S.C.A. No. 19-56376, affirming the district court's denial of Cota's habeas petition and denying a petition for rehearing issued on December 13, 2023.

OPINION BELOW

On September 28, 2023, the Ninth Circuit filed an unpublished memorandum opinion affirming the conviction in this case, a copy of which is attached as Appendix A. On December 13, 2023, the Ninth Circuit rejected Petitioner's request for rehearing and suggestion for rehearing *en banc.* See, Appendix B.

In the memorandum opinion, the Ninth Circuit affirmed the district court's denial of Robert Cota's motion to vacate his conviction for conspiring to distribute methamphetamine pursuant to 28 U.S.C. §2255 and affirmed the district court's denial of an evidentiary hearing under 28 U.S.C. §2255(b). The opinion in the instant case, upholding the denial of a hearing, violates the mandate of §2255(b) directing district courts to hold a hearing unless "the files and the records of the case *conclusively* show that the prisoner is entitled to no relief".

JURISDICTION

This Court has Jurisdiction under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED IN THIS CASE

U.S. Const. Amend. V: No person shall be held to answer for a capital, or otherwise infamous crime, . . . without due process of law . . . .

FEDERAL STATUTE INVOLVED IN THIS CASE

Title 28 U.S.C. §2255(b): "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusion of law with respect thereto."

STATEMENT OF FACTS RELEVANT TO THIS PETITION

A. Summary of Procedural History

Robert Cota was the only defendant in a 23-defendant Indictment who proceeded to trial on charges that he conspired to distribute methamphetamine. (2-ER-257-60;).[1/] Cota represented himself at trial, with the assistance of advisory

[1] "ER" refers to Appellant Cota's Excerpt of Record filed with his opening brief to the Ninth Circuit; "CR" refers to the Clerk's Record; and, "TT" refers to the Trial Transcript of Cota's jury trial in 2014.

counsel John Kirby. (C.R. 99-104). After a four-day jury trial, on December 2 - 5, 2014, Cota was convicted of the conspiracy charge. (C.R. 104). On May 20, 2015, Cota was sentenced to 240 months (20 years) followed by 10 years of supervised release. (3-ER-563-66). Cota is in custody serving that sentence with a projected release date of December 13, 2028.

On December 10, 2018, Cota, acting pro se, filed a motion to vacate, set aside or correct his conviction pursuant to 28 U.S.C. § 2255, arguing, *inter alia*, that he was unconstitutionally shackled in leg irons throughout his jury trial. (1-ER-17-122). In support of his claim, Cota presented nine declarations from people present at the trial attesting they saw and heard the leg irons shackling Cota's ankles during trial. (1-ER-67-77). However, the lower court refused to hold a hearing and dismissed the petition. (1-ER-4-16).

B. Evidence Cota Was Shackled

Advisory counsel John Kirby, who was present at every hearing and throughout the trial and sentencing, signed two declarations attesting that Cota was shackled in leg irons throughout his trial. (1-ER-68 & 1-ER-169). Seven other declarations were attached to the Habeas Petition and Reply, all attesting that Cota was shackled during trial and the shackles were visible and audible (due to the rattling of the chains). (1-

ER-69-77; 1-ER-165-68).

Evidence in the trial record supports Cota's claim that he was, in fact, shackled, corroborating the affidavits submitted. Specifically, just before trial, the lower court advised both sides that they would be conducting their examinations, as well as opening and closing statements, while seated, rather than from the podium as is standard. (1-ER-401; see also, TT 397). The court explained how the exhibits would be displayed on the computer screens and if something had to be handed to the witness "the court clerk will retrieve it and hand it to the witness." (1-ER-399-400; see also, 1-ER-439). The only time the parties would stand was when the judge entered the courtroom, when the jury entered or left the courtroom or when objecting. (1-ER-401; 1-ER-439; 1-ER-451). This departure from standard protocol would lessen the chance that the jury would notice the leg irons shackling Cota's ankles. No other justification for this odd procedure was given.

The trial record contains no statement nor conclusive evidence that Cota was unshackled during trial. The record of the numerous pre-trial proceedings contains conclusive evidence, i.e., statements from the district court and Cota, showing that Cota was shackled during pre-trial proceedings (consistent with the universal shackling policy of the Southern District of California that was in effect at that time).

(1-ER-69-77; 1-ER-165-68).

At no time was there a hearing, as required by *Deck v. Missouri*, 544 U.S. 622 (2005), to determine if circumstances warranted the extraordinary measure of shackling the pro se defendant throughout his trial.

C. Facts Presented At Trial

Cota's defense at trial was that he was involved in marijuana distribution, but not methamphetamine and that the government's star witness, Julie Peterson, lacked any credibility. (TT 74). While the case involved months of wiretaps and surveillance, the primary evidence against Cota came from a traffic stop and search which led to the seizure of approximately one pound of methamphetamine concealed inside a red coffee can found in Cota's car.

Julie Peterson, the number one defendant in the indictment, had a long history of importing methamphetamine from Mexico and had ties to two large and dangerous Mexican drug cartels: the Sinaloa Cartel and the La Familia Cartel. (TT 110-11, 157-158, 355). Upon her arrest, Peterson decided to plead guilty and cooperate against her Mexican connections. (TT 110-11, 124). She had been previously convicted of selling methamphetamine, importing marijuana and bulk cash smuggling. (TT 121-122).

Peterson initially denied that any promises had been offered in exchange for her testimony against Cota, protesting that she was only there to "tell the truth". (TT 124). However, on cross-examination, she admitted that she agreed to testify against Cota "hoping for" a sentence less than 30 years to life. (TT 160, 162). She knew that the length of her sentence depended on how much her testimony helped the government. (TT 12-2-14, 160-161).[2/]

Upon her arrest, Peterson told agents that Cota was ***not*** involved in methamphetamine distribution. (TT 123, 155-157). At that time, she told agents that Cota was only involved in marijuana. (TT 156, 161). At trial, however, she claimed her initial statement was a lie because she was "scared". (TT 123).

At trial, Peterson claimed that in 2010 and 2011, she sold pound quantities of methamphetamine to Cota on several occasions. (TT 125-140). Peterson listened to several of the recorded calls from the wiretap and testified the calls were between herself and Robert Cota and concerned drug deals. (TT 148-154).

On July 25, agents surveilled Cota as he drove to a Food-4-Less grocery store and purchased several items, including a large red container of coffee. (TT 178-185, 199). The surveilling agents testified that, in their opinions, Cota spent an inordinate

[2] Peterson was sentenced to only 10 years. (CR 1106).

amount of time (5 to 7 minutes) "hunched over" the trunk of his car when placing his groceries in the car. (TT 180-185, 188, 201, 220-225).

The agents asked Chula Vista Police Officer Carter to "conduct a traffic stop" on Cota for the purpose of searching his car for evidence of drugs. (TT 186, 247). Officer Carter stopped Cota and impounded the car. (TT 234, 246). Once Cota's car was at the police station, agents searched the trunk and seized 444.9 grams of methamphetamine, discovered inside a red plastic coffee container. (TT 272, 281-282, 323-325). The red coffee container, in which the drugs were found, appeared to have been opened and then re-sealed with glue. (TT 281-82). However, no loose coffee grounds were found in the trunk of the car. (TT 291). A small container of glue was found during the search of the car. (TT 291, 357-358).

Cota called a forensics expert who examined the tube of glue seized from his car and compared it to the glue that was used to re-seal the coffee container in which the methamphetamine was found. (TT 422-424). The expert determined the glue found in the car was not the same glue used to reseal the coffee container. (TT 425).

Defense investigator Bellizzi conducted a demonstrative re-enactment in which he unsealed a red coffee container, dumped out some coffee and inserted a pound of sugar which was equivalent to the weight of the methamphetamine allegedly found

in the coffee container in Cota's trunk. (TT 375-378). After completing the demonstration, investigator Bellizi showed the jury the coffee grounds that had to be removed from the container so the pound of sugar would fit inside. (TT 378).

The defense also introduced eight recorded calls from the wiretap which showed that Cota was discussing marijuana trafficking (rather than methamphetamine trafficking). (TT 363-366, 373-375, 382). Defense investigator Bellizi had reviewed many of the thousands of recorded wiretap calls and never heard Cota say "methamphetamine." (TT 390).

During the search of the Cota's residence no methamphetamine was discovered. (TT 339). However, several marijuana plants, dried marijuana and marijuana literature were found. (TT 114, 337-339). Agents searched another residence on Rigel Street which was associated with the investigation and found a marijuana grow, seizing 266 marijuana plants. (TT 340-346, 356). This marijuana grow was also associated with Cota. (TT 347).

The trial spanned two and a half days. The jury deliberated over two days. During that time, the jury asked two questions about the methamphetamine seized. (TT 510, 513, 518, 520-521). On the second day of deliberations, the jury returned a guilty verdict.

D. The Ninth Circuit's Decision

On September 28, 2023, the Ninth Circuit issued its decision affirming the district court's dismissal of Cota's habeas petition. (Appx. A). Specifically, the lower court held that the district court "did not abuse its discretion in resolving Cota's motion without an evidentiary hearing." (A, p. 2). Most important, the Ninth Circuit held that 22 U.S.C. § 2255(b) only "creates a presumption in favor of holding evidentiary hearings" which could be ignored here because "judges may alternatively rely on records, their own notes and recollections, and common sense to resolve factual disputes, especially when the factual dispute concerns something that occurred in open court and could be resolved by considering the trial record." (A, p. 3).

The Ninth Circuit also held that the district court did not clearly err in finding (without holding a hearing) that "Cota was not shackled at his trial." (A, p. 3). Moreover, the Panel held that "[t]he court did not need to separately address each declaration; the record supports the adverse credibility determination as to all of the declarations." (A, p. 3). These holdings then led the Ninth Circuit to conclude, "Cota's success on the merits of his shackling claim is foreclosed by the district court's finding that Cota was not shackled at trial." (A, p. 4).

On November 15, 2023, Cota filed a petition for rehearing and suggestion for

rehearing en banc. On December 13, 2023, the Ninth Circuit denied the petition for rehearing and rehearing en banc. (Appx. B).

REASONS FOR GRANTING THE WRIT

The Due Process Clause of the Fifth Amendment guarantees that no person shall be "deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. This Court has repeatedly noted that "[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982) (alteration in original) (quoting *Greenholtz v. Neb. Penal Inmates*, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part and dissenting in part)). Liberty from bodily restraint includes the right to be free from shackles in the courtroom. *See Deck v. Missouri*, 544 U.S. 622, 629 (2005). "'[N]o person should be tried while shackled and gagged except as a last resort' because of the distinct possibility of 'a significant effect on the jury's feelings about the defendant." *Rhoden v. Rowland*, 172 F.3d 633, 636 (9th Cir. 1999)(quoting *Illinois v. Allen*, 397 U.S. 337, 344 (1970)).

Here, Cota filed a habeas petition alleging he was unconstitutionally

shackled during his jury trial and therefore tried in violation of the guarantees enshrined in the Due Process Clause. In support of his contention that he was shackled throughout trial, Cota submitted nine declarations from people who observed the trial, his advisory counsel and his investigator. Because the affidavits submitted with Cota's petition were specific, detailed and not contradicted by the record, a hearing was required under 28 U.S.C. §2255(b). Yet, the district court refused to grant a hearing and made factual findings against Cota. The Ninth Circuit also violated the mandate of 28 U.S.C. §2255(b) in affirming the district court's denial of a hearing.

Certiorari should be granted to protect the rights of habeas petitioners, to vindicate and protect §2255(b)'s provision requiring hearings when the petitioners raise factual disputes and to ensure that defendants are not shackled throughout trial in violation of the Due Process Clause.

ARGUMENT

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE NINTH CIRCUIT VIOLATED §2255(b), AND IN DOING SO, FAILED TO PROTECT COTA'S FIFTH AMENDMENT RIGHT TO BE FREE FROM SHACKLES DURING TRIAL.

Title 28 U.S.C. §2255(b) clearly mandates:

> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusion of law with respect thereto.

The statute does not create a soft presumption that can be easily rebutted. The statute uses the mandatory directive "shall" when stating that the court "shall" hold a hearing. The only exception is when the "files and records of the case ***conclusively*** show that the prisoner is entitled to no relief." (emphasis added). In other words, "'a hearing is mandatory whenever the record does not affirmatively manifest the factual or legal invalidity of the petitioner's claims,' and failure to grant one in such a circumstance is an abuse of discretion." *United States v. Reyes-Bosque*, 624 Fed.Appx. 529, 530 (9th Cir. 2015) (reversing and remanding

for a hearing).

In contrast, the Ninth Circuit in this case incorrectly held that the trial court could "rely upon common sense to resolve factual disputes, especially when the factual dispute concerns something that occurred in open court and could be resolved by considering the trial record." (A, p. 3). This holding violates the plain and clear directive of §2255 by allowing the lower court to use its "common sense" and simply decide that it does not believe the allegations in the petition and sworn statements.

Nor was there conclusive evidence in the record which "affirmatively manifest[ed] the factual or legal invalidity" of Cota's claim. There was never any indication on the record that Cota was not shackled during trial. The trial transcript was silent on whether the leg irons, in which Cota appeared throughout the pre-trial proceedings, were removed for trial. While the district court pointed out an instance in which one of the affidavits was contradicted by the record *on a collateral issue*, that conflict is not sufficient to foreclose a hearing. *Rodriguez*, *infra*, at 1216. Nothing in the record contradicts the nine sworn affidavits on the key question, was Cota shackled? Nor did the government offer any affidavits from the prosecutor or the Deputy U.S. Marshal attending the trial contradicting

Cota's claim he was shackled during trial.

While a material factual dispute must be shown to warrant an evidentiary hearing, *Turner v. United States*, 183 F.3d 474, 477 (6th Cir. 1999), the petitioner's burden for establishing entitlement to an evidentiary hearing is "relatively light", *Smith v. United States,* 348 F.3d 545, 551 (6th Cir. 2003). When, as here, the district court is presented with specific factual disputes supported by evidence outside the record and not contradicted by the record, a hearing is required. See, *Raysor v. United States*, 647 F.3d 491, 496 (2d Cir. 2011) (evidentiary hearing required for allegation of ineffective assistance of counsel because record not sufficiently developed); *United States v. Booth*, 432 F.3d 542, 545-46 (3d Cir. 2005) (evidentiary hearing required to determine whether defendant's trial counsel was ineffective); *United States v. White*, 366 F.3d 291, 300 (4th Cir. 2004) (evidentiary hearing required because factual dispute existed regarding claim prosecutor orally promised guilty plea was conditional); *United States v. Estrada*, 849 F.3d 1304, 1306-07 (10th Cir. 1988) (evidentiary hearing required for claim of involuntary guilty plea because record inconclusive on issue). Even when the district court is "faced with conflicting" sworn accounts, a hearing is required. *Reyes-Bosque*, 624 Fed.Appx. At 530 (citing *United States v. Chacon-Palomares*,

208 F.3d 1157, 1158-59 (9th Cir. 2000); see also, *United States v. Rivas-Lopez*, 678 F.3d 353, 358-59 (5th Cir. 2012) (evidentiary hearing required for allegation of ineffective assistance of counsel because of conflicting accounts and incomplete record on relevant factors). Here, the district court did not even have "conflicting" sworn statements and still refused to hold a hearing

Other evidence in the record corroborates Cota's claim that he was shackled during trial. As explained above, the district court's order that the parties remain seated during the trial supports Cota's claim that he was shackled and the district court was attempting to hide that fact from the jury by ordering the parties to remain seated at the table.

As held in *United States v. Rodriguez*, 49 F.4th 1205, 1213 (9th Cir. 2022), the use of the word "shall" in §2255(b) mandates a hearing "[u]nless the motion and the files and records of the case *conclusively show* that the prisoner is entitled to no relief." (quoting 28 U.S.C. §2255 and citing *United States v. Howard*, 381 F.3d 873, 877 (9th Cir. 2004)). *Rodriguez* explained that a hearing is mandated "unless" the record "affirmatively manifest[s] the factual or legal invalidity of the petitioner's claims." *Id.* (quoting *Bauman v. United States*, 692 F.2d 565, 571 (9th Cir. 1982)).

Moreover, some conflict between a petitioner's evidence and the trial record does not foreclose a hearing. In *Rodriguez*, the Ninth Circuit found the "evidence contradicting Rodriguez's argument is certainly strong," but still found that this evidence did not "conclusively" foreclose the claim and relief sought. The *Rodriguez* Court concluded,

> When the [trial] court is faced with a fact-intensive analysis . . . and where the defendant presents some evidence not palpably false which suggests that he [is entitled to relief], then it cannot be said that the record is conclusive against the defendant, ... nor can it be said that the defendant's claim is "so palpably incredible or patently frivolous as to warrant summary dismissal." On these facts, it is "illogical" – and therefore an abuse of discretion – to deny an evidentiary hearing.

Id. at 1216 (quoting *United States v. Werle*, 35 F.4th 1195, 1206 (9th Cir. 2022) and *United States v. Schaflander*, 743 F.3d 714, 717 (9th Cir. 1984); *see also, United States v. Kallas*, 814 Fed.Appx. 198, 202 (9th Cir. 2020) (where the Ninth Circuit reversed and remanded for an evidentiary hearing on petitioner's claim that the trial court closed the proceedings to the public during voir dire, despite some evidence in the record contradicting the claim); and *United States v. Burrows*, 872

F.2d 915 (9th Cir. 1989) (reversing and remanding for evidentiary hearing); and, *Guerrero v. United States,*84 Fed.Appx. 933 (9th Cir. 2003) (reversing and remanding for evidentiary hearing).

Here, the Ninth Circuit relied upon *Shah v. United States*, 878 F.2d 1156 (9th Cir. 1989), to support its argument that the lower court was justified in denying a hearing. However, *Shah* is so distinct from this case that it has no precedential authority. In *Shah*, the Ninth Circuit made no mention of any evidence, such as affidavits, offered to support the petitioner's claims. Rather the *Shah* Court merely refereed to the petitioner's allegations and claims. There, the petitioner claimed he received IAC at the plea bargaining stage because his lawyer advised him that if he pleaded guilty the judge would not consider nor hold against him his criminal record; whereas, if he went to trial, the jury would convict him based on his record and he could not withdraw his plea prior to sentencing. *Shah* 878 F.2d at 1159-1162. The record in *Shah* **did** directly contradict the claims of petitioner. For example, the transcript of the guilty plea in *Shah* revealed that the trial judge advised petitioner that the sentence would be based in part on his criminal record, contradicting petitioner's claim. *Id.* at 1159. Moreover, in *Shah,* the government submitted an affidavit from defense counsel specifically

contradicting petitioner's allegations. *Id.* at 1162; Cf., *Purkey v. Maass*, 945 F.2d 409 (9th Cir. 1991) (unpubl)(reversing and remanding for a hearing on the petitioner's allegations consistent with the mandate of §2255(b) after observing that, in *Shah,* the trial court had before it portions of the record that specifically and clearly refuted the allegations in the habeas petition contrary to the facts of *Purkey*).

It also bears repeating that the courts, in reviewing a §2255 petition on a motion to dismiss, must begin by crediting the allegations of the petitioner. *Baumann v. United States*, 692 F.2d 565, 571 (9th cir. 1982) ("[T]he petitioner ... must only make specific factual allegations which, if true, would entitle him to relief."); and *United States v. Briggs*, 939 F.2d 222, 228 (5th Cir. 1991). Moreover, because Cota was proceeding pro se, his pleadings must be "liberally construed". *Erickson v. Pardus,* 551 U.S. 89, 94 (2007) (per curiam) (quoting *Estelle v. Gamble,* 429 U.S. 97, 106 (1976)); *see also Haines v. Kerner,*404 U.S. 519, 520 (1972) (per curiam) (*pro se* complaint held to less stringent standards than formal papers drafted by lawyers); *Zichko v. Idaho,* 247 F.3d 1015, 1020 (9th Cir.2001) (The liberal construction "rule particularly applies to ... motions filed by pro se prisoners." (citing *United States v. Seesing,* 234 F.3d 456, 462–63 (9th

Cir.2000)) and *Green v. United States*, 260 F.3d 78, 83 (2d Cir. 2001) (*pro se* §2255 motion construed liberally).

The record does not conclusively show that Cota is entitled to no relief and, indeed, supports his contention that he was shackled in violation of the Due Process Clause and therefore entitled to a hearing under §2255(b). Thus, this Court should grant certiorari to review and reverse the Ninth Circuit's decision which violates §2255(b) and, in doing so, violated Cota's Fifth Amendment right to be tried free from shackles.

CONCLUSION

"'[N]o person should be tried while shackled and gagged except as a last resort' because of the distinct possibility of 'a significant effect on the jury's feelings about the defendant." *Rhoden v. Rowland*, 172 F.3d 633, 636 (9th Cir. 1999)(quoting *Illinois v. Allen*, 397 U.S. 337, 344 (1970)). Shackling during trial is a serious Due Process violation which strikes at the very heart of the Constitution's guarantee of a fair trial. Here Cota presented nine declarations attesting that he was shackled throughout his jury trial, a serious Due Process violation.

Because the affidavits submitted with Cota's petition were specific, detailed

and not contradicted by the record, a hearing was required under 28 U.S.C. §2255(b). The district court's factual findings, affirmed by the Ninth Circuit, which were made without the benefit of a hearing at which the witnesses could testify and be cross-examined, are clearly erroneous. Thus, the Ninth Circuit decision upholding the denial of a hearing on the significant constitutional issue of whether Cota was shackled during trial should be reviewed and reversed. Certiorari should therefore be granted.

Respectfully submitted,

Date: April 15, 2024

S/ Martha M. Hall

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

UNITED STATES OF AMERICA,

Respondent-Appellee,

vs.

ROBERT COTA, JR.,

Petitioner -Appellant.

PROOF OF SERVICE AND DECLARATION OF COUNSEL

MARTHA M. HALL, being first duly sworn, deposes and says:

Counsel was court appointed, pursuant to Title 18, United States Code Section 3006A (a)(2)(B), on appeal to the Ninth Circuit Court of Appeals;

That on April 15, 2024, the petition for writ of certiorari and motion were deposited in a United States Post Office mailbox located in San Diego, California, with first class postage prepaid, properly addressed to the Honorable William Sutter, Clerk of the Supreme Court of the United States, One First Street, NE, Washington, D.C. 20543;

That an additional copy of the petition, motion and the affidavit of proof of mailing of the petition was served on counsel for respondent: Elizabeth Prelogar, the Solicitor General of the United States, at the U.S. Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001, through the United States mail.

Dated at San Diego, California, this 15th day of April, 2024.

S/Martha M. Hall

Martha M. Hall

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

_____

UNITED STATES OF AMERICA,

Respondent-Appellee,

vs.

ROBERT COTA, JR.,

Petitioner -Appellant.

CERTIFICATE OF COMPLIANCE:

I, the undersigned, say:

I certify that the opening brief is proportionateley spaced, has a typeface of 14 points and is under 40 pages in compliance with Rule 33.2.

I certify under penalty of perjury that the foregoing is true and correct. Executed April 15, 2024, at San Diego, CA.

_____S/ Martha M. Hall_____
MARTHA M. HALL

APPENDIX A

NOT FOR PUBLICATION

FILED

SEP 28 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ROBERT COTA, Jr., Defendant-Appellant.	No. 19-56376 D.C. Nos. 3:18-cv-02787-WQH 3:11-cr-04153-WQH-10 MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
William Q. Hayes, District Judge, Presiding

Submitted August 16, 2023**
Pasadena, California

Before: WARDLAW, CHRISTEN, and SUNG, Circuit Judges.

Petitioner Robert Cota, Jr. appeals the district court's denial of his 28 U.S.C. § 2255 motion to vacate his conviction for conspiring to distribute methamphetamine. Cota claims that he was unconstitutionally shackled at trial. The district court judge, who also presided over Cota's trial, dismissed Cota's

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

motion, because he found that Cota was not shackled during trial. The judge made that factual finding without conducting an evidentiary hearing.[1]

We review a district court's decision not to hold an evidentiary hearing in a § 2255 proceeding for abuse of discretion. *United States v. Rodriguez*, 49 F.4th 1205, 1211 (9th Cir. 2022). We review factual findings and credibility determinations for clear error. *Earp v. Davis*, 881 F.3d 1135, 1142 (9th Cir. 2018). We conclude that the district court neither abused its discretion nor clearly erred, so we affirm.[2]

1. The district court did not abuse its discretion in resolving Cota's motion without an evidentiary hearing.[3] The record shows that the district court gave Cota's claim "careful consideration and plenary processing, including full opportunity for presentation of the relevant facts." *Shah v. United States*, 878 F.2d 1156, 1158 (9th Cir. 1989). Although 28 U.S.C. § 2255 creates a presumption in

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[1] Because the parties are familiar with the facts, we do not recount them here.

[2] We grant Cota's unopposed motion to take judicial notice (Dkt. 17) of documents relating to the Southern District of California's universal shackling policy. Although Cota argues that the universal shackling policy also creates the inference that he was shackled at trial, the policy, by its express terms, did not apply to jury trials, and the only case Cota identifies in which a defendant was shackled during trial was a misdemeanor bench trial.

[3] A two-member panel of this court granted a Certificate of Appealability (COA) only for the issue of procedural default. However, as the government concedes, the COA encompasses the threshold question of whether the district court abused its discretion by declining to hold an evidentiary hearing.

favor of holding evidentiary hearings, *see Rodriguez*, 49 F.4th at 1213, judges may alternatively rely on records, their own notes and recollections, and common sense to resolve factual disputes, especially when the factual dispute concerns something that occurred in open court and could be resolved by considering the trial record, *see Shah*, 878 F.2d at 1159. Here, the district court judge found that Cota was not shackled based on his review of the entire record of Cota's trial, including his "substantial efforts to prevent the jury from inferring that Petitioner was detained pre-trial." Cota argues that the district court failed to adequately explain why it did not credit Cota's supporting declarations. We disagree. The district court explained that at least one of the declarations was squarely contradicted by the record.[4] The court did not need to separately address each declaration; the record supports the adverse credibility determinations as to all of the declarations.

2. The district court did not clearly err in finding that Cota was not shackled at his trial.[5] We will overturn a factual finding as clearly erroneous only if it is "illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *Where Do We Go Berkeley v. Cal. Dep't of Transp.*, 32

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[4] The judge noted that Roland Cota claimed in his declaration to have been present "at the trial for the whole trial," even though he had been excluded from the courtroom as a witness prior to his testimony.

[5] Clear error review applies even where, as here, a district court made factual findings without holding an evidentiary hearing. *Crittenden v. Chappell*, 804 F.3d 998, 1006–07 (9th Cir. 2015).

F.4th 852, 857 (9th Cir. 2022). The court's efforts to deflect the jury's focus from Cota's detention and its ruling permitting Cota to stand when the jury entered and for objections provide support for the finding that Cota was not shackled; this supporting evidence is bolstered by the fact that the same judge also presided over Cota's trial. The court's factual finding and subsequent credibility determinations are thus not "without support" and therefore withstand clear error review. *Id.*

3. Cota's success on the merits of his shackling claim is foreclosed by the district court's finding that Cota was not shackled at trial. Because the district court did not clearly err in finding that Cota was not shackled, we do not reach the issue of whether procedural default applies to Cota's shackling claim.

AFFIRMED.

APPENDIX B

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ROBERT COTA, Jr., Defendant-Appellant.	No. 19-56376 D.C. Nos. 3:18-cv-02787-WQH 3:11-cr-04153-WQH-10 Southern District of California, San Diego ORDER

Before: WARDLAW, CHRISTEN, and SUNG, Circuit Judges.

The panel unanimously votes to deny the petition for panel rehearing and for rehearing en banc. The full court has been advised of the petition for rehearing and rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. ROBERT COTA JR. (10), Defendant.	Case No.: 11cr4153 WQH **ORDER**

HAYES, Judge,

The matter before the Court is the motion to reconsider and renewed motion for a reduction in sentence under 18 U.S.C. § 3582(c)(1) (ECF No. 1231) filed by the Defendant.

FACTS

On September 15, 2011, Defendant was charged with conspiracy to distribute methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846.

On September 28, 2011, a Notice of Intent to seek Enhancement was filed notifying the Defendant that the Government intended to seek an enhanced penalty under Title 21, United States Code, Sections 841, 846 and 851, based upon a prior conviction for a felony drug offense on July 10, 1997, in criminal case number SCD125062 for the felony offense of manufacturing a controlled substance, a violation of California Health and Safety Code §11379.6(a). Pursuant to the provisions of Title 21, United States Code,

Sections 841, 846 and 851, Defendant faced a mandatory term of 20 years of imprisonment upon conviction of the charge in the Indictment.

After a trial, the jury found Defendant guilty on the charge in the Indictment.

The Presentence Report concluded that the Defendant was a career offender having at least two prior felony convictions for a controlled substance offense. The Presentence Report detailed Defendant's criminal history including thirteen convictions starting at age 19 though age 44. Defendant's criminal history included more than five felony drug offenses in California and Nevada. The Presentence Report concluded that the total offense level was 37; the Criminal History Category was VI; and the guideline range was 360 months to life. Pursuant to the enhancement, the mandatory minimum sentence was 240 months.

On May 20, 2015, this Court entered Judgment committing Defendant to the custody of the Bureau of Prisons for a total term of 240 months and a supervised release term of ten years.

On February 1, 2021, the Court denied Defendant's motion for compassionate release. The Court concluded

> At the time of sentencing, the Court concluded that the 240 months sentence was the minimum sentence necessary to satisfy the sentencing factors set forth in § 3553(a). The Court accepts Defendant's position that a mandatory minimum sentence of 120 months would be applicable in his case after the passage of the First Step Act. While Congress did not conclude that all defendants subject to the prior 240 month mandatory minimum sentence should automatically receive new sentences, Congress expanded the power of the courts under §3582(c)(1) to reduce the sentences of some defendants based upon findings of extraordinary and compelling reasons and the consideration of 3553(a) sentencing factors. The revisions in sentencing provisions in the First Step Act can result in a disparity between the sentence that a defendant received before the First Step Act and the sentence a defendant would have received after the First Step Act. The resulting disparity is a relevant factor in determining whether extraordinary and compelling reasons may exist to reduce a defendant's sentence. *See United States v. Lott*, 95cr72

WQH, ECF No. 744, (June 8, 2020).

In this case, the Court detailed Defendant's unbroken string of criminal behavior starting at age 18 and continuing through the age of 50. The Court determined that 240 months was the appropriate sentence given the nature of the drug offense and the Defendant's lengthy history of criminal conduct. The Court takes into account the changes made in the First Step Act and finds no sentencing disparity constituting an extraordinary and compelling reason to reduce Defendant's sentence. Applying the factors under 18 U.S.C. § 3553(a), the Court granted a significant departure from the guideline range of 360 months to life. The Court concluded that 240 months in the custody of the Bureau of Prisons was the minimum sentence to satisfy the sentencing factors under 18 U.S.C. §3553(a) based upon the seriousness of the offense, Defendant's lengthy criminal history, and the need to protect the public from further crime.

Section 3553(a) provides that the sentencing court must impose a sentence that is "sufficient, but not greater than necessary … (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed education or vocational training, medical care, or other correctional treatment in the most effective manner[.]" 18 U.S.C. § 3553(a)(2)(A)-(D). The Court must also consider, among other factors, "the nature and circumstances of the offense and the history and characteristics of the defendant" and the "need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." *Id.*

These factors continue to weigh heavily against reducing the Defendant's sentence in light of the significant departure applied by the Court at the time of sentencing, the seriousness of the offenses, and the history and characteristics of this Defendant. The need for the sentence "to protect the public from further crimes of the defendant" and "to reflect the seriousness of the offense" under 18 U.S.C. §3553(a) continues to support the sentence imposed. Reducing this Defendant's sentence to time served would fail to protect the public, and fail to afford adequate deterrence to criminal conduct. The Court concludes that reducing Defendant's sentence to 110 months would not be

> consistent with any of the factors under § 3553(a) and any applicable policy statement issued by the Sentencing Commission.
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> In this case, medical records indicate Defendant suffers from obesity and chronic cough caused by a decade long history of smoking. Chronic conditions, such as obesity, that can be managed in prison are not a sufficient basis for compassionate release. The record demonstrates that Defendant continues to receive treatment for his existing medical conditions. There is no evidence that the treatment Defendant continues to receive for his medical conditions is not adequate. The facts presented in this record further show Bureau of Prisons modified operational plans to address the risk of COVID-19 transmission at FCI Lompoc. As of February 1, 2021, BOP reports confirmed no positive cases of COVID-19 inmates and three positive cases in staff, at FCI Lompoc. Three inmates have died from the infection, and 655 inmates have recovered. www.bop.gov/coronavirus/.
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> While the coronavirus remains a risk to all communities, relief under § 3582(c)(1)(a) can only be granted "after consideration of the factors set forth in 18 U.S.C. § 3553(a)" and when the Court finds that "extraordinary and compelling reasons warrant such a reduction." In this case, the application of the § 3553(a) factors weigh strongly against reducing Defendant's sentence and compelling reasons do not warrant a reduction of his sentence to time served.

ECF No. 1227. Defendant moves for reconsideration on the grounds that the Court committed clear error. Defendant asserts that the Court failed to consider evidence of Defendant's COPD and his particular vulnerability to COVID-19, and the Court erroneously found that Defendant continues to receive treatment for his medical conditions. Defendant further asserts that the Court failed to consider Defendant's clean disciplinary record since the date of sentencing. Plaintiff United States opposes reconsideration on the grounds that there are no changes in the law or the facts which would support Defendant's release. Plaintiff United States contends that the medical records do not demonstrate compelling reasons to reduce the sentence due to COVID-19 vulnerability, and that the refusal of the Defendant to accept the COVID-19 vaccine demonstrate a lack of self-care.

Plaintiff United States further asserts that the rehabilitation alone is not a compelling reason for sentence reduction.

RULING OF THE COURT

18 U.S.C. § 3582(c)(1)(A) provides:

> The court may not modify a term of imprisonment once it has been imposed except that--
> (1) in any case--
> (A) the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that--
> (i) extraordinary and compelling reasons warrant such a reduction;
>
> and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission;

18 U.S.C. § 3582(c)(1)(A).

The Court has considered the entire range of Defendant's conduct, prior to the imposition of sentence and after the imposition of sentence. There are no grounds to reconsider the ruling that "the application of the § 3553(a) factors weigh strongly against reducing Defendant's sentence and compelling reasons do not warrant a reduction of his sentence to time served." ECF No. 1227 at 8. Defendant does not present evidence to support a medical condition or other circumstance that would serve as "extraordinary and compelling reasons" for a sentence reduction under § 3582(c)(1)(A)(i). In this case, BOP records continue to report no positive cases of COVID-19 inmates at FCI Lompoc and the record shows that Defendant was offered the opportunity to receive the protections of the vaccine. Infection with the coronavirus remains a risk, however, the application of the §

3553(a) factors weigh strongly against reducing Defendant's sentence and compelling reasons do not warrant a reduction of his sentence under § 3582(c)(1)(A)(i).

IT IS HEREBY ORDERED that the motion to reconsider and renewed motion for a reduction in sentence under 18 U.S.C. § 3582(c)(1) (ECF No. 1231) is denied.

Dated: April 12, 2021

William Q. Hayes

Hon. William Q. Hayes
United States District Court