No. 24-5433

IN THE SUPREME COURT OF THE UNITED STATES

DAVID VARGAS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

NICOLE M. ARGENTIERI
Principal Deputy Assistant
Attorney General

JOHN-ALEX ROMANO
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the district court permissibly applied the sentence enhancement for physical restraint, Sentencing Guidelines § 2B3.1(b)(4)(B) (2021).

IN THE SUPREME COURT OF THE UNITED STATES

No. 24-5433

DAVID VARGAS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. 2a-10a) is available at 2024 WL 706842.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 2024. A petition for rehearing and rehearing en banc was denied on April 30, 2024 (Pet. App. 11a). On July 26, 2024, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including August 28, 2024. The petition for a writ of certiorari was filed on August 27, 2024. 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 District of Colorado, petitioner was convicted on two counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951(a) and 2; two counts of brandishing a firearm during and in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii); and one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Judgment 1. He was sentenced to 318 months of imprisonment, to be followed by three years of supervised release. Id. at 2-3. The court of appeals affirmed. Pet. App. 2a-10a.

1. On November 14, 2020, petitioner and an accomplice entered a Foot Locker store in Lakewood, Colorado, and began removing merchandise from the shelves. Pet. App. 3a; Gov't C.A. Br. 2. When a store employee tried to intervene, petitioner displayed a revolver, which was pointed downward. Pet. App. 3a. The employee heard a "click," which he believed to be the chamber of the revolver clicking into place. Ibid. Petitioner told the employee, "You're going to have to let us take everything." Ibid. Mistaking the employee's merchandise scanner for a cellphone, petitioner also instructed the employee to "[p]ut down the phone." Ibid. The employee complied by putting the scanner down, backing away, and raising his hands above his head. Ibid. Petitioner then told employees to stand back with their hands up and not to

call the police or do anything else. Id. at 3a-4a. After grabbing additional merchandise, petitioner and his accomplice left the store. Id. at 4a.

Petitioner and his accomplice then drove to a Designer Shoe Warehouse (DSW) store in Westminster, Colorado. Pet. App. 4a; Gov't C.A. Br. 4. Petitioner brought several pairs of shoes to the checkout counter as though he was going to purchase them. Pet. App. 4a. While the cashier removed the security tags from the shoes, petitioner removed a revolver from his hip pocket and loudly slammed it on the counter with the barrel facing the cashier. Ibid. When the cashier saw the gun, she backed up as far as she could and put her hands up. Gov't C.A. Br. 5. At one point a shoe box fell behind the counter, and petitioner gestured with the revolver for the cashier to pick it up. Pet. App. 4a. The barrel remained fixed on the cashier for most of the robbery. Ibid. Petitioner and his accomplice left the DSW store with stolen merchandise. Ibid.

Later that night, petitioner led police officers on a lengthy, high-speed car chase, during which a different accomplice fired shots at the officers. Pet. App. 4a. Petitioner escaped that night, but he was apprehended and arrested a few weeks later. Ibid.

2. A federal grand jury in the District of Colorado returned an indictment charging petitioner with two counts of Hobbs Act

robbery, in violation of 18 U.S.C. 1951(a) and 2; two counts of brandishing a firearm during and in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii) and 2; one count of aiding and abetting discharge of a firearm during and in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(iii) and 2; and one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Indictment 1-3.

The jury found petitioner guilty on all counts except aiding and abetting the discharge of a firearm. Pet. App. 5a; Judgment 1. The district court sentenced petitioner to 318 months of imprisonment: 150 months for the robbery convictions; 120 months for the felon-in-possession conviction, to run concurrently with the 150-month robbery sentences; and two mandatory, and consecutive sentences of 84 months each for the convictions for brandishing a firearm during the course of a crime of violence. Judgment 2.

The district court began by calculating the appropriate offense levels for the two robberies. As recommended by the Probation Office, over petitioner's objection, the court included in its calculation for both robberies a two-level enhancement for physical restraint under Sentencing Guidelines § 2B3.1(b)(4)(B) (2021), which provides for such an enhancement "if any person was physically restrained to facilitate commission of the offense or

to facilitate escape." Pet. App. 5a. The court reasoned that the enhancement applied to both robberies because petitioner had done "something more than mere brandishing" with his gun "to physically restrain the victim." Sent. Tr. 8. The court observed that during the Foot Locker robbery, "the employees put their hands up" and "put their belongings on the ground" while petitioner brandished the revolver, and during the DSW robbery, the cashier "retreated as far as she could" within the cashier's box after petitioner "slammed" the revolver on the counter and "pointed it at [her]." Id. at 8-9.

Combining the physical-restraint enhancement with other applicable offense-level adjustments and petitioner's criminal history, the Guidelines range for the robberies was 188 to 235 months' imprisonment. Pet. App. 5a. The government recommended a downward variance to 150 months. Gov't Sent. Statement 10-13. The government had originally recommended such a sentence based on a presentencing estimated Guidelines range of 120 to 150 months (which anticipated the physical-restraint enhancements, but not other aspects of the sentence) for the robberies. Sent. Tr. 18; Gov't Sent. Statement 10-13. Although the district court ultimately calculated a higher range of 188 to 235 months, the government stood by its initial recommendation at sentencing in light of the lengthy total sentence that petitioner would be serving. Sent. Tr. 20, 24-29.

The district court initially questioned whether the recommended downward variance was appropriate given the gravity of petitioner's offenses. Sent. Tr. 20. The court observed that the government's recommendation was "lower" than what the court had been "thinking of when [it] went through the file," and it stated that it had been inclined to sentence petitioner at the low end of his Guidelines range (188 months) on the robbery counts. Id. at 30, 37. But the court ultimately agreed with the government's recommendation and sentenced petitioner to 150 months on the robbery counts and a total sentence (including the consecutive sentences on the Section 924(c) counts) of 318 months. Id. at 39.

3. The court of appeals affirmed in an unpublished order. Pet. App. 2a-10a.

The court of appeals rejected petitioner's contention that the district court erred in applying the sentencing enhancement for physical restraint. Pet. App. 2a-3a. The court of appeals noted that, under circuit precedent, "[p]hysical restraint" is "not limited to physical touching of the victim," but instead occurs when "the defendant's conduct * * * hold[s] the victim back from some action, procedure, or course, prevent[s] the victim from doing something, or otherwise keep[s] the victim within bounds or under control." Id. at 7a (quoting United States v. Fisher, 132 F.3d 1327, 1329 (10th Cir. 1997), and United States v. Checora, 175 F.3d 782, 791 (10th Cir. 1999)). The court made clear,

however, that "'something more must be done with the gun' to apply the enhancement" -- something that "'keep[s] someone from doing something.'" Id. at 7a-8a (citations omitted).

The court of appeals found that petitioner did more than brandish his firearm in the Foot Locker robbery, during which he clicked the revolver's chamber into place while giving employees orders to prevent them from interfering, including "You're going to have to let us take everything," and later, "Put down the phone" and "Go stand back there with your hands up." Pet. App. 8a. The court observed that security-camera footage of the robbery, which showed the Foot Locker employees "frozen with their hands in the air," indicated that the employees "reasonably concluded that failure to comply would result in grave consequences." Ibid.

The court of appeals likewise found that petitioner did "more than merely brandish the revolver" in the DSW robbery. Pet. App. 9a. The court observed that petitioner "fixed" the gun's barrel "on the cashier" for most of that robbery, and that when petitioner pointed the gun at the cashier and "ordered her to pick up a fallen shoe box," "she complied." Ibid.

ARGUMENT

Petitioner contends (Pet. 7-19) that the physical-restraint enhancement in Sentencing Guidelines § 2B3.1(b)(4)(B) (2021) 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 fact-specific and does not warrant this Court's review. Moreover, the record shows that the district court likely would have imposed the same sentence even if it had not applied the physical-restraint enhancement, making this case a poor vehicle for reviewing the question presented.

The Court recently denied certiorari on the same issue concerning the scope of the sentencing enhancement for "physically restrain[ing]" a robbery victim under Sentencing Guidelines § 2B3.1(b)(4)(B). See Ware v. United States, 144 S. Ct. 1395 (2024) (No. 23-5946). Likewise, 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 paragraph, 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, 583 U.S. 854 (2017) (No. 16-9520). The Court should do the same here.

1. This Court ordinarily does not review decisions interpreting the Sentencing Guidelines, because the U.S. Sentencing 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 Booker, which rendered the Guidelines advisory only. 543 U.S. at 245.

No sound reason exists to depart from that practice here. The Commission has a quorum, see U.S. Sent. Comm'n, ORGANIZATION, https://www.ussc.gov/about/who-we-are/organization, and it has announced "[r]esolution of circuit conflicts" as one of its priorities, Final Priorities for Amendment Cycle, 88 Fed. Reg. 60,536, 60,537 (Sept. 1, 2023). And with respect to the specific issue here, 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, indicating that the Commission is aware of the question presented here. See Office of the Gen. Counsel, U.S. Sent. Comm'n, Primer: Robbery Offenses 29-30 (Aug. 2023), https://www.ussc.gov/sites/default/files/pdf/training/

primers/2023_Primer_Robbery.pdf (Commission Primer). Indeed, the report identifies many of the decisions cited by petitioner. Compare id. at 29-30 nn.194, 200, with Pet. 8-11.

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); id. § 2B3.1, comment. (n.1) (emphasis omitted). Three other Guidelines provisions use that same definition. See id. § 2B3.2(b)(5)(B) & comment. (n.1) (extortion by force or threat); id. § 2E2.1(b)(3)(B) & comment. (n.1) (credit extortion); id. § 3A1.3 & comment. (n.1) (restraint of victim). The Commission is best positioned to resolve a question, like this one, with broader implications for the Guidelines.

2. 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 term "[p]hysically restrained" is defined in the commentary 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 id. § 2B3.1, comment. (backg'd) (similar). The courts of appeals agree that the three examples of

forcible restraint in the Guidelines 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 permissibly applied the physical-restraint enhancement to both of petitioner's robberies. In each robbery, petitioner's victims were "physically restrained," Sentencing Guidelines § 2B3.1(b)(4)(B), when petitioner used his revolver and verbal commands to restrict their physical movement. During the Foot Locker robbery, petitioner audibly prepared the revolver for firing and directed the employees to hold up their hands and not to move. Pet. App. 3a, 8a. His actions constrained the victims' movement, leaving them "frozen with their hands in the air." Id. at 8a. And during the DSW robbery, petitioner slammed his revolver on the counter and kept the barrel trained on the cashier for most of the robbery. Id. at 4a. When the cashier saw the gun, she backed up as far as she could within the confines of the register and put her hands up. Gov't C.A. Br. 5. And at one point, petitioner waved the revolver to order the cashier to pick up a fallen shoe box. Pet. App. 4a.

Petitioner asserts that if his conduct qualifies for the physical-restraint enhancement, then so will "virtually every robbery," as victims rarely feel free to "move about or leave" while being robbed. Pet. 12 (citation and internal quotation marks omitted). That assertion lacks merit. The Tenth Circuit did not

conclude that petitioner's victims were "physically restrained" simply because the victims subjectively felt afraid to move. Instead, the court of appeals looked to both the victims' restricted movement and petitioner's conduct, noting that in each robbery petitioner "did something more than merely brandish the revolver" but rather used it in a way that "restricted the employees' movement and actions." Pet. App. 9a. Consistent with that approach, the Tenth Circuit has recognized that the enhancement would not apply if a robber "simply walked up to [a bank] teller's station with a gun visible in his waistband and demanded money," United States v. Miera, 539 F.3d 1232, 1236 (2008), cert. denied, 555 U.S. 1124 (2009), even though in that situation the teller might be afraid to move. The Tenth Circuit has also recognized that the enhancement does not apply where a robber waves his gun at a victim and tells him to "get out of here." United States v. Rucker, 178 F.3d 1369, 1373, cert. denied 528 U.S. 957 (1999). Petitioner's concerns that the enhancement would apply to "virtually every robbery" are thus misplaced.

3. Petitioner contends that the decision below conflicts with decisions of the Second, Third, Fifth, Sixth, Seventh, Ninth, and D.C. Circuits. Petitioner's assertion of a conflict is overstated, and this Court's intervention is would not be warranted even aside from the substantial likelihood that the Sentencing Commission will address the physical-restraint guideline.

a. By petitioner's own admission, three of the cases he cites did not address the fact pattern presented here: a defendant who uses a gun and verbal commands to restrict his robbery victims' physical movement. Pet. 10 (citing Bell, 947 F.3d at 58 & n.5 (3d Cir.); United States v. Ziesel, 38 F.4th 512, 517 (6th Cir. 2022); United States v. Herman, 930 F.3d 872, 876 (7th Cir. 2019)). In Ziesel, for example, the Sixth Circuit found that an unarmed defendant "ordering the tellers 'to the ground,' without more," was not sufficient to sustain the physical-restraint enhancement. 38 F.4th at 516. But the court of appeals there emphasized the absence of any "threat, real or implied, of use of a dangerous weapon." Id. at 518. Here, in contrast, the lower courts explained that petitioner was armed and took threatening actions with his revolver. Pet. App. 8a-9a.

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 Third Circuit 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 of appeals 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. 7a, there is no square conflict. Several of the Bell factors -- such as whether the defendant exerted control over the victim, provided the victim with no alternative but compliance and focused on the victim for some period of time -- counsel in favor of applying the enhancement here. And unlike in Bell, petitioner used a real firearm and succeeded in subduing his victims.

In United States v. Herman, a defendant who was visiting the home of a friend and his mother pulled out a revolver, instructed his hosts not to move, and ran out of the home. 930 F.3d at 873. The victims in that case "ignored [the defendant's] order" and ran after him, at which point he fired a shot past one of them. Ibid. The court of appeals held that the physical-enhancement restraint did not apply, emphasizing that a victim could choose to "ignore" a command by an armed robber -- as the victims in fact had done. Id. at 876. As with Bell, aspects of Herman may be in some tension with the decision below. See id. at 877 ("[M]ore than pointing a gun at someone and ordering that person not to move is necessary for the application of § 2B3.1(b)(4)(B)."). But the defendant in Herman did not succeed in restricting the movement of his victims using his gun and his verbal commands, and the facts of that case

are accordingly distinct from the facts of this one. Cf. California v. Hodari D., 499 U.S. 621, 629 (1991) (holding that a suspect is not "seized" under the Fourth Amendment when he does not comply with a show of authority).

b. Petitioner also contends that four courts of appeals have held that "pointing a gun at a person while commanding them to not move does not constitute physical restraint." Pet. 8 (citing United States v. Taylor, 961 F.3d 68 (2d Cir. 2020); United States v. Garcia, 857 F.3d 708 (5th Cir. 2017), cert. denied, 583 U.S. 1061 (2018); United States v. Parker, 241 F.3d 1114 (9th Cir. 2001); United States v. Drew, 200 F.3d 871 (D.C. Cir. 2000)) (emphasis omitted). Although there is some disagreement between those decisions and the decision below, much of that disagreement is narrow and fact-bound, and in any event does not warrant this Court's intervention.

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 reversed count, one of the robbers merely "pointed a gun at a bank teller and yelled at her to get down on the floor." Id. at 1118. But in finding that conduct insufficient, the court distinguished a situation where a defendant's "sustained focus on the restrained person * * * lasts long enough for the robber to direct the victim into a room or order the victim to walk

somewhere." Ibid. (emphasis removed). Petitioner's focus on the victims in this case was similar in respects to the sustained focus described in Parker, as petitioner gave repeated directives to the Foot Locker employees after clicking the chamber of his revolver and kept his revolver trained on the DSW cashier for most of the robbery, even motioning her to pick up a fallen item. Pet. App. 3a-4a, 7a-8a.

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 that the record did not sustain the enhancement where it showed that the defendant "herd[ed] customers, as well as employees, into a back room." Id. at 79-80; see United States v. Anglin, 169 F.3d 154, 163-165 (2d Cir. 1999). Several of the factors in Taylor may be satisfied in cases where the defendant uses a gun and verbal commands to physically restrain a victim -- for example, if the defendant also physically touched his victims or gave them unusually demanding verbal instructions -- so any delta between Taylor and the decision below is highly factbound and would appear to matter only at the margins.

In United States v. Garcia, 857 F.3d at 710, the Fifth Circuit found that the physical-restraint enhancement did not apply to a defendant who, along with his associates, held a gun to a store employee's head and demanded that the employee drop to the floor. The victim was not able to comply due to physical limitations, ibid., and thus the defendant's actions did not actually restrict the victim's movements as petitioner's actions in this case did. A second employee in the store was likewise not subdued -- he "rushed to the front of the store, took cover behind a display case, and loaded a pistol" upon hearing the robbers, and even after they shot him, he "stood and fired" back. Ibid. Garcia's discussion of the physical-restraint Guideline diverges from the decision below in certain respects. See id. at 713 (suggesting that the court would apply the physical-restraint enhancement only if the victims were subjected to the type of restraint "that victims experience when they are tied, bound, or locked up"). But given that the defendants in Garcia were not able to control their victims' movements as petitioner was here, it does not squarely conflict with the decision below.

Finally, in United States v. Drew, the D.C. Circuit held that similarly worded physical-restraint enhancement in Sentencing Guidelines § 3A1.3 did not apply where the defendant did not physically touch his victim-spouse but ordered her at gunpoint to leave her bedroom and walk down the stairs. 200 F.3d at 880. The

court concluded that "physical restraint requires the defendant either to restrain the victim through bodily contact or to confine the victim in some way." Ibid. Although that approach is difficult to square with the Tenth Circuit's decision in this case, the court was applying a different Guidelines enhancement outside the context of a robbery. And any tension between the two decisions does not require this Court's intervention, particularly given the Commission's awareness of this issue (and the Drew decision in particular, see Commission Primer 30 n.200) and ability to resolve disagreements regarding the Guidelines.

4. In all events, this case would be a poor vehicle for resolving the question presented because even if the district court erred in imposing the two-level physical-restraint enhancement, that error did not prejudice petitioner. As petitioner notes (Pet. 3), his Guidelines range without the physical-restraint enhancement would have been 151 to 188 months of imprisonment for the robbery counts. The 150-month sentence that the court imposed in this case thus would still be below the advisory range, and the sentencing record does not indicate that the court would have imposed an even lower sentence. The court considered petitioner's arguments for a greater downward variance, but stated that it was persuaded by the government's recommendation -- whose leniency it initially questioned -- that 150 months was appropriate. Sent. Tr. 32-36. And the record indicates that the government would

have recommended the same 150-month sentence even if the physical-restraint enhancement had not applied, because the government's 150-month recommendation was originally based on an estimated Guidelines range (120 to 150 months) that was even lower than the Guidelines range that would apply absent the enhancement (151 to 188 months). See pp. 5-6, supra. The record thus strongly suggests that the court would have imposed the same below-Guidelines 150-month sentence regardless of whether the physical-restraint enhancement applied. At a minimum, therefore, petitioner is unlikely to obtain practical relief even if this Court were to grant certiorari and issue a decision in his favor.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

NICOLE M. ARGENTIERI
Principal Deputy Assistant
Attorney General

JOHN-ALEX ROMANO
Attorney

NOVEMBER 2024