

In the Supreme Court of the United States

DAVID HOUSTON VARGAS,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondents.

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

SUPPLEMENTAL BRIEF FOR PETITIONER

SCOTT KEITH WILSON
Federal Public Defender,
District of Utah

JESSICA STENGEL
Assistant Federal Public Defender,
46 W. Broadway, Suite 110
Salt Lake City, Utah 84101
(801) 524-4010
Jessica_Stengel@fd.org

QUESTION PRESENTED

Whether a district court's failure to follow the plain language of the Sentencing Guidelines constitutes an incorrect application of the Sentencing Guidelines.

RELATED PROCEEDINGS

United States v. Vargas, No. 22-1400, 2024 WL 706842 (10th Cir. Feb. 21,
2024)

United States v. Vargas, No. 1:21-cr-00024-RBJ-1 (D. Colo. 2021)

TABLE OF CONTENTS

QUESTION PRESENTED	i
RELATED PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
SUPPLEMENTAL BRIEF FOR PETITIONER.....	1
CONCLUSION	3

TABLE OF AUTHORITIES

Federal Cases

<i>United States v. Anglin</i> , 169 F.3d 154 (2d Cir. 1999)	2
<i>United States v. Deleon</i> , -- F.4th --, 2024 WL 4048332 (11th Cir. Sept. 5, 2024)	1
<i>United States v. Vargas</i> , No. 22-1400, 2024 WL 706842 (10th Cir. Feb. 21, 2024)	ii

Rules

U.S.S.C. § 2B3.1	1, 2
------------------------	------

SUPPLEMENTAL BRIEF FOR PETITIONER

Petitioner David Vargas submits this supplemental brief pursuant to Supreme Court Rule 15.8 in order to call attention to the recent published decision by the Eleventh Circuit Court of Appeals in *United States v. Deleon*, -- F.4th --, 2024 WL 4048332 (11th Cir. Sept. 5, 2024). The opinion begins with the following disclaimer: “Our prior-precedent rule requires us to follow Eleventh Circuit precedent—even if we disagree with it or think that prior panels have overlooked important arguments—unless and until the Supreme Court or our court sitting en banc abrogates the precedent.” *Id.*

The basis for imposing the physical restraint enhancement in *Deleon* was the following: during an armed robbery, Mr. Deleon took out a handgun and pointed it at the cashier, who was standing behind a counter. The cashier emptied the register for Mr. Deleon. Mr. Deleon wasn’t satisfied; he repeatedly signaled for the cashier to keep looking in the cash register by reaching over the counter to point into the register. Once out of cash, the cashier handed over \$40 of postal stamps. The record shows that Mr. Deleon never actually touched the cashier. *Id.*

Judge Rosenbaum, joined by Judge Abudu, concurred with her own majority opinion, calling for en banc review. The concurrence masterfully identifies the problem: “a plain reading of the text of section 2B3.1(b)(4)(B) does not support” the broad application that the Eleventh Circuit has deemed permissible. If the text of section 2B3.1(b)(4)(B) cannot support the Eleventh Circuit’s broad application, then

it necessarily cannot sustain the limitless application that the Tenth Circuit applies.

Judge Rosenbuam identifies the same circuit split as Petitioner, but taking a macroscopic approach to the split. In doing so, she accurately characterizes the Eleventh Circuit's atextual approach (and by extension, the Tenth, First, Fourth, and Sixth Circuits) as a departure from "the heavier emphasis of textualism" and calls for the Eleventh Circuit to "align [its] jurisprudence with what section 2B3.1(b)(4)(B) actually says." *Id.*

She also recognizes that the five other circuits (the Second, Fifth, Seventh, Ninth, and D.C. Circuits) hew more closely to the plain text of section 2B3.1(b)(4)(b). These circuits all require "something *more* than *pointing* a gun and giving a command to justify the physical restraint enhancement." *Id.* Judge Rosenbaum specifically emphasized the Second Circuit's reasoning in *United States v. Anglin*, 169 F.3d 154 (2d Cir. 1999) as to why pointing a gun wasn't enough to merit the physical restraint enhancement: "virtually every robbery would be subject to the 2-level enhancement for physical restraint unless it took place in unoccupied premises." *Id.* (quoting *Anglin*, 169 F.3d at 165). Applying the physical restraint enhancement would be a "problematic effect for a provision drafted to deal with a special circumstance." *Id.*

The concurrence confirms that, as argued in Petitioner's petition for a writ of certiorari, there is an entrenched circuit split. The question presented in Petitioner's petition is of extraordinary importance and the split shows no sign of

resolution independent of this Court’s intervention. As the concurrence points as and as demonstrated in Petitioner’s case, the circuits are consistently unwilling to take up the issue en banc. The lower courts’ refusal to reconsider the misapplication of the plain text of the Guidelines—in the face of a clear and deeply-rooted circuit split—underscores the need for this Court to address the matter.

CONCLUSION

For the reasons set forth in Petitioner’s petition for a writ of certiorari and in Judge Rosenbaum’s concurring opinion, this Court should grant the writ of certiorari in this case.

Respectfully submitted,

SCOTT KEITH WILSON
Federal Public Defender

/s/ Jessica Stengel
Assistant Federal Defender
46 W. Broadway, Suite 110
Salt Lake City, UT 84101
(801) 524-4010

September 18, 2024