

24-7058

No. _____

ORIGINAL

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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

TODD EUGENE CANNADY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Todd Eugene Cannady, Reg. # 86669-012
Federal Correctional Institution
3600 Guard Road
Lompoc, California 93436

In Propria Persona

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QUESTION PRESENTED

Was the Petitioner's Fifth Amendment Due Process rights violated when the Ninth Circuit denied his Certificate of Appealability petition for a procedurally dismissed § 2255 habeas without conducting the mandatory § 2253(c) threshold inquiry?

Did trial counsel's failure to object to the physical restraint enhancement in the base offense level calculation constitute ineffective assistance of counsel under the Sixth Amendment?

The physical restraint enhancement in U.S.S.G. § 2B3.1(b)(4)(B) has different interpretations across Circuits. The Ninth Circuit's view contrasts with others, indicating a need for review. Circuit courts are divided on applying this enhancement in the Sentencing Guidelines, leading to varied conclusions in similar cases. To resolve this split, a standardized test is needed for a consistent definition.

Whether U.S.S.G. § 2B3.1(b)(4)(B), the term "physically restrained" is defined in Application Note 1 (L) to §1B1.1 (Application Instructions) as "the forcible restraint of the victim such as by being tied, bound, or locked up," which serves as the controlling interpretation of that guideline.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner, Todd Eugene Cannady was the sole defendant in the criminal case prosecuted by the United States Attorney's Office for the Central District of California in the United States District Court for the Central District of California.

STATEMENT OF RELATED PROCEEDINGS

Todd Eugene Cannady v. United States, Case No: 5:23-cv-0186-SB, United States District Court for the Central District of California. Judgment entered January 16, 2024.

Todd Eugene Cannady v. United States, Case No: 24-1065, U.S. Court of Appeals for the Ninth Circuit. Judgment entered January 24, 2025.

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ORDERS BELOW

The Ninth Circuit's order on January 24, 2025 denying a certificate of appealability was not reported and is included in the Appendix A.

The district court entered on February 24, 2024 denying a Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. § 2255. (Appendix D) The district court's criminal judgment imposing sentence was entered on July 26, 2022.

JURISDICTION

The Ninth Circuit denied Petitioner's COA motion on January 24, 2025. (Appendix A) Under Rule 13(c) which of this Court's Rules, Petitioner has ninety days from that date to file a petition. This petition is being filed on or about March 14, 2025, exactly ninety days from the denial.

Under 28 U.S.C. § 1254(1), the Supreme Court has jurisdiction to review denial of application for a certificate of appealability by circuit judge or appellate panel because application qualifies as "case" *Hohn v. United States*, 524 U.S. 236, 241 (1998).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment states, in pertinent part: "[N]or be deprived of life, liberty, or property, without due process of law...."

The Sixth Amendment states, in pertinent part: "that in all criminal prosecutions, the accused shall enjoy the right '[t]o have the Assistance of Counsel for his defense....'"

SENTENCING GUIDELINES PROVISIONS

Subsection (b)(4)(B) of §2B3.1 (Robbery) provides for a 2-level enhancement "if any person was physically restrained to facilitate escape."

Application Notes:

For purposes of § 2B3.1(b)(4)(B), the term "physically restrained" is defined in Application Note 1 (L) to §1B1.1 (Application Instructions) as "the forcible restraint of the victim such as by being tied, bound, or locked up." For many years, this broad definition.¹

Additional provisions of the 2021 U.S. Sentencing Guidelines are reproduced in Appendix E.

¹ U.S. Sentencing Guidelines Manual § 1B1.1, cmt. 1(L) (U.S. Sentencing Commission 2022).

STATEMENT OF THE CASE

A. Legal Background

1. Introduction

This petition asks whether the U.S. Sentencing Guidelines are uniquely immune from the interpretive principles that govern other sources of federal law. At Congress's direction, the U.S. Sentencing Commission, a federal agency, promulgates Guidelines that specify sentencing ranges for federal defendants. Like other agencies, the Commission promulgates text (the Guidelines) that is subject to mandatory congressional review notice-and-comment procedures, and commentaries on the text (Application Notes) that are not. And like other federal provisions, the Guidelines impose collateral consequences on individuals for their offense characteristics such as a physical restraint enhancement.

Under the Federal Sentencing Guidelines Manual ("Guidelines"), "physically restrained" is defined as "the forcible restraint of the victim such as being tied, bound, or locked up."² For many years, this broad definition³ has been a headache to apply when a defendant is convicted of armed bank robbery under 18 U.S.C. §2113(a)(d).⁴ This is because Chapter Two of the Guidelines allows prosecutors to increase⁵ the convicted defendant's "base offense level"⁶ by two points if the defendant had physically restrained a victim to "facilitate [the] commission of the offense or to facilitate escape."⁷ While the Guidelines themselves do not limit the issue of physical restraint at sentencing to robbery cases, this sub-section narrows its focus to the physical restraint enhancement used in robbery cases under Chapter Two of the Guidelines.⁸

Yet despite the Guidelines' similarity to other federal law, circuits are deeply split on whether the interpretative methodologies that generally apply to federal law likewise govern the Guidelines. It is undisputed, for instance, that this Court uses a "categorical approach" that "requires the court to come up with a 'generic' version of a crime – that is, the elements of 'the offense as commonly understood'" "when the statute refers generally to an offense without specifying its elements." *Shular v. United States*, 140 S.Ct. 779, 783 (2020). Yet the circuits are

² U.S. Sentencing Guidelines Manual § 1B1.1, cmt 1(L) (U.S. Sentencing Manual 2024).

³ See *United States v. Thompson*, 109 F.3d 639, 641 (9th Cir.1997) ("[T]he application note unhelpfully states that 'physical restraint' means 'forcible restraint.' Yet, as we have said, restraint itself includes the use of force. Thus, the application would appear to refer to the *forcible use of force, which redundancy does not advance matters much.*") (emphases added).

⁴ See, e.g., *United States v. Herman*, 930 F.3d 872, 875-76 (7th Cir.2019). Also held the Guidelines do not limit the issue of physical restraint at sentencing to robbery cases. . See U.S. Sentencing Guidelines Manual § 3A1.3. However, Note narrows its focus to the issue of physical restraint as it relates to robbery sentencing under Chapter Two of the Guidelines. See U.S. Sentencing Guidelines Manual § 2B3.1(b)(4)(B). (U.S. Sentencing Guidelines Manual 2021).

⁵ This increase is known as a "sentencing enhancement." They are applicable "only if the defendant has already committed some other underlying crime[...]the prosecutor elects to charge it[,] and...the sentencing enhancement has not been incorporated into the Guidelines calculation for the underlying crime." Michael A. Simons, Prosecutors as Punishment Theorists: Seeking Sentencing Justice, 16 GEO. MASON L. REV. 303, 329 (2009). When they are applied, they "often generate sentences far different from the otherwise applicable Guidelines sentences." *Id.* at 330.

⁶ The base offense level is general measurement of the severity of the crime.

⁷ U.S. Sentencing Guidelines Manual § 2B3.1(b)(4)(B) (2021).

⁸ *Id.* § 3A1.3

split on whether that categorical approach applies to undefined generic offenses in the Guidelines. It is likewise settled that a court may not defer to an agency's interpretation of regulation "unless the regulation is genuinely ambiguous," and that "before concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019). Yet the circuits are also split on whether they should defer to the Commission's commentary interpreting the Guidelines without such a finding of genuine ambiguity in the guideline text.

The questions presented are important and warrant this Court's review. Not only do they involve fundamental questions about how courts should interpret the Guidelines, but (in this case) the failure of Petitioner's trial counsel to object to an erroneous physical restraint enhancement at the sentencing hearing, which affected the base offense level, was tantamount to Petitioner having no legal representation. Currently, federal circuit courts are divided on how to apply the robbery abduction enhancement as outlined in the United States Sentencing Guidelines. Due to varying interpretations and the lack of consensus on what constitutes an abduction, courts have reached significantly different conclusions in nearly identical cases. To address this split, it is imperative for this Court to establish a functional test that provides a unified definition of location. The enhancement leads to increased punishment for Petitioners subjected to a physical restraint enhancement during sentencing.

FACTS MATERIAL TO QUESTIONS PRESENTED

Petitioner filed a 28 U.S.C. §2255 motion raising two constitutional issues. The United States District Court for the Central District of California summarily denied an evidentiary hearing and dismissed the case procedurally without issuing a Certificate of Appealability (COA) for ineffective assistance of counsel claims. (Appendix D) Petitioner then appealed this procedural dismissal and requested a COA.

Petitioner knew he needed to meet the jurisdictional prerequisite of 28 U.S.C. §2253(c)(1), requiring a substantial showing of the denial of a constitutional right, to appeal his petition's dismissal. This means showing that reasonable jurists would find it debatable whether the petition states a valid claim and whether the district court's procedural ruling was correct. *Miller-El v. Cockrell*, 537 U.S. 322, 336-37 (2003); *Slack v. McDaniel*, 529 U.S. 473, 529 (2000).

The district court used the Miller-El threshold and the Slack test, concluding that Petitioner failed to show a substantial constitutional denial required for COA. It found that reasonable jurists would not debate its decision on the merits or procedural dismissal and denied COA on both issues.

Petitioner filed a COA application to the Ninth Circuit.

The Ninth Circuit denied the Petitioner's Certificate of Appealability (COA) application. (Appendix A) The decision was based on the fact that although the Petitioner's COA application requested a COA on his claims: (1) that his attorney failed to object to the district court's inaccurate calculation of the *sentencing guidelines* of the base offense level, related to the erroneous physical restraint enhancement under USSG §2B3.1(b)(4)(B), at the time of sentencing; and (2) that *he*

received ineffective assistance of counsel (IAC) under the Sixth Amendment of the U.S. Constitution, and due process rights were violated when his sentence was improperly enhanced by a physical restraint enhancement; he had provided a detailed briefing on whether reasonable jurists would debate the propriety of the district court's dismissal of his motion. (Appendix B).

Petitioner contends that he is entitled to an appeal of the dismissal of his petition and that the Ninth Circuit denied him the right to appeal by refusing to perform the §2253(c) threshold inquiry, to see if the circuit court could entertain the appeal. Petitioner's Fifth Amendment Right to Due Process was violated by the appellate court's refusal to determine if an appeal of the district court's order could be taken.

The following relevant facts, summaries, and pertinent quotations of specific portions of the record hopefully show this Court that the district court's application of Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") to Petitioner's constitutional claims was debatable among jurists of reason, and that the appellate court should have issued COA after performing the mandatory §2253(c) threshold inquiry. The record also supports, and Petitioner requests that this Court determines the circuit conflicts, eleven courts of appeals have been divided on whether to apply USSG §2B3.1(b)(4)(B)'s two-point sentencing enhancement when a firearm is brandished during the commission of a robbery.

1. The Sentencing Guidelines

The United States Sentencing Commission is a federal agency that issues "Guidelines *** for use of a sentencing court in determining the sentence to be imposed in a criminal case." 28 U.S.C. § 994(a)(1). The Commission must submit proposed guideline amendments to Congress, which has six months to review them before they take effect. *Id.* § 994(a)(1). The proposed amendments must comply with the notice-and-comment requirements of the Administrative Procedure Act. *Id.* § 994(x). The Commission also produces commentary to its Guidelines, but the commentary is not subject to the mandatory Congressional review and notice-and-comment procedures applying to the Guidelines themselves.

Under that framework, the Commission promulgated U.S.S.G. § 2B3.1(b)(4)(B) and § 1B1.1 Application Note 1(L). Section 1B1.1 Application Note 1(L), "physical restrained", specifies means the forcible restraint of the victim such as by being tied, bound, or locked up.

2. Administrative Deference

In *Bowles v. Sminole Rock & Sand Co.*, this Court held that when the "meaning of [a regulation] is in doubt," "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." 325 U.S. 410, 413 (1945). That holding, known at first as *Seminole Rock* deference and later as *Auer* deference (after *Auer v. Robbins*, 519 U.S. 452 (1997)) became the "most classic formulation" of the test for when courts must defer to agency interpretations of their own regulations. *Kisor*, 139 S. Ct. at 2415.

In *Stinson v. United States*, this Court applied that principle of agency deference to the Sentencing Commission's commentary on its guidelines. The Court held that "the commentary [should] be treated as an agency's interpretation of its own legislative rule." 508 U.S. 36, 44 (1993). It thus held that if the Commission's commentary "does not violate the Constitution or a federal statute, it must be given 'controlling weight unless it is plainly erroneous or inconsistent with'" the Guidelines. *Id.* at 45 (quoting *Seminole Rock & Sand Co.*, 325 U.S. at 414).

In 2019, this Court in *Kisor* narrowly declined to overrule *Auer*, 139 S. Ct. at 2418-23; *Id.* at 2424 (Roberts, C.J., concurring). The Court acknowledged that its "most classic formulation" of its agency deference test — the one developed in *Seminole Rock* and applied in Stinson — "may suggest a caricature of the doctrine, in which deference is 'reflexive.'" *Id.* at 2415. But the Court held, properly applied, *Auer* does not "bestow [] on agencies expansive, unreviewable' authority," but rather obligates "courts to perform their reviewing and restraining functions." *Id.*

To ensure such proper application, the Court "reinforc[ed] some of the limits inherent in the *Auer* doctrine." *Id.* "First and foremost" among these limits is that "a court should not afford *Auer* deference unless the regulation is genuinely ambiguous." *Id.* Deference without genuine ambiguity "would 'permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.'" *Id.* (quoting *Christensen v. Harris County*, 529 U.S. 576, 588 (2000)). And "before concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction." *Id.*

3. Sentencing Commission Proposed Guideline Amendments

United States Sentencing Commission, made a summary proposal of 2025 Amendments (Published December 2024) Seeks comment on a two-part proposed amendment addressing circuit conflicts concerning (A) whether the "physically restrained" enhancement at §2B3.1 (Robbery) can be applied to situations in which a victim is restricted from moving at gunpoint but is not otherwise immobilized through physical measures.

Pursuant to Section 2B3.1(b)(4)(B) of the U.S. Sentencing Guidelines (Physical Restraint) the United States Sentencing Commission has proposed an amendment (December 2024) as follows:

Synopsis of Proposed Amendment: Subsection (b)(4)(B) of §2B3.1 (Robbery) provides for a 2-level enhancement "if any person was physically restrained to facilitate commission of the offense or to facilitate escape." For purposes of §2B3.1(b)(4)(B), the term "physically restrained" is defined in Application Note 1(L) to §1B1.1 (Application Instructions) as "the forcible restraint of the victim such as by being tied, bound, or locked up."

A circuit conflict has arisen concerning whether the enhancement at §2B3.1(b)(4)(B) can be applied to situations in which a victim is restricted from moving at gunpoint but is not otherwise immobilized through physical measures such as those outlined in the Commentary to §1B1.1 (i.e., "being tied, bound, or locked up").

The First, Fourth, Sixth, Tenth, and Eleventh Circuits have held that restricting a victim from moving at gunpoint suffices for the enhancement. See, e.g., United States v. Wallace, 461 F.3d 15, 34–35 (1st Cir. 2006) (affirming application of enhancement where one victim had her path blocked and was ordered at gunpoint to stop, and the other had a gun pointed directly at his face and chest, “at close range,” and was commanded to “look straight ahead into the gun and not to move”); United States v. Dimache, 665 F.3d 603, 608 (4th Cir. 2011) (upholding enhancement where “two bank tellers ordered to the floor at gunpoint were prevented from both leaving the bank and thwarting the bank robbery”); United States v. Howell, 17 F.4th 673, 692 (6th Cir. 2021) (noting that the Sixth Circuit has “rejected the notion of a ‘physical component’ limitation as inapt” and upholding enhancement where victim was ordered at gunpoint to lie down on the floor (citation omitted)); United States v. Miera, 539 F.3d 1232, 1235–36 (10th Cir. 2008) (pointing gun around, commanding bank occupants not to move, and blocking door sufficed for enhancement); United States v. Deleon, 116 F.4th 1260, 1261–62 (11th Cir. 2024) (affirming application of enhancement where the defendant “pointed a gun at the cashier while demanding money” but never “actually touched the cashier”).

By contrast, the Second, Third, Fifth, Seventh, Ninth, and D.C. Circuits largely agree that a restraint must be “physical” for the enhancement to apply and that the psychological coercion of pointing a gun at a victim, without more, does not qualify. See, e.g., United States v. Anglin, 169 F.3d 154, 164 (2d Cir. 1999) (“displaying a gun and telling people to get down and not move, without more, is insufficient to trigger the ‘physical restraint’ enhancement”); United States v. Bell, 947 F.3d 49, 57, 60–61 (3d Cir. 2020) (adopting “the requirement that the restraint involve some physical aspect”; placing fake gun on victim’s neck and forcing him to floor did not suffice); United States v. Garcia, 857 F.3d 708, 713–14 (5th Cir. 2017) (vacating enhancement because “standing near a door, holding a firearm, and instructing a victim to get on the ground” did not “differentiate th[e] case in any meaningful way from a typical armed robbery”); United States v. Herman, 930 F.3d 872, 877 (7th Cir. 2019) (“more than pointing a gun at someone and ordering that person not to move is necessary”); United States v. Parker, 241 F.3d 1114, 1118–19 (9th Cir. 2001) (“briefly pointing a gun at a victim and commanding her once to get down” did not constitute “physical restraint, given that nearly all armed bank robberies will presumably involve such acts”); see also United States v. Drew, 200 F.3d 871, 880 (D.C. Cir. 2000) (“the phrase ‘being tied, bound, or locked up’ indicates that physical restraint requires the defendant either to restrain the victim through bodily contact or to confine the victim in some way”; physically restrained adjustment did not apply where victim was ordered to walk down the stairs at gunpoint).

Part A of the proposed amendment presents three options for responding to this circuit conflict by amending the enhancement at §2B3.1(b)(4)(B).

Option 1 would generally adopt the approach of the First, Fourth, Sixth, Tenth, and Eleventh Circuits that the enhancement applies with or without physical measures. It would amend the language of §2B3.1(b)(4)(B) to specify that the increase applies to cases in which “any person’s freedom of movement was restricted through physical contact or confinement (such as being tied, bound, or locked up) or other means (such as being held at gunpoint or having a path of escape

blocked) to facilitate commission of the offense or to facilitate escape.” **Option 1** also includes conforming changes to the Commentary to §2B3.1.

Option 2 would generally adopt the approach of the Second, Third, Fifth, Seventh, Ninth, and D.C. Circuits that physical measures must be used for the enhancement to apply. It would amend the language of §2B3.1(b)(4)(B) to clarify that the increase applies only in cases in which “any person’s freedom of movement was restricted through physical contact or confinement, such as being tied, bound, or locked up, to facilitate commission of the offense or to facilitate escape.” **Option 2** also includes conforming changes to the Commentary to §2B3.1.

Option 3 would combine the approaches from both sides of the circuit split into a two-tiered enhancement that would replace the current “physically restrained” enhancement at 103 §2B3.1(b)(4)(B). The new enhancement would provide for a 2-level enhancement for offenses in which “any person’s freedom of movement was restricted through physical contact or confinement, such as being tied, bound, or locked up, to facilitate commission of the offense or to facilitate escape.” It would also add a 1-level enhancement for offenses in which “any person’s freedom of movement was restricted through means other than physical contact or confinement, such as being held at gunpoint or having a path of escape blocked, to facilitate commission of the offense or to facilitate escape.” **Option 3** includes conforming changes to the Commentary to §2B3.1.

Issues for comment are also provided.

Proposed Amendment: Option 1 (First, Fourth, Sixth, Tenth, and Eleventh Approach – Physical or Non-Physical Means):

Section 2B3.1(b)(4)(B) is amended by striking “if any person was physically restrained” and inserting “if any person’s freedom of movement was restricted through physical contact or confinement (such as being tied, bound, or locked up) or other means (such as being held at gunpoint or having a path of escape blocked)”.

The Commentary to §2B3.1 captioned “Application Notes” is amended in Note 1 by striking “‘abducted,’ and ‘physically restrained’ are defined” and inserting “and ‘abducted,’ have the meaning given such terms”.

The Commentary to §2B3.1 captioned “Background” is amended by striking “was physically restrained by being tied, bound, or lock up” and inserting “a victim’s freedom of movement was restricted”.

Option 2 (Second, Third, Fifth, Seventh, Ninth, and D.C. Circuits Approach – Physical Contact or Confinement Required): Section 2B3.1(b)(4)(B) is amended by striking “if any person was physically restrained” and inserting “if any person’s freedom of movement was restricted through physical contact or confinement, such as being tied, bound, or locked up.”.

The Commentary to §2B3.1 captioned “Application Notes” is amended in Note 1 by striking “‘abducted,’ and ‘physically restrained’ are defined” and inserting “and ‘abducted,’ have the meaning given such terms”.

The Commentary to §2B3.1 captioned “Background” is amended by striking “was physically restrained by being tied, bound, or lock up” and inserting “a victim’s freedom of movement was restricted”.

Option 3 (Combination of Both Approaches):

Section 2B3.1(b)(4) is amended by striking the following:

“(A) If any person was abducted to facilitate commission of the offense or to facilitate escape, increase by 4 levels; or (B) if any person was physically restrained to facilitate commission of the offense or to facilitate escape, increase by 2 levels”; and inserting the following:

“(A) If any person was abducted to facilitate escape, increase by 4 levels; (B) if any person’s freedom of movement was restricted through physical contact or confinement, such as being tied, bound, or locked up, to facilitate commission of the offense or to facilitate escape, increase by 2 levels; or (C) if any person’s freedom of movement was restricted through means other than physical contact or confinement, such as being held at gunpoint or having a path of escape blocked, to facilitate commission of the offense or to facilitate escape, increase by 1 level”.

The Commentary to §2B3.1 captioned “Application Notes” is amended in Note 1 by striking “‘abducted,’ and ‘physically restrained’ are defined” and inserting “and ‘abducted,’ have the meaning given such terms”.

The Commentary to §2B3.1 captioned “Background” is amended by striking “was physically restrained by being tied, bound, or lock up” and inserting “a victim’s freedom of movement was restricted”.

Issues for Comment

The term “physically restrained,” as used in §2B3.1 (Robbery), is defined in Application Note 1(L) of the Commentary to §1B1.1 (Application Instructions). Other Guidelines also use the term “physically restrained” and define such term by reference to the Commentary to §1B1.1. See §2B3.2(b)(5)(B) (“[I]f any person was physically restrained to facilitate commission of the offense or to facilitate escape, increase by 2 levels.”), 2E2.1(b)(3)(B) (“[I]f any person was physically restrained to facilitate commission of the offense or to facilitate escape, increase by 2 levels.”), 3A1.3 (“If a victim was physically restrained in the course of the offense, increase by 2 levels.”). If the Commission were to promulgate Part A of the proposed amendment, should the Commission also amend any or all of these other Guidelines to mirror the proposed approach for §2B3.1? Instead of amending §2B3.1 or the other Guidelines, should the Commission amend Application Note 1(L) of the Commentary to §1B1.1 to mirror the proposed approach for §2B3.1?

PROCEDURAL HISTORY

On August 20, 2021, an Information charging document was filed in the district court against Petitioner Todd Eugene Cannady (hereinafter “Petitioner”) alleging a violation of 18 U.S.C. § 2113 (a) (d) armed bank robbery. Petitioner made his initial appearance before a

Magistrate Judge and was appointed counsel through the Federal Public Defenders Office, to Deputy Federal Public Defender, Young J. Kim as counsel of record. Petitioner was detained in pretrial detention in the custody of the United States Marshals Service at the Federal Bureau of Prisons' Metropolitan Detention Center, Los Angeles.

On August 3, 2021, Petitioner waived his right to a preliminary hearing and on August 20, 2021, a two count Information was filed charging him with armed bank robbery in violation of 18 U.S.C. §2113(a) (d) and possess, use, carry, and brandish a firearm during in and furtherance of a crime of violence of 18 U.S.C. § 924(c) (1)(A) (ii). On October 5, 2021, the district court held a change of plea hearing and Petitioner entered a guilty plea to counts one and two of the Information filed pursuant to the Government's plea agreement. Subsequently, on February 23, 2022, Young Kim, Deputy Federal Public Defender filed an *Ex Parte* Application for an Order to withdraw as the appointed counsel, and the district court entered an order granting substitution of counsel. Thereinafter Richard Callahan, Jr. was appointed as panel counsel under the Criminal Justice Act.

At the time of sentencing, Petitioner's attorney, Richard M. Callahan, Jr. (hereinafter "trial counsel") failed to object to the district court's inaccurate calculation of the base offense level, the miscalculation of his criminal history category including but not limited to the failure to object to the erroneous physical restraint enhancement. Instead, trial counsel focused all his effort on urging the district court to grant a variance based on Petitioner's past social history and recent diagnosis related to mental health disorders.⁹ While there is nothing wrong with this approach, counsel erred in failing to contest the district court's offense level of 31 and the placement of Petitioner's criminal history in category IV. A closer examination of Petitioner's offense level scoring and criminal history calculation reveals that he should have properly been placed in offense level 29 and criminal history category III, not IV with a sentencing guideline range of 108 to 135 months of imprisonment on count one. When the district court ultimately sentenced Petitioner to 151 months as to count one, it did so by first establishing the guideline range based on an adjusted offense level of 31 and criminal history category IV, yielding a sentencing range of 151-188

⁹ Trial Counsel's sentencing memorandum state: "Cannady's mental state at the time of the offenses can and should be considered by the Court in mitigation at sentencing even though not amounting to a full defense of the criminal charge. See e.g., *United States v. Cantu*, 12 F.3d 1506, 1512 (9th Cir.1993) (in felon in possession of a firearm case, combat veteran suffering from PTSD and depression entitled to departure); *United States v. Gray*, 453 F.3d 1323 (11th Cir. 2006) (in pornography distribution case, lower court sentenced defendant to less than one-half of the Guideline calculation due to factors including the defendant's age, minimal record, fact he suffered from depression and tried to commit suicide several times).

As evidenced from Petitioner's mental health evaluation conducted by psychologist Nadim Karim, Ph.D., that: "Mr. Cannady has suffered for years from several mental health disorders, none of which has ever been properly treated:

Based on his clinical presentation, I would opine that Mr. Cannady presents with the following DSM V mental disorders: PTSD; Generalized Anxiety; and Persistent Depressive Disorder.
[See Eval. at 8]. (Dkt. 37, 38)

Dr. Karim recommends Mr. Cannady receive "mental health treatment that can address his clinical needs (such as Rochester)." Eval. at 9. The Federal Medical Center (FMC) in Rochester, Minnesota is highly regarded to treat a myriad of mental health conditions, including the psychological issues present here. It is requested that the Court recommend Mr. Cannady be housed at FMC Rochester for treatment of his mental health diagnosis. In addition, the evaluation Dr. Karim recommended that "Mr. Cannady receive a full neurological scan to assess whether he suffers from a Neurocognitive Disorder." *Id.*

months of imprisonment for Count One. As to Count Two of the Information charged Possession, Use, Carry, Brandish a Firearm in Furtherance of and During and in Relation to, a Crime of Violence in violation of 18 U.S.C. § 924(c)(1)(A)(ii) the district court imposed 84 months to be served consecutively, for the term of imprisonment of 235 months as to Counts one and two of Information to be served consecutively.

On July 26, 2022, the district court imposed a sentence of 235 months of imprisonment on Counts one and two of the Information with five years of supervised release and a restitution order. The district court made a judicial recommendation at the time of sentencing to the Bureau of Prisons that in designating the Petitioner, “the Bureau of Prisons consider designation to the Federal Medical Center (FMC) in Rochester, Minnesota. If FMC Rochester is unavailable, the [district] court recommends the Bureau of Prisons designate the [Petitioner] to a facility where he may receive regular mental health counseling.”¹⁰ On August 8, 2022, Petitioner filed a Notice of Appeal to the United States Court of Appeals for the Ninth Circuit.

Although Petitioner waived his right to a direct appeal or collaterally attack his sentence, the terms of the plea agreement expressly reserve his right to make claims of ineffective assistance of counsel. As both the arguments presented below are based on counsel’s lapses at the time sentencing, they were properly presented in the district court pursuant to 28 U.S.C. §2255. In support of this request for writ of certiorari, Petitioner submits the following:

APPELLATE COURT COA PETITION

A. Petitioner’s Appellate Court COA Application

The petitioner initiated his Certificate of Appealability (COA) petition pursuant to 28 U.S.C. §2253(c), requesting COA from the appellate court. He asserted that the issues presented warranted encouragement for further proceedings and argued that reasonable jurists would find the district court’s procedural ruling in dismissing the request for a certificate of appealability was due to the appellant’s failure to make a substantial showing of the denial of a constitutional right. The petitioner’s habeas corpus issue involved a claim of ineffective assistance of counsel for failing to object to both the presentence report and the physical restraint enhancement imposed by the district court. (Appendix B)

Petitioner specified the merits issues were constitutional, and explicitly requested COA for each issue, pursuant to the mandatory requirement in 28 U.S.C. §2253(c)(3).

The issues were numbered, indented, uppercase, and bolded. The COA petition’s first section, entitled “The COA Standard,” cited the COA for procedurally dismissed habeas requirements required under 28 U.S.C. § 2253(c) and *Miller-El*, 527 U.S. at 336.

¹⁰ Since Petitioner’s arrival at two Bureau of Prisons designated institutions FCI Herlong and FCI Lompoc, federal prison authorities taken deliberate indifference in denying him mental health treatment. Despite the district court judicial recommendation even after a congressional inquiry and the White House intervention. Petitioner has exhausted his administrative remedies for being denied mental health treatment with the Warden, Regional Director and Central Office.

Petitioner explained that the Ninth Circuit had articulated a standard when applying Slack. Lambright v. Stewart, 220 F.3d 1022 (9th Cir.2000). Essentially, for procedurally dismissed habeas, the appellate court should assume the dismissal is debatable and look to the constitutionality of the merits issue, by examining the district court pleadings, and the record. If constitutional issues are debatable, COA should be issued. If record materials are incomplete, a court may need an evidentiary hearing before a fair Slack determination may be made. However, if a COA request fails to state a debatable constitutional issue, it can be fairly denied.

Petitioner argued to the appellate court that he had provided enough evidence to the district court regarding the denial of effective assistance of counsel for failure to object to an erroneous physical restraint enhancement, so as to be entitled to an evidentiary hearing. Petitioner provided the appellate court detailed analysis regarding the validity of his denial of effective assistance of counsel claim as outlined below.

B. Appellate Record Supplemented

On January 14, 2025, the Petitioner filed a *pro se brief* in support of his Application for Certificate of Appealability to the Ninth Circuit. (Appendix B).

1. Ninth Circuit Denial of COA Petition

On January 24, 2025, the Ninth Circuit denied Petitioner's COA motion.

The Ninth Circuit looked at the COA application, did not see separately briefing the timeliness issue; and summarily denied COA, without looking at the merits or record.

"The request for a certificate of appealability (Docket Entry No. 3) is denied because appellant has not made a "substantial showing of a constitutional right." 28 U.S.C. § 2253(c)(2); see also Miller-El v. Cockrell, 537 U.S. 322, 327 (2003)."

The Ninth Circuit decided that if the procedural prong of Slack is not briefed, the entire COA threshold analysis is waived. The Ninth Circuit determined that they were not required to examine the record before applying §2253(c) review. The Ninth Circuit applied the procedural prong of Slack as a jurisdictional requirement.

C. Basis for Federal Jurisdiction in the Court of First Instance

The district court had subject-matter jurisdiction because Petitioner was alleged to have violated 18 U.S.C. §2113(a) (d), in the Central District of California, by Bank Robbery.

1. Proceedings Below

a. The District Court Level:

The petitioner filed a §2255 on August 15, 2023. The government submitted a Motion to Dismiss an Opposition to the Petitioner's Motion to Vacate, Set Aside, or Correct sentence pursuant

to 28 U.S.C. §2255. The petitioner replied to the Government's Opposition. The district court summarily dismissed the §2255 motion without an evidentiary hearing based on procedural grounds and denied a Certificate of Appealability (COA). The Petitioner then filed a Notice of Appeal regarding the summarily denial. Subsequently, the Petitioner filed a Notice of Appeal on the denial of the §2255 motion and requested a certificate of appealability for the Fifth and Sixth constitutional issues raised in the §2255 motion. (Appendix B).

b. The Appellate Court Level:

The Petitioner filed a motion for a certificate of appealability (COA) in the court of appeals. He renewed his COA request to the Ninth Circuit under §2253(c), which was denied. This petition seeks review of that denial.

REASON FOR GRANTING THE WRIT

Certiorari Should Be Granted to Resolve Conflicts in Principle among the Circuit Split

This Court should grant writ of *certiorari* per Supreme Court Rule 10(c) due to significant federal questions raised by the Ninth Circuit's decision in Petitioner's case. The Ninth Circuit denied a Sixth Amendment violation for ineffective counsel who failed to object to an erroneous sentencing enhancement. Although bound by prior panel precedent to apply the enhancement, it noted that other Circuits would not have done so. The Ninth Circuit's ruling conflicts with other Circuits and diverges from the Sentencing Guidelines' text, necessitating this Court's intervention. The decisions below cements several circuit conflicts over a foundational question about how courts should apply the sentencing guidelines. The first involves whether this Court categorical approach applies to the federal sentencing guidelines in the same way it does to other federal provisions. And the second involves whether the limits on agency difference apply to the Sentencing Commission as they do to other agencies. The circuit conflicts warrants this Court's review.

That a trial counsel's failure to object at the sentencing hearing to a base offense level was equivalent to Petitioner's having no trial counsel at all. *United States v. Ford*, 918 F.2d 1343, 1350 (8th Cir.1990). Thus, constitutes a Sixth Amendment violation under *Glover v. United States*, 531 U.S. 198, 204 (2001).

ARGUMENT AND AUTHORITY

A. Courts are Obligated to Construe Pro se Prisoner Pleadings Liberally and to Afford the Petitioner the Benefit of the Doubt

The pleadings of *pro se* prisoners are held to "less stringent standards than formal pleadings drafted by lawyers" and considered "however inartfully pleaded." *Haines v. Kerner*, 404 U.S. 519, 520 (1972). The Court has a responsibility to interpret *pro se* pleadings liberally. *Hughes v. Rowe*,

449 U.S. 5, 9 (1980). This Court stated that "we can hardly demand of a layman and pauper who drafts his petition behind prison walls the skill of one trained in the law." *Tomkins v. Missouri*, 323 U.S. 485, 487 (1945). As noted by the court in *Price v. Johnston*, 334 U.S. 266, 292 (1948):

"Prisoners are often unlearned in the law and unfamiliar with the complicated rules of pleading. Since they act so often as their own counsel in *habeas corpus* proceedings, we cannot impose on them the same high standards of the legal art which we might place on the members of the legal profession. Especially is this true in a case like this where the imposition of those standards would have a retroactive and prejudicial effect on the prisoner's inartistically drawn petition."

See *Sanders v. United States*, 373 U.S. 1, 22 (1963) ("An applicant for [collateral] relief ought not to be held to the niceties of lawyers' pleadings."); see also *Burris v. United States*, 430 F.2d 399, 402 (7th Cir. 1970) ("The petition was filed *pro se* and its allegations, though vague and conclusory, are entitled to a liberal construction. It is difficult, in many instances, to require great specificity and persuasion in a Section 2255 petition.").

1. The Petitioner's Fifth Amendment Right to Due Process was Violated When The Ninth Circuit Denied His COA Petition for A Procedurally Dismissed §2255 Habeas Without performing The Mandatory §2253(c) Threshold Inquiry.

While an appeal is a continuation of the litigation started in the trial court, it is a distinct step. *Slack*, 528 U.S. at 481-82. Under AEDPA, the appellate case began when the application for a Certificate of Appealability (COA) was filed. *Slack*, 529 U.S. at 481-82; *Hohn*, 524 U.S. at 241; The COA statute sets procedural rules and requires an initial inquiry into whether the circuit court may hear the appeal. *Id.*; *Lambright v. Stewart*, 220 F.3d 1022 (9th Cir.2000).

Although a Petitioner has a qualified right to appeal, it is still a right.

The COA determination under §2255(c) required an overview of the claims in the habeas petition and a general assessment of their merits. *Miller-El*, 537 U.S. at 950.

The Ninth Circuit's ruling allowed the denial of a COA petition on a procedural basis, without performing the merit portion of *Slack* or reviewing the record. They are interjecting the wrong standard of review for the procedural arm of *Slack*.

2. This Court's Review of Petitioner's Case

When this Court reviews an appellate court's COA ruling, the issue is whether Petitioner's case should have been heard by the court of appeals. *Miller-El*; *Slack* at 529 U.S. at 481-82. This Court looks to the district court's application of §2253 to Petitioner's constitutional claims and asks whether that resolution was debatable amongst jurists of reason. *Id.*

A Petitioner is not required to prove, before the issuance of a COA, that some jurists would grant the petition for 2255 motion. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that Petitioner will not prevail. *Slack*, 529 U.S. at 484.

3. District Court Analysis Requested

The petitioner alleges that his trial counsel did not provide effective assistance by failing to object to an incorrect sentencing guideline enhancement. He contends that the enhancement of his sentence violates his Fifth Amendment right to due process.

Petitioner hopes that this Court can find that he made a substantial showing of constitutional violations and is entitled to COA. At this stage, Petitioner requests that this Court determine from the record and arguments that the district court's application of AEDPA deference, to Petitioner's constitutional claims, was debatable amongst jurists of reason.

4. Overview of Record and Related Error

The appellate court should have only inquired whether a "substantial showing of the denial of a constitutional right" had been proved. This requirement cannot be determined unless it is analyzed in the first place. The question is the debatable of the underlying constitutional claim, not the resolution of that debate.

To secure habeas relief, Petitioner must demonstrate that the district court finding that there was no constitutional violation in light of the record before the court was debatable. Petitioner contends he has done so and requests that this Court examine such of his merit issues with the proper framework and make the §2253 determination.

The Court should consider the subsidiary questions raised by this issue; because:

B. There are Important Federal Questions at issue

Important federal questions at issue are whether §2253 review is discretionary; whether *Slack's* procedural prong is a jurisdictional requirement, unlike §2253(c)(3), for §2253 analysis, when Petitioner's trial counsel's fails to object at the sentencing hearing to a base offense level that incorporated an *erroneous* physical restraint enhancement was equivalent to Petitioner's sentencing hearing having no trial counsel at all. *Ford*, 918 F.2d at 1350. As held by other Circuit, the physical restraint enhancement in U.S.S.G. §2B3.1(b)(4)(B) requires more than pointing a gun at someone.

C. There is a Conflict with this Court.

The Ninth Circuit conflicts with this Court by stating that *Slack* review is discretionary; constitutional issues can be passed if procedural dismissal is available, and record review is discretionary.

D. The Ninth Circuit has Departed from the accepted and usual course of Judicial Proceedings.

Petitioner was completely denied the right to make a §2253 threshold showing to a reviewing court. The Ninth Circuit has departed from the accepted and usual course of judicial proceedings, calling for this Court's exercise of supervisory power.

E. Petitioner was Denied his Sixth Amendment Right to Effective Assistance of Counsel when Trial Counsel Failure to Object to an Erroneous Physical Restraint Enhancement which resulted in Longer Sentence of Imprisonment.

The petitioner asked the Ninth Circuit to review the record and arguments from both district and the appeal petitions for COA to decide if the Sixth Amendment right to effective counsel was violated when trial counsel failed to object to an incorrect physical restraint enhancement, leading to a longer sentence.

The United States Constitution's Sixth Amendment guarantees an accused has the right to have effective assistance of counsel ("IAC") for his defense in all criminal prosecutions. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Moreover, this Court has recognized "the right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14. (1970) ("[T]he right to counsel is the right to the effective assistance of counsel."); *Lafler v. Cooper*, 566 U.S. 156, 165 (2012); *Hill v. Lockhart*, 474, U.S. 52, 57-58 (1985). A claim that trial counsel was ineffective at sentencing is cognizable under §2255. See *Glover*, 531 U.S. at 204. Thus, although a federal prisoner may not directly attack a sentencing error under § 2255 he may claim that counsel's failure to raise the issue constituted ineffective assistance. See *Strickland*, 466 U.S. at 688; *United States v. Reed*, 230 F.3d 1368 (9th Cir. 2000) ("Although Reed cannot directly attack his sentencing enhancement under U.S.S.G. § 2D1.1...he can allege that his counsel's failure to raise the issue fell below an 'objective standard of reasonableness.'").

The terms of the plea agreement also do not foreclose this challenge to Petitioner's sentence on the basis that he received ineffective assistance of counsel. Although the plea agreement generally precludes any appeal or collateral attack upon the terms of the agreement or the sentence imposed by the district court, paragraph 22 of the plea agreement expressly reserved Petitioner's right to challenge his sentence by way of §2255 motion on the basis of ineffective assistance of counsel. The district court recognized this exception during the change of plea hearing. Therefore, although Petitioner pled guilty and waived most of his rights with respect to review of the plea and sentence, he did not waive his right to claim that his attorney's representation was deficient and prejudicial, which is the basis of the claims detailed below.

Generally, a habeas petitioner may not raise on collateral review an issue that could have been raised during the course of his direct appeal. *United States v. Frady*, 456 U.S. 152, 165 (1982) ("[A] collateral challenge may not do service for an appeal."); *Auman v. United States*, 67 F.3d 157, 161 (8th Cir.1995) ("[O]rdinary questions of guideline interpretation...[which do not present a] 'miscarriage of justice'...do not present a proper section 2255 claim."); see also *Sun Bear v. United States*, 644 F.3d 700, 704 (8th Cir.2011) (noting the absence of precedent in which a Guidelines error was held to be a miscarriage of justice). However, a habeas petitioner may use facts relating to guideline calculation errors – including the counsel's failure to object – to support a claim for ineffective assistance of counsel under §2255. *Auman*, 67 F.3d at 162.¹¹ "[A]ttorney's

¹¹ *Sun Bear*, which addressed the applicability of the "miscarriage of justice" standard to a habeas petitioner's attempt to re-litigate the matter of an alleged error in Guidelines interpretation already raised on direct appeal, does not disrupt

failure to object to an error in the PSR's calculation of the Guidelines — if left uncorrected by the district court — can be grounds for finding the deficient performance.” Howard v. United States, 734 F.3d 459, 464 (6th Cir.2014).

The Eighth Circuit in United States v. Ford, 918 F.2d at 1350, held that a trial counsel's failure to object at the sentencing hearing to a base offense level equated to having no trial counsel at all. Therefore, the first standard is satisfied. The second Strickland requirement demands proof “that counsel's errors were so severe as to deprive the defendant of a fair trial.” Petitioner's trial counsel's failure to object at the sentencing to a base offense level was tantamount to no representation. Thus, the first standard is met. In Petitioner's case, the error deprived Petitioner of a fair sentence. If trial counsel had objected to the base offense level of 31, the district court might have reduced it to 29. Petitioner's original sentence (151 months) is thirty months longer than it could have been. See United States v. Curtis, 360 Fed. Appx. 413, 415 (4th Cir. 2010) (finding ineffective assistance where an objection could have resulted in a six-month shorter sentence).

To demonstrate prejudice “the [Petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Strickland, 466 U.S. at 694. “the likelihood of a different result must be substantial...” Harrington v. Richter, 562 U.S. 86, 111-12 (2011). This Court has defined reasonable probability as “probability sufficient to undermine confidence in the outcome.” Cullen v. Pinholster, 563 U.S. 170 (2011) (quoting Strickland, 466 U.S. at 694). Although any increase in the sentence is sufficient to show prejudice in this context. Glover, 531 U.S. at 204; United States v. Franks, 230 F.3d 811, 815 (5th Cir.2000) (holding that the defendant was prejudice when counsel failed to object to an improper enhancement which increased the overall offense level and sentencing Guidelines.).

This Court has recognized that “[w]hen a defendant is sentenced under an incorrect Guidelines range—whether or not the defendant's ultimate sentence falls within the correct range—the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error.” Molina-Martinez v. United States, 578 U.S., 189, 198 (2016). In other words, an error resulting in a higher range than the Guidelines provide usually establishes a reasonable probability that a defendant will serve a prison sentence that is more than “necessary” to fulfill the purposes of incarceration. 18 U.S.C. §3553(a); Tapia v. United States, 564 U.S. 319, 325 (2011) “To a prisoner,” this prospect of additional “time behind bars is not some theoretical or mathematical concept.” Barber v. Thomas, 560 U.S. 474, 504 (2010) (Kennedy, J., dissenting). “[A]ny amount of actual jail time” is significant, Glover v. United States, 531 U.S. at 203, and “ha[s] exceptionally severe consequences for the incarcerated individual [and] for society which bears the direct and indirect costs of incarceration,” United States v. Jenkins, 854 F.3d 181, 192 (2nd Cir. 2017). “That was especially so here, where the district court's error in imposing [Petitioner's] sentence was based on a mistake made in the presentence investigation report by the Probation Office, which works on behalf of the district court.” Rosales-Mireles, 585 U.S. 129, 140 (2018). See also, Glover, 531 U.S. at 204. The petitioner asserts that his counsel's

the principle that counsel's failures with regard to a guideline calculation can support § 2255 relief on the ground of ineffective assistance of counsel. *Id.* at 701. (“[T]he career offender issue was raised on direct appeal due to the ineffective assistance of his counsel, and it is an undisputed error of calculation, not interpretation.

failure to object to the two-level physical restraint enhancement resulted in at least 30 months of additional imprisonment, affecting his eligibility for early release.

The risk of unnecessary deprivation of liberty particularly undermines the fairness, integrity, or public reputation of judicial proceedings in the context of a plain Guidelines error because of the role the district court plays in calculating the range and the relative ease of correcting the error. Unlike “case[s] where trial strategies, in retrospect, might be criticized for leading to a harsher sentence,” Guidelines miscalculations ultimately result from judicial error. Rosales-Mireles, 585 U.S. at 140; Glover, 531 U.S., at 204; see also Peugh v United States, 569 U.S. 530, 537 (2013).

1. The District Court Abused its Discretion in Summarily Denying Petitioner’s § 2255 Motion without an Evidentiary Hearing.

The district court should have granted an evidentiary hearing on Petitioner’s §2255 motion unless the motion, files, and records of the case conclusively demonstrated that the prisoner was entitled to no relief. United States v. Rodriguez, 49 F.4th 1205, 1213 (9th Cir. 2022) (first quoting 28 U.S.C. §2255 and then (citing Howard, 381 F.3d at 877). In essence, “a hearing is obligatory whenever the record does not clearly show the factual or legal invalidity of the petitioner’s claims.” Baumann v. United States, 692 F.2d 565, 571 (9th Cir. 1982). An evidentiary hearing “is mandatory whenever the record does not affirmatively manifest the factual or legal invalidity of the Petitioner’s claims.”¹² *Id.*; Rodriguez, 49 F.4th at 1213 (quoting Baumann, 692 F.2d at 571 (*emphasis added*)).

“Evidentiary hearings are particularly appropriate” where, as here, the [petitioner’s] “raise facts which occurred outside of the courtroom and off the record.” *Id.*, quoting United States v. Chacon-Palomares, 208 F.2d 1156, 1158 (9th Cir.1989); also, Shah v. United States, 878 F2d 1156, 1158 (9th Cir.1989). The counterfactual inquires of “what a defendant would have done” and/or what an effective attorney would have done are particularly appropriate for an evidentiary hearing. Rodriguez, 49 F4th at 1213, (citing United States v. Werle, 35 F.4th 1195, 1206 (9th Cir.2022)). Furthermore, evidentiary hearings are often necessary “to access the effect of the attorney’s deficient performance” on the Petitioner’s case. Detrich v. Ryan, 740 F.3d 1237, 1246-47 (9th Cir.2013) (*emphasis added*). Lawrence v. Armontrout, 900 F.2d 127, 131 (8th Cir. 1990) (remanding for evidentiary hearing to determine whether counsel’s failure to investigate alibi witnesses prejudiced defense).

Here, the district court abused its discretion in denying Petitioner’s § 2255 motion without an evidentiary hearing. Rodriguez, 49 F.4th at 1213; also, Matthews v. United States, 682 F3d 180, 188 (2d Cir.2012) (concluding district court erred in denying § 2255 motion without affording defendant opportunity to show at evidentiary hearing what evidence “could have [been] unearthed” to establish prejudice). Petitioner’s IAC claims, and the prejudice that resulted therefrom, are highly fact dependent and must be more fully explored at an evidentiary hearing, where factual development would “shed a valuable cross-light’ upon the [physical restraint enhancement].” Bruce v. United States, 256 F.3d 592, 600 (7th Cir.2001); see also Turner v. Duncan, 158 F.3d 449,

457 (9th Cir.1998) (“Without an evidentiary hearing before the district court, we cannot determine whether Turner meets this prejudice standard.”); *Hendricks v. Vasquez*, 974 F.2d 1099, 1110 (9th Cir.1992) (same).

An evidentiary hearing was critical to develop a full record on the erroneous physical restraint enhancement. *Marshall v. Hendricks*, 307 F.3d 36, 108 (3d Cir.2002). Given the trial counsel's deficient representation in various areas, testimony from him and the bank robbery victims would have helped the district court assess how his inadequate performance impacted sentencing evidence and whether a different outcome was likely without those errors. *Id.*; see also *Strickland*, 466 U.S. at 686; *Martin v. United States*, 889 F.3d 827, 836 (6th Cir. 2021) (remanding for evidentiary hearing to further develop ineffective assistance claim).

F. Conflict in the Federal Court Circuits

Petitioner asserts since January 7, 2021, eleven United States Court of Appeals have been divided on whether to apply U.S.S.G. §2B3.1(b)(4)(B)’s two-point sentencing enhancement when a firearm is brandished during the commission of a robbery.¹³ *United States v. Herman*, 930 F.3d 872 (7th Cir.2019) (providing the names and citations of the cases for the various circuits that are split on this issue, as well as clarifying the 7th Circuit’s previous holdings on the matter). The First, Fourth, Eighth, Tenth, and Eleventh Circuits hold that brandishing a gun during a robbery is enough to trigger the sentencing enhancement. See *United States v. Dimache*, 665 F.3d 603 (4th Cir.2011); *United States v. Stevens*, 580 F.3d 718, 719 (8th Cir.2009); *United States v. Miera*, 539 F.3d 1232 (10th Cir.2008); *United States v. Wallace*, 462 F.3d 15 (1st Cir.2006); *United States v. Gonzalez*, 183 F.3d 1315 (11th Cir.1999). The Second, Third, Fifth, Seventh, Ninth, and D.C. Circuits hold the opposite, ruling that it is not sufficient for purposes of the sentencing enhancement that a gun brandished, even if the victim is told not to move, as it is not a “physical restraint.” See *United States v. Herman*, 930 F.3d 872 (7th Cir.2019); *United States v. Parker*, 241 F.3d 1114 (9th Cir.2001); *United States v. Drew*, 200 F.3d 871 (D.C.Cir.2000); *United States v. Anglin*, 169 F.3d 154 (2d Cir.1999); *United States v. Hickman*, 151 F.3d 446 (5th Cir.1998).

G. The Decision Below Entrenches an Eleven Circuit Conflicts

The decision highlights conflicts among eleven courts of appeals on key questions about a sentencing Guidelines provision. First, should the Court’s categorical approach apply to federal sentencing Guidelines as it does to other federal provisions? Second, do limits on agency deference apply to the Sentencing Commission similarly to other agencies? These circuit conflicts warrant review. The circuits are divided on applying the categorical approach to guideline provisions. Additionally, there is a six-to-five split on whether a physical restraint enhancement requires more than pointing a gun during a robbery, due to differing methodologies.

¹³ See. U.S.S.G. § 2B3.1(b)(4)(B).

H. As Held by Other Circuits, the Physical Restraint Enhancement in U.S.S.G. §2B3.1(b)(4)(B) requires more than pointing a gun at someone, and the Ninth Circuit's decision to the contrary should be reversed, as it clearly out of line with the Other Circuits.

1. Circuits holding that Brandishing a Firearm is a Physical Restraint

In order to understand why five United States Courts of Appeals hold that brandishing a firearm during the commission of a robbery is sufficient to constitute a physical restraint of a victim, it is important to evaluate each of the five cases, their facts, and their holdings. There is a common theme among these decisions' reason, namely that physical restraint should not be limited only to actions that are commonly recognized as physical restraint, but rather that it should encompass actions taken in the overall spirit of keeping a victim physically restrained.

2. Basis of the Decisions

All five of these United States Court of Appeals reached their respective decisions – holding that brandishing a firearm during the commission of a robbery is sufficient to physically restrain a victim – based on the same line of thinking. Specifically, they based their decisions on the idea that a person can be “physically restrained” by forces that are not strictly physical, but that could be considered psychological in nature. These courts focused on the fact that the brandishing of firearms keeps a victim from moving, effectively restraining them physically.¹⁴ Further, all of these decisions interpreted U.S.S.G. § 1B1.1’s definition of “physical restraint” as exemplary rather than limiting; the text lists non-exhaustive examples of physical restraint rather than a definitive list in the spirit of *inclusion unius*.¹⁵ It is also important to note that there was no single dissent or concurrence raised among any of these five Circuits’ decisions. See *United States v. Dimache*, 665 F.3d 603 (4th Cir.2011); *United States v. Miera*, 539 F.3d 1232 (10th Cir.2008). In these Circuits, then, it would appear as if the courts had settled on the issue of whether brandishing a firearm during the commission of a robbery is sufficient to warrant a two-point sentencing enhancement for physical restraint of a victim under U.S.S.G. § 2B3.1(b)(4)(B).

3. Circuits Holding that Brandishing a Firearm is not a Physical Restraint.

To understand why six United States Courts of Appeals have held that brandishing a firearm is not a physical restraint for the purposes of a sentencing enhancement – in contrast with the five circuits holding the reverse – it is vital to understand on what basis these decisions were made. In reaching their respective decisions, these six courts focused on the distinction between mental and physical restraint, as well as the fact that the Guidelines themselves explicitly state “physical restraint” as opposed to all restraints.

Whether brandishing a firearm during the commission of a robbery constitutes a physical restraint is a complex issue that is hotly contested within the various jurisdictions of the United States. It has been brought before eleven of the nation’s thirteen federal courts of appeals, and

¹⁴ David Sandefer, Comment, To Move or Not to Move? That is the *Metaphysical Question*, 85 U.Chic.L.Rev. 1973, 1997 (2018).

¹⁵ U.S. Sentencing Guidelines Manual § 1B1.1 comt.n.1(L) (U.S. Sentencing Comm'n 2020); *Expressio Unius Est Exclusio Alterius*, Black’s Law Dictionary (11th Deluxe ed. 2024).

currently sits at a six-five split. A circuit split occurs when two or more of the courts of appeals have conflicting rulings on the same issue, and this Court considers this when deciding whether to grant *certiorari* for a given case.¹⁶ Because eleven circuits are split on this issue – an issue that leads to a longer period of incarceration for defendants – there is an urgent need for this Court to resolve this issue as quickly as possible. This Court should grant *certiorari* in a case involving the application of U.S.S.G. §2B3.1(b)(4)(B) to prevent further confusion and create a binding precedent for the uniform application of sentencing Guidelines.

This Court should strictly interpret the language of the sentencing Guidelines, following a textualist approach, to conclude that “physical restraint” is limited to restraints that are physical in nature, not mental in nature.¹⁷ The Court should follow the example set by the Second, Fifth, Seventh, Ninth, and D.C. Circuits in holding this way. The focus of the inquiry should be on the text of the Guidelines, which very clearly “physical restraint.”¹⁸

4. Textualism and the Court

Textualism, according to the late Justice Scalia, has one major principle: “The text is the law, and it is the text that must be observed.”¹⁹ Jurists who follow a textualist approach believe that the interpretation of a law should begin, and end, with the text as Congress wrote it, and there should be no further foray into the legislative history or intent of Congress.²⁰ Judge Easterbrook, of the Seventh Circuit, has stated that textualist approach “should look at the statutory structure and hear the words as they would sound in the mind of a skilled, objectively reasonable user of words.”²¹ Importantly, since Justice Scalia’s nomination to this Court, textualism has increased in strength and importance for the Court in making its decision.²² Textualism has become the starting point of judicial interpretation of statutes, and Justice Kagan even stated in 2015 that “we’re all textualists now.”²³ Additionally, no matter which interpretative philosophy a Justice subscribes to, statutory interpretation always begins with the primary language of the text.²⁴

I. Statutory Interpretation of §2B3.1 of the Sentencing Guidelines

The textualist approach to resolving this circuit split would begin with looking at the plain language of the Sentencing Guidelines and giving the text its objectively reasonable meaning. In this case, which would mean examining the language used in § 2B3.1(b)(3). This section states that a two-level sentencing enhancement will be applied if, during the commission of a robbery,

¹⁶ See SUP. CT. R. 10(a); Tom Cummins & Adam Aft, *Appellate Review*, 2 J. LAW 59, 60 (2012).

¹⁷ See Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (1999) (defining textualism and how it is applied in judicial interpretations in cases).

¹⁸ U.S.S.G. § 2B3.1(b)(2) (U.S. Sentencing Comm’n 2021).

¹⁹ Antoni Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A Matter of Interpretation: Federal Courts and the Law*, 3, 22 (Amy Gutmann ed., 1997).

²⁰ Paul Killebrew, *Where are all the Left-Wing Textualists?*, 82 N.Y.U.L. Rev. 1895, 1896-97 (2007).

²¹ Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL’Y.

²² See Jesse D.H. Snyder, *How Textualism Has Changed the Conversation in the Supreme Court*, 48 U. Balt.L. Rev. 413 (2019).

²³ *Id.* at 413-14.

²⁴ William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 819 (3d ed 2001) (explaining how all statutory interpretation must begin with the text of a statute even if a justice or judge is not necessarily a textualist). See Robert A. Katzmann, *Judging Statutes* 4, 28-31 (2014) (stating that even for purposivist judges the text is a starting point for statutory interpretation before delving into legislative history or the intent of the drafters).

"any person was *physically* restrained to facilitate commission of the offense or to facilitate escape."²⁵ Here, an ordinary, objectively reasonable individual would most likely understand "physical" to mean something that involved touch – a tangible restraint. The *Merriam-Webster Dictionary* further bolster this interpretation, as it defines "physically" as "in a physical manner" or "in respect to the body."²⁶ Thus, by looking only at the text and nothing else, it becomes clear that pointing a gun at an individual during a robbery is in fact not physical restraint, as there has been no physical contact with respect to the body. It is most likely a mental or emotional restraint, and under this approach, it is not a physical restraint.

Because "[t]he preeminent canon of statutory interpretation requires us to presume that the legislature says in a statute what it means and it says there[,] . . . our inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *Bed Roc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004). "It is well established that 'when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'" *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, (2000)) And we typically give terms their ordinary meanings if they are not defined in the statute. See *FCC v. AT & T Inc.*, 562 U.S. 397, 403 (2011).

Even if the language is not exceedingly plain on its face – which in this case it appears to be—courts may apply textualism in the form of various canons of statutory interpretation. Some canons of statutory interpretation that the Court may consider if they do not resolve the circuit split through the plain meaning of the text of the Sentencing Guidelines are in *pari materia*, *expression unius est exclusion alterius*, and *noscitur a sociis*. The canon of in *pari materia* states that statutes or sections that are on the same subject matter may be construed together so that any inconsistencies in one may be resolved by looking at the other.²⁷ The application notes to § 2B3.1

²⁵ U.S.S.G. § 2B3.1 (b)(4)(B) (U.S. Sentencing Comm'n 2021) (*emphasis added*).

²⁶ *Physically*, Merriam-Western Dictionary, <https://www.merriam-webster.com/dictionary/physically> (last visited January 30, 2025). The Guidelines use "physically restrained" as a term of art in many sections, not just in § 2B3.1(b)(4)(B). And the Guidelines define that term of art in the application notes: "'Physically restrained' means 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). That "[w]ords should mean something," and the following dictionary definitions helpful in analyzing the plain meaning of the relevant words in § 2B3.1(b)(4)(B):

- Physically is an adverb that means "[w]ith regard to the body; in bodily terms or by bodily means."
- Restrained is the past tense of the transitive verb "restrain," which means "[t]o restricts, limit, confine."

As a combined phrase, then, "physically restrained" describes a state of being where an individual's control over his body or bodily means has been limited, restricted, or confined by another. Additionally, these definitions of the relevant words in the application note useful:

- Forcible is an adjective that means "[d]one by force," and "by force" means "by employing violence, by violent means, also under compulsion."
- Restraint is a noun that means "[t]he actions or an act of restraining, checking, or stopping something."

Combining "forcible" and "restraint" to make "forcible restraint" describes a violent or coercive action that has the effect of restraining or stopping an individual's ability to act.

These descriptions fit well with the Guidelines' no exhaustive list of examples. If a person is tied, bound, or locked up, the person is "physically restrained" because he has limited control of his body. Likewise, a defendant engages in "forcible restraint" if he uses some violent or coercive action to restrict a person's ability to act or move. Both of these descriptive phrases are broad enough to encompass the conduct of a defendant who orders a person at gunpoint not to move.

²⁷ *In Pari Materia*, Black's Law Dictionary (11th ed. 2019).

make it clear that “physically restrained” is defined in § 1B1.1, and so these sections should be construed together.²⁸ Section 1B1.1 defines “physically restrained” as the “forcible restraint of the victim such as by being tied, bound, or locked up.”²⁹ By applying the *in pari materia* canon of statutory interpretation, it should become clear that “physically restrained” has a physical, tangible nature to it, given the definition supplied in § 1B1.1.

The expression *unius est exclusio alterius* canon of statutory interpretation says that choosing to include or express one thing necessarily implies the exclusion of the alternative.³⁰ Section 2B3.1 is modified by § 1B1.1’s definition of “physically restrained,” and that section used the following to define physical restraint: “being tied, bound, or locked up.”³¹ If this sentencing enhancement was intended to apply to *all* restraints generally, then it would state as much; however, it does not. In fact, these sections, taken together, list examples that are very clearly physical in nature, such as being tied up.³² By including only physical restraints, the *expressio unius* canon suggests that non-physical restraints were intended to be excluded. Further bolstering this conclusion is the *noscitur a sociis* canon of statutory interpretation, which holds that the meaning of unclear phrases or words should be determined by the words that immediately surround it.³³ Again, the words that follow “physically restrained” are “forcible restraint of the victim such as by being tied, bound, or locked up.”³⁴ The word “physically,” construed in accordance with the words that immediately surround it, should be taken to mean something that is tangible and involves more than a mental or psychological restraint to a victim.

Even if the Court is not convinced that the ambiguity is resolved either through (1) the plain meaning, or (2) the canons of statutory construction applied above, it would still have to resolve this circuit split and hold that the use of a firearm is not a physical restraint by applying the rule of lenity. The rule of lenity is a maxim that holds that statutory ambiguities in a law should be construed against the government and in favor of a defendant.³⁵ *United States v. Bass*, 404 U.S. 336, 347 (1971) (“[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.”). This rule of statutory construction has a long history dating back to at least Chief Justice Marshall, who described the rule as “perhaps not much less old than construction itself.”³⁶ *United States v. Wiltberger*, 18 U.S. 76, 95 (1820). In this case, even if the Court were to find that there is still ambiguity in the language, application of the rule of lenity would lead to the same result. Under the rule of lenity, the Court would have to strictly construe the language against the Government and hold that the use of a firearm during a robbery does not constitute a *physical restraint*. The rule of lenity “demand[s] resolution of ambiguities in criminal statutes in favor of the defendant” *Hughey*, 495 U.S. at 422. The rule extends to statutes that set criminal punishments as well as statutes that carry criminal penalties if violated. See *Id.* (applying the rule of lenity to a restitution provision of the Victim and Witness Protection Act); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-518, n.10 (1992) (plurality opinion) (employing the rule of lenity to interpret “a tax statute . . . in a civil setting” because the statute “has criminal

²⁸ See U.S.S.G. § 2B3.1; *id.* at § 1B1.1 cmt.n.1 (L).

²⁹ *Id.* § 1B1.1 cmt. n.1 (L).

³⁰ *Expressio Unius Est Exclusio Alterius*, Black’s Law Dictionary (11th ed. 2019)

³¹ U.S.S.G. § 2B3.1; *Id.* at § 1B1.1 cmt. n.1 (L).

³² U.S.S.G. § 1B1.1 cmt. n.1 (L).

³³ *Noscitur A Sociis*, Black’s Law Dictionary (11th ed. 2019)

³⁴ U.S.S.G. § 1B1.1 cmt. n.1 (L).

³⁵ See Zachary Rice, *The Rule of Lenity as a Rule of Structure*, 72 Fordham L. Rev. 885, 885 (2004).

³⁶ *The New Rule of Lenity*, 119 Harv. L. Rev. 2424, 2420 (2006).

applications"); *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004). Normally resolve "ambiguity concerning the ambit of criminal statutes...in favor of lenity" *United States v. Pepe*, 895 F.3d 679, 688 (9th Cir. 2018) (quoting *United States v. Bass*, 404 U.S. 336, 348 (1971)). In addition, "because of the seriousness of criminal penalties, usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *McBoyle v. United States*, 283 U.S. 25, 27 (1931); *See also United States v. Santos*, 553 U.S. 507, 514 (2008) ("The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them."). If a "choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *Jones v. United States*, 529 U.S. 848, 858 (2000) (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952)).

Even if this Court were to reject all of the above methods of interpretation and follow the line of thinking of the circuits holding that brandishing a firearm *is* sufficient to constitute physical restraint – namely that the examples given in the comment are exemplary rather than limiting – the Court should still reach the same result.³⁷ If the examples listed in the comment are exemplary, they are all of a physical nature; none of them could be considered a mental restraint as opposed to a physical restraint because they would have the same effect on *every* individual, regardless of their mental state.³⁸ Being tied up, bound, or locked up would equally restrain all people, but pointing a firearm at a person – even coupled with a threat to remain on the ground – will most certainly not have the same effect on every person. Accordingly, the distinction between a mental and physical restraint must be drawn by this Court in reaching a decision and resolving this circuit split.

As the Second Circuit held, there must be a distinction between what constitutes a physical restraint versus a mental restraint. A physical restraint must apply equally to all individuals, something that brandishing a firearm will not accomplish as people have widely varying personalities, experiences, and reactions to such encounters. *United States v. Anglin*, 169 F.3d at 164-65. It would be unjust for the Court to rule otherwise because there would be no limiting principle for this sentencing enhancement; it could presumably and reasonably be applied to every single armed robbery, a reality that would greatly prejudice defendants and lead to a miscarriage of justice based on subjective factors. *United States v. Hickman*, 151 F.3d 446, 461-62 (5th Cir. 1998).

The above underlying claims Petitioner asserts the trial counsel's failure to object to the physical restraint enhancement for the two-level increase to the base offense that prejudices him for the unprofessional error which was a denial of effective assistance of counsel under the Sixth Amendment. *Glover*, 531 U.S. at 204.

Furthermore, the district court exercised poor judgment by refusing to conduct an evidentiary hearing regarding the sentencing enhancement on the IAC claims. These claims included allegations that defense counsel did not object to the incorrect recommendation for a physical restraint enhancement in the presentence investigation report.

³⁷ U.S. Sentencing Guidelines Manual § 1B1.1 cmt. n.1 (L); *Expressio Unius Est Exclusio Alterius*, Black's Law Dictionary (11th ed. 2019).

³⁸ U.S.S.G. § 1B1.1 cmt. n.1 (L) (listing examples of physical restraint: "the forcible restraint of the victim such as

1. Reason for Resolving the Circuit in Favor of a Narrow Interpretation

This Court should grant certiorari for resolving the Circuit conflict surrounding the interpretation of the physical restraint enhancement in favor of a narrow construction. Specifically, the Court should adopt the strict textual interpretation used by the majority of the circuits. It should do so for three reasons. First, the narrow interpretation is more consistent with the plain language of U.S.S.G. § 2B3.1(b)(4)(B) and its accompanying definition of § 1B1.1 Application Note 1(L). Second, the narrow interpretation more accurately reflects the purpose of enhanced punishment and the seriousness of the offense. Third, the expansive interpretation is unnecessarily punitive.

First, the narrow interpretation is more consistent with the plain language of 2B3.1(b)(4)(B) and its accompanying definition. The Sentencing Commission's use of the modifier "physical," as well as the examples of binding, tying, and locking up, illustrate that the rule intended to punish offenders who restrict their victim's freedom of movement through physical contact or some form of physical confinement. *United States v. Harris*, 959 F.2d 246, 265 (D.C. Cir. 1992). Because the Guidelines' examples are best understood as illustrations of the type of conduct punishable under physical restraint enhancement, it is apparent the type of restraint that occurs when an offender commands the victim to "get down" is qualitatively distinct from what Commission sought to punish. *Parker*, 241 F.3d at 1118-19. Therefore, the act of brandishing a weapon and ordering the victim to "get down," without more, should not trigger the enhancement.

Second, the narrow interpretation more accurately reflects the purpose of enhanced punishment and the seriousness of the offense. Sentencing enhancements are designed to provide additional punishment for conduct that aggravates, rather than constitutes, the underlying criminal offense. *United States v. Anglin*, 169 F.3d at 165. Here, the Guidelines' examples are wholly independent of the baseline offense of robbery. However, when the physical restraint enhancement is understood to include conduct that is typical of most robberies, the rule loses its narrow purpose and begins to swallow the underlying elements of the offense itself. *Parker*, 241 F.3d at 1118. In other words, one can expect an armed robber to brandish a weapon and then say. "Put your hands up," or "Don't move" As the Second Circuit explained in *Anglin*, "[I]t would require a quixotic robber to display his gun, and then say to the tellers or bank customer, 'this is a holdup, but feel free to move about the bank, and if any of you have to leave for an appointment elsewhere, that's fine.'" *Anglin*, 169 F.3d at 165.

Similarly, the narrow interpretation more accurately reflects the seriousness of the offense. This is because the physical restraint enhancement is designed to punish specific aggravating conduct not typical of most robberies. However, when it is interpreted expansively, it is at risk of no longer operating as a sentencing enhancement but instead as a potentially automatic increase of the defendant's base offense level from twenty to twenty-two.³⁹ *Id.* This is because most armed robberies involve the offender threatening or coercing the victim into moving to a specific location, such as lying down on the floor. Accordingly, unless the robbery occurred in a vacant structure, it is difficult to imagine when the enhancement would not apply under an expansive interpretation. *Id.*

³⁹ "If the government's interpretation was correct, virtually every robbery would be subject to the 2-level enhancement for physical restraint unless it took place in unoccupied premises."

Third, under the expansive interpretation, when U.S.S.G. § 2B3.1(b)(4)(B) is applied to conduct typical of most robberies, it is unnecessarily punitive. In these instances, the defendant receives additional punishment not only for conduct beyond the scope of the rule but also for conduct that, in effect, constitutes the underlying crime of armed robbery. *Id.* While the two-level upward adjustment sounds relatively mild, it has significant consequences for the defendant, who is subjected to additional months – often years – of incarceration because of its application. Moreover, it is important to realize that the upward adjustment is only rarely applied in isolation. Typically, it is applied in tandem with other related sentencing enhancements, such as the five-point upward adjustment for brandishing a weapon during the commission of the offense. In these situations, the defendant is not only additionally punished for conduct typical of most robberies but also punished twice for it. See e.g., *United States v. Rosario*, 7 F.3d 319, 321 (2nd Cir.1993).

A uniform standard for physical restraint enhancement is needed to strengthen federal sentencing goals. This Court should interpret specific Guidelines to shape federal sentencing policy. By narrowly interpreting U.S.S.G. §2B3.1(b)(4)(B), it can resolve the circuit split, preserve the enhancement's purpose, and avoid punitive sentences and inconsistencies in federal law.

This case is a suitable vehicle to resolve the circuits split. Petitioner's case directly addresses these splits. Resolution of either question in Petitioner's favor would indicate that the physical restraint enhancement affected his sentence. It increased his offense level by two points, resulting in a recommended range of 151 – 188 months. Based on that range, the district court sentenced Petitioner to 151 months of imprisonment. However, if the physical restraint enhancement had not been applied, his recommended sentence range would have been 121 to 151 months, and his final sentence would likely have been lower. See *Rosales-Mireles*, 138 S. Ct. at 1807 ("[A]n error resulting in a higher range than the Guidelines provide usually establishes a reasonable probability that a defendant will serve a prison sentence that is more than 'necessary' to fulfill the purposes of incarceration. (quoting 18 U.S.C. § 3553(a)").

J. The Questions Presented are Important and this Case is an Excellent Vehicle

The physical restraint enhancement needs a uniform standard of application. In the last twenty-five plus years, the federal circuits have distorted its proper meaning and scope by entrenching themselves along opposite lines of authority. Six circuits prefer a strict interpretation; five circuits prefer an expansive one. The Commission has never amended its robbery Guideline to resolve the conflict. Such inaction is incompatible with the goals of federal sentencing, as similarly situated offenders convicted of robbery in different circuits face a heightened risk of receiving unjustifiably disproportionate punishments.⁴⁰ Therefore, the disparities must be addressed and resolved.

⁴⁰Compare *United States v. Fisher*, 132 F.3d 1327, 1329-30 (10th Cir.1997) ("[P]hysical restraint occurs whenever a victim is specifically prevented at gunpoint from moving, thereby facilitating the crime.") with *United States v. Parker*, 241 F.3d at 1118-19 ("Congress meant for something more than briefly pointing a gun at a victim and commanding her once to get down to constitute physical restraint, given that nearly all armed bank robberies will presumably involve such acts.").

The longevity of the conflict, coupled with the likelihood of the Commission's continued inaction, should inspire this Court to reconsider the limited role it imposed on itself in the interpretation of specific guideline provisions. The circuit split surrounding the interpretation of the physical restraint enhancement is an appropriate vehicle for the Court to revisit its decision in *Braxton v. United States*, 500 U.S. 344, 348 (1991). Therefore, this Court — not the Commission should resolve the conflict among the circuits by adopting the strict interpretation adopted by the majority of federal circuits. The following paragraphs first explain why the Court should abandon *Braxton*. Then follows the argument that the Court should resolve the conflict by prescribing a definitive interpretation of the scope and application of the physical restraint enhancement.

1. *Braxton v. United States*: Abandoning the Court's "Restrained" Role in Guideline Interpretation

In *Braxton v. United States*, the Court ruled that Congress intended the Commission to resolve conflicting interpretations of specific Guidelines. 500 U.S. at 348. Since then, the Court sees the Commission as solely responsible for such conflicts. This has resulted in the Court avoiding responsibility in shaping the rules used as "the starting point and the initial benchmark" of every federal criminal sentence. *Gall v. United States*, 552 U.S. 38, 49 (2007); see also *Kimbrough v. United States*, 552 U.S. 85, 91 (2007).

The Court should abandon the limited role it prescribed for itself for three reasons. First, there is no language in the Sentencing Reform Act of 1984 (SRA) to suggest that the Commission is solely responsible for resolving conflicting interpretations of specific guideline provisions. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified at 18 U.S.C. § 3351 *et seq.*; 28 U.S.C. §§ 991-98). Moreover, there is no evidence in the SRA's legislative history to suggest that Congress intended the Commission to assume such a responsibility.⁴¹ Second, the Court's decision to categorically exclude cases in which it would be tasked with interpreting specific guideline provisions is rooted in an overextension of *Braxton's* holding. The Court's continued reliance on it is not only misguided but also inconsistent with its traditional institutional responsibilities. Third, the Commission cannot practicably resolve all conflicting interpretations of the law it creates on its own. The following paragraphs address each argument in turn.

First, Congress never intended for the Commission to shoulder the burden of resolving conflicting interpretations of specific guideline provisions by itself. As the *Braxton* Court noted, Congress certainly intended the Commission to play an important role in resolving circuit conflict. *Braxton*, 500 U.S. at 348-50. Otherwise, it would not have granted the Commission both the power and responsibility to "periodically review and revise...the Guidelines" or to decide which amendments are to be given retroactive effect. 28 U.S.C. § 944(o) – (p). But this language cannot be fairly read to suggest that Congress expected the Commission to have the exclusive responsibility of correcting the misapplication of the law it creates. Nor does any evidence in the

⁴¹ Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 Wake Forest L. Rev. 223, 225 (1993) ("The great majority of federal criminal statutes have stated only a maximum term of years....").

SRA's legislative history support such a proposition.⁴² Ultimately, if Congress expected the Court to abandon perhaps its most important and traditional institutional responsibility, then one might expect the legislature to make that point clear. In the SRA, it did not.

Moreover, it is unlikely that Congress intended for the Court to abdicate its interpretative responsibility in light of the fact that the Commission's duty to review and revise the law it promulgates is unremarkable in American administrative law. *Id.* at 35-40. Numerous federal agencies share with the Commission the same or similar responsibilities, with respect to the regulations they promulgate. *Id.* However, the Court has often resolved conflicting interpretations of other federal regulations.⁴³ It is only the Guidelines that are categorically exempt from Court review. As Justice Samuel Alito explained regarding the Commission, "no other federal agency...has ever performed a role anything like it."⁴⁴ Therefore, in light of the Court's role with respect to other federal agencies with similar authority, it is unlikely that Congress intended the Commission to become the "Guidelines Supreme Court"⁴⁵ or for the actual Court to abandon its role in clarifying and improving federal sentencing law.

Second, the Court's practice of categorically refusing to interpret specific guideline provisions is rooted in an overexpansion of *Braxton*'s holding. In *Braxton*, the Court held that the Commission was principally responsible for resolving circuit conflicts. 500 U.S. at 347-49. The Court did not hold that the Commission was *exclusively* responsible for maintaining the consistent application of the law it creates. *Id.* Yet, since *Braxton*, the Court has not taken a single case involving a disputed guideline provision. Additionally, the practice of declining review for disputed guideline provisions takes *Braxton* out of context. In *Braxton*, the Court declined to resolve a circuit split surrounding a specific guideline provision principally because the Commission had already begun amending the specific provision in dispute. *Id.* However, that decision has somehow "morphed...into the broad position that the Court always decline to address

⁴² Dawinder S. Sidhu, *Sentencing Guidelines Abstention* 33 (2021), <https://ssrn.com/abstract=3950703> ("Moreover, there is simply nothing in the legislative history or the SRA to suggest that Congress intended for the Court to completely surrender its traditional role to the Commission, or for the Court to do anything different than it does for Congress or agencies in the context of relevant splits.").

⁴³ See, e.g., *Rust v. Sullivan*, 500 U.S. 173, 177 (1991) (resolving a circuit split over a Health and Human Services regulation); *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759, 762 (1969) (resolving a circuit split over a National Labor and Relations Board regulation); *Mass. Trs. of E. Gas & Fuel Assocs. V. United States*, 377 U.S. 235, 237 (1964) (resolving a circuit split over a Maritime regulation); *United States v. Correll*, 389 U.S. 299, 301 (1967) (resolving a circuit split over an IRS regulation); *Fulman v. United States*, 434 U.S. 528, 529-30 (1978) (resolving a circuit split over a Department of Treasury regulation); *Ehlert v. United States*, 402 U.S. 99, 101 (1971) (resolving a circuit split over a Selective service regulation); *Fed. Power Comm'n v. Texaco, Inc.*, 377 U.S. 33, 37 (1964) (resolving a circuit split over Federal Power Commission regulation); *Household Credit Servs v. Pfenning*, 541 U.S. 232, 235 (2004) (resolving a circuit split over a Federal Reserve Board regulation).

⁴⁴ Samuel Alito, *Reviewing the Sentencing Commission's 1991 Annual Report*, 5 Fed. Sentencing Guidelines R. 166, 168 (1992).

⁴⁵ See Douglas A. Berman, *The Sentencing Commission as Guidelines Supreme Court: Responding to Circuit Conflicts*, 7 Fed. Sentencing Guidelines Rep. 142, 142 (1994).

circuit court conflicts concerning the Guidelines regardless of whether the Commission is addressing the same issue.”⁴⁶

The Court’s position regarding Guidelines interpretation conflicts not only with its treatment of other federal regulations but also with its own institutional responsibilities. As the Court in *Braxton* noted, a “principal purpose” of the Court’s certiorari jurisdiction is to resolve conflicting interpretations of federal law. *Braxton*, 500 U.S. at 347. Yet, the Guidelines are the only exception.⁴⁷ *Gall*, 552 U.S. at 49. Given their importance as the “starting point and the initial benchmark” of every federal criminal sentence, the Court should be involved in shaping their development. *Gall*, 552 U.S. at 49. In other words, the Guidelines should not be treated as a separate class of federal law that is categorically exempt from Court review.

Third, the Commission cannot practicably ensure consistent and accurate application of the law it creates by itself. The Commission is supposed to have seven voting members; therefore, at least four members are needed. 28 U.S.C. § 991(a). Even with the Commission quorum, it has slow to act. Perhaps the most obvious example it has taken more than twenty-five years to revise proposed amendment to the robbery Guideline, notwithstanding a deep circuit split over the interpretation of the physical restraint enhancement.

Despite its unresponsiveness, proponents of the Commission’s primacy with respect to the resolution of circuit conflict often tout the Commission’s purported efficiency. The reasoning follows that the Commission is better suited to resolve circuit conflict because it is an independent agency comprised of sentencing experts; thus, it ought to be more efficient because it operates outside of political influences of Congress and is unconstrained by the sluggishness of the judiciary. Yet, as of writing this petition, the Commission has been powerless — for the fourth straight year.

The Court can no longer afford to provide such extreme deference to the Commission. The time has come for it to reexamine its hands off policy with respect to the interpretation of specific guideline provisions. The Court should do so because its deference to the Commission is required by neither the SRA nor fair reading of *Braxton*, and the Commission is incapable of practicably fulfilling its duties. By taking a more active role in shaping the rules that affect every federal criminal sentence, the Court would not only begin to carve an appropriate role for itself in Guidelines interpretation but also would work to further the goals of federal sentencing by eliminating unwarranted sentencing disparities. Ultimately, the resolution of the conflict surrounding the scope and application of the physical restrain sentencing enhancement provides an appropriate vehicle for the Court to reconsider its role in guideline interpretation.

⁴⁶ Dawinder S. Sidhu, *Sentencing Guidelines Abstention* 33 (2021), <https://ssrn.com/abstract=3950703> (“Moreover, there is simply nothing in the legislative history or the SRA to suggest that Congress intended for the Court to completely surrender its traditional role to the Commission, or for the Court to do anything different than it does for Congress or agencies in the context of relevant splits.”).

⁴⁷ Samuel Alito, *Reviewing the Sentencing Commission’s 1991 Annual Report*, 5 Fed. Sentencing Guidelines. 166, 168 (1992).

2. Limits on Agency Deference Apply to the Sentencing Commission Just as They Do To Other Agency

In *Kisor v. Wilkie*, this Court “reinforce[ed] some of the limits inherent in the *Auer* doctrine.” 139 S. Ct. 2400, 2415. The Court recognized that some language in its prior cases—like its statement that an “agency’s interpretation ‘becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation’”—“may suggest a caricature of the doctrine, in which deference is ‘reflexive.’” *Id.* at 2412, 2415. *Kisor* made clear, however, that agency deference must not be accorded in that fashion. *Id.* at 2415.

“First and foremost,” the Court explained, “a court should not afford *Auer*⁴⁸ deference unless the regulation is genuinely ambiguous. *Id.* “And before concluding that a rule is genuinely ambiguous, a court must exhaust all the ‘traditional tools’ of construction.” *Id.* That means “carefully consider[ing] the text, structure, history, and purpose of a regulation, in all the ways [the court] would if it had no agency to fall back on.” *Id.* “[O]nly when that legal toolkit is empty, and the interpretive question still has no single right answer can a judge conclude that it is ‘more [one] of policy than of law.’” *Id.*

When conflicting interpretations of the Guidelines are left unresolved, the primary purpose of the SRA—eliminating unwarranted sentencing disparities—is undermined because, when the sentencing rules vary from circuit to circuit, defendants are at a heightened risk of receiving disproportionate punishments for the same or similar crimes. See *United States v. Banuelos-Rodriguez*, 215 F.3d 969, 979 (9th Cir. 2000). (Pregerson, J., dissenting) (“[I]ntracircuit sentencing disparities...defeat the fundamental purpose of the Sentencing Guidelines: ‘reasonable uniformity in sentencing’...”). The question thus becomes, *Which institution is responsible for resolving circuit conflicts?* *Knitter*, at 214-19 (calling for the Commission to redefine the physical restraint sentencing enhancement), with *Slaugenhaft*, at 491 (calling the Supreme Court to define “physical restraint” in order to resolve the circuit split).⁴⁹ In theory, there are two institutions capable of resolving conflicting interpretations of specific Guidelines provisions: (1) the Commission, which can resolve the conflict by revising a given provision through the amendment process; 28 U.S.C. § 994(o)-(p). and (2) this Court, upon a petition for a writ of certiorari.⁵⁰

In practice, however, the burden of eliminating circuit splits rests entirely upon the Commission. See *Braxton*, 500 U.S. at 347-48. In *Braxton*, this Court declared its reluctance to resolve conflicting interpretation of specific Guidelines provisions, because Congress entrusted the Commission to ensure consistent application of the law it creates through its amendment process. *Id.* The Court reasoned that the Commission is *principally* responsible for resolving circuit splits because 28 U.S.C. § 944(o) commands the Commission to “periodically review and revise” the Guidelines. *Id.* Therefore, even though a “principal purpose” of this Court’s certiorari jurisdiction is to resolve conflicts concerning the interpretation of federal law,⁵¹ the Court in

⁴⁸ *Auer v. Robbins*, 519 U.S. 452 (1997)

⁴⁹ See, e.g., Juila Knitter, Comment, “*Don’t Move*”: *Redefining “Physical Restraint” in Light of A United States Circuit Court Divide*, 44 Seattle U.L. Rev. 205, 215-16 (2020);

⁵⁰ Devin Thomas Slaugenhaft, *Resolving Division Among The U.S. Court of Appeals: What Constitutes A Physical Restraint?*, 82 U. Pitt. L. Rev. 489, 497 (2020).

⁵¹ *Id.* at 347-48

Braxton allowed the Commission to perform “essentially the same role” with respect to the interpretation of other federal laws through its amendment process.⁵² The result of the Court’s decision has been truly unique in American administrative law, as the Commission now operates as its own “Guidelines Supreme Court.” According to Justice Samuel Alito, no other federal agency has “ever performed a role anything like it.” *Id.*

This case is an excellent vehicle to resolve either split. Petitioner’s case squarely implicates six to five splits. Resolution of either question in Petitioner’s favor would render the physical restraint enhancement inapplicable. And that enhancement unquestionably affected Cannady’s sentence. It increased his offense level by two points. Anchored by that range, the district court sentenced Petitioner to 155 months’ imprisonment. But had the physical restraint not been applied, his recommended sentencing range would have been 121 – 155 months, and thus his ultimate sentence would certainly have been far lower. See *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1907 (2018) (“[A]n error resulting in a higher range than the Guidelines provide usually establishes a reasonable probability that a defendant will serve a prison sentence that is more than ‘necessary’ to fulfill the purposes of incarceration. (quoting 18 U.S.C. § 3553(a)”).

CONCLUSION

The Ninth Circuit ignores the principle that courts should avoid constitutional issues if procedural grounds suffice to resolve a *habeas* case. *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). It has even decided that procedural grounds do not need a record review for disposal. The concept of a threshold, or gateway, test is to distinguish appeals deserving of attention from those that plainly do not. *Miller-El*.

The appellate court is supposed to grant COA to Petitioners who meet the § 2253 threshold requirements. Instead of fulfilling its Gatekeeper role, the Ninth Circuit seemed more intent on playing “hide the procedural ball” from a petitioner who makes a substantial’ showing of constitutional violations. By refusing to consider the constitutional merits of Petitioner’s COA application; the Ninth Circuit has transformed itself from Gatekeeper to goalie.

Petitioner requests this Court to grant writ to review the Ninth Circuit’s dismissal of Petitioner’s COA application. Petitioner hopes that the fundamental constitutional violations, poor judicial reasoning, and potentially grave injustice involved in Petitioner’s case will provide this Court with compelling enough reasons to justify this Court’s intervention.

⁵² Samuel Alito, *Reviewing the Sentencing Commission’s 1991 Annual Report*, 5 Fed Sentencing Rep. 166, 168 (1992).

Wherefore, Petitioner Todd Eugene Cannady respectfully prays that a writ of certiorari be granted.

Dated: This _____ day of April, 2025.

Todd Eugene Cannady
In Propria Persona

INDEX OF APPENDIXES

Appendix A: Order of the Ninth Circuit denying Petitioner's motion for a certificate of appealability. (United States v. Todd Eugene Cannady, No. 24-1065, January 24, 2025).

Appendix B: Ninth Circuit, Brief in Support of Application for Certificate of Appealability, United States v. Todd Eugene Cannady, No: 23-1065.

Appendix C: Ninth Circuit Docket Sheet, United States v. Todd Eugene Cannady, No: 23-1065.

Appendix D: Order of the district court denying Petitioner's Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. §2255, United States v. Todd Eugene Cannady, No. 5:23-cv-0186-SB and district court's order denying its certificate of appealability, January 16, 2024).

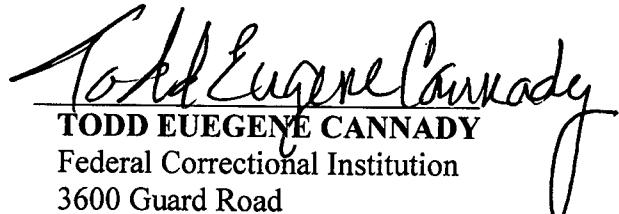
CERTIFICATIE OF SERVICE

I, Todd Eugene Cannady, certify that I have served a true and correct copy of the foregoing Petition for a Writ of Certiorari upon opposing counsel by United States Mail to:

Solicitor General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW, Room 5626
Washington, D.C. 20530-0001

United States Attorney's Office
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Dated: This 17, day of April, 2025, mailed at the Federal Correctional Institution, 3600 Guard Road, Lompoc, California 93436.


TODD EUEGENE CANNADY
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