No._____

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

APPENDIX A THRU D

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

In Propria Persona

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 24 2025

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

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. TODD CANNADY, Defendant - Appellant.	No. 24-1065 D.C. Nos. 5:21-cr-00181-SB-1 5:23-cv-01686-SB Central District of California, Riverside ORDER

Before: SILVERMAN and SUNG, Circuit Judges.

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

Any pending motions are denied as moot.

DENIED.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TODD EUGENE CANNADY, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	Case No. 5:23-cv-01686-SB ORDER DENYING PETITIONER'S MOTION TO VACATE AND CORRECT SENTENCE PURSUANT TO 28 U.S.C. § 2255

Petitioner Todd Eugene Cannady pleaded guilty to armed bank robbery and use of a firearm in furtherance of a violent crime and received a sentence of 235 months. Cannady now brings a motion under 28 U.S.C. § 2255, alleging ineffective assistance of counsel (IAC). Because Cannady has not shown that he was prejudiced by any deficient performance by his counsel, the Court DENIES the motion.[1]

I.

Cannady admitted to committing a string of armed bank robberies as part of a plea agreement. Plea Agreement, No. 5:21-cr-181-SB-1, Dkt. No. 22. Pursuant to the agreement, the government charged him with one count (instead of ten counts) of armed bank robbery and one count of the use of a firearm in furtherance of a violent crime. *Id.* ¶¶ 4–5. The parties stipulated to an offense level of 34, which contained a two-point enhancement for "physical restraint." *Id.* ¶ 17. The parties did not stipulate to a particular criminal history category. *Id.* ¶ 19.

[1] Because "the motion and the files and records of the case conclusively show that [Cannady] is entitled to no relief," the Court decides the motion without a hearing. 28 U.S.C. § 2255.

Prior to sentencing, Cannady's counsel challenged the probation officer's six-point enhancement for brandishing a firearm during the robbery. PSR Addenda, No. 5:21-cr-181-SB-1, Dkt. No. 41. Cannady's counsel argued that the six-point enhancement would amount to double-counting the same conduct charged in Count Two, which itself contained a seven-year mandatory minimum sentence. 18 U.S.C. § 924(c)(1)(A)(ii). The probation officer responded that the guidelines required it to take into account Cannady's conduct in his other admitted, noncharged robberies in the plea agreement. PSR Addenda at 2. Because he used a gun in those other robberies, the probation officer recommended the six-point enhancement. *Id.* The parties, however, agreed to recommend the stipulated offense level calculated in the plea agreement, which did not include the six-point enhancement.

Cannady's counsel also objected to the calculation of Cannady's criminal history category, arguing that his 1994 conviction for assaulting a federal officer fell outside the relevant 15-year time period. *Id.* at 4. The probation officer responded that because the sentences ran consecutively, rather than concurrently, the incarceration and supervised release resulting from Cannady's 1994 offense fell within the 15-year period. The Court agreed with the probation officer. Once it was established that Cannady had been sentenced consecutively for his 1994 conviction, Cannady's counsel ultimately appeared to agree as well.

At Cannady's sentencing hearing, the Court sentenced Cannady to 235 months, the low end of the guideline range. In its statement of reasons, the Court found that a sentence at the "high end of the range, or beyond" would have been appropriate but imposed the 235 months instead because of Cannady's age. Statement of Reasons, No. 5:21-cr-181-SB-1, Dkt. No. 44; *see also* Revised PSR, No. 5:21-cr-181-SB-1, Dkt. No. 40 (Cannady was 61 at the time of sentencing).

Cannady filed this motion to vacate and correct his sentence under 28 U.S.C. § 2255 based on IAC.

II.

To prevail on a claim for IAC, the defendant must demonstrate that his counsel's conduct was both constitutionally deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To be deficient, counsel's conduct must be objectively unreasonable. *Id.* at 688. In evaluating deficiency, "courts indulge a strong presumption that conduct 'falls within the wide range of reasonable assistance.'" *United States v. Sanchez-Cervantes*, 282 F.3d 664, 671–72 (9th Cir. 2002). To be prejudicial, there must be a "reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different." *Harrington v. Richter*, 562 U.S. 86, 104 (2011).

III.

Cannady bases his IAC claim on his counsel's failure to object to: (1) the 1994 sentence's inclusion in the calculation of the criminal history category; (2) the two-point enhancement to the offense level based on physical restraint; and (3) facts in the PSR about physical restraint. Dkt. No. 2 at 9, 11; Dkt. No. 12 at 15. Cannady has not demonstrated that his counsel's performance was deficient as claimed.

First, Cannady's counsel did object to the inclusion of the 1994 sentence in the calculating his criminal history category. *See* PSR Addenda (acknowledging defense counsel's objections to the PSR, including the specific objection to the inclusion of the 1994 offense in the calculation of Cannady's criminal history category). At the sentencing hearing, the Court accepted the calculation by the probation department, thereby overruling the objection.

Second, the decision to not object to the two-point enhancement for physical restraint was reasonable because the parties agreed to the enhancement as part of the plea agreement. Moreover, even if counsel were at liberty to object, the objection would have been meritless. Cannady placed a gun against a teller's back and forced her to walk to other teller stations and out of the bank. This conduct qualifies as physical restraint and does not constitute double counting with a § 924(c) charge. *United States v. Lindsey*, 634 F.3d 541, 555 (9th Cir. 2011) (holding bank robbers' double-counting argument foreclosed by prior Ninth Circuit precedent where he placed gun against bank employee's back and moved employee to bank vault).[2] Thus, the IAC challenge on this ground fails.

Third, Cannady raises the additional argument in his reply brief that his counsel should have objected to the facts in the PSR that support the physical

[2] Cannady cites two distinguishable cases to argue that the use of a weapon does not constitute a separate physical restraint. *United States v. Parker* is distinguishable because the defendant there (unlike here) did not focus his attention on the victim long enough to order her to walk somewhere. 241 F.3d 1114, 1119 (9th Cir. 2001) (finding "sustained focus" necessary for physical restraint enhancement). *United States v. Taylor* is distinguishable because the Second Circuit's standard is different than the Ninth's, and in any event, the defendant in *Taylor* did not actually have a firearm. 961 F.3d 68, 73, 77–78 (2d Cir. 2020).

restraint enhancement. But Cannady admitted those facts in the plea agreement. Plea Agreement at 8–9 (admitting that Cannady pressed a gun against teller's back, pushed her to the teller door and other teller stations, and out of the bank). Cannady's counsel therefore had no basis to object to the admitted facts.

The petition separately fails because it does not demonstrate prejudice. Cannady argues that, if his counsel had objected, the guideline range would have been lower, and he would have been sentenced to the low end of the new range. But that conclusion incorrectly assumes the Court would have sentenced him at the low end of a lower guideline range. In fact, the Court noted that a sentence at the high end of the range (or exceeding the range) would have been appropriate and only declined to impose a higher sentence because of Cannady's age. Statement of Reasons, No. 5:21-cr-181-SB-1, Dkt. No. 44 ("The high end of the range, or beyond, would have been appropriate but for age considerations."). In this circumstance, Cannady cannot show that he would have received a lower sentence. Nor has Cannady demonstrated that he would have received a better plea deal or that he would have rejected the deal if his counsel would have pressed the objections.

IV.

In addition to his IAC claims, Cannady briefly argues that he is entitled to a two-point reduction in the calculation of his criminal history category because of a recent, retroactive amendment to the sentencing guidelines that eliminated the two points he received for committing the underlying offenses while under post-conviction supervision. *See* United States Sentencing Commission, Guidelines Manual App. C., Amdt. 821 (Supp. Nov. 2012–Nov. 2023) (removing 2-point enhancement for offenses committed while under any criminal justice sentence under prior section § 4A1.1(d)). Because this amendment did not take effect until after sentencing, Cannady cannot fault his counsel for not raising it.

A motion for a reduction of sentence under 18 U.S.C. § 3852(c)(2) is distinct from a motion brought under § 2255. *See United States v. Prophet*, 989 F.3d 231, 238–39 (3d Cir. 2021) ("When a petitioner seeks relief under § 2255 . . . , the analysis is different from [a motion for reduction of sentence under] § 3582(c)(2)."). However, consistent with its obligation to construe pro se pleadings liberally, the Court construes this argument as brought under § 3582 and addresses it accordingly.[3] *See, e.g.*, *United States v. Akel*, 388 F. Supp. 3d 1248,

[3] Because there is no jurisdictional bar to successive § 3582(c)(2) motions, *United States v. Trujillo*, 713 F.3d 1003, 1005 (9th Cir. 2013), unlike petitions under

1251 (D. Nev. 2019) (construing sentencing enhancement argument in § 2255 motion as a resentencing motion under § 3582(c)); *Proctor v. Guttierrez*, No. 12-cv-04774 ODW (VBK), 2013 WL 1970238, at *3 (C.D. Cal. Apr. 11, 2013) (same), *report and recommendation adopted,* 2013 WL 1970232 (C.D. Cal. May 10, 2013).

Section 3252, which sets forth the process for reducing a sentence pursuant to a retroactive amendment to the sentencing guidelines, states:

> [I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. § 3582(c)(2). Amendment 821 is "consistent with applicable policy statements issued by the Sentencing Commission." *See* U.S.S.G. § 1B1.10(d)–(e) (listing Amendment 821 as applying retroactively effective February 1, 2024). Courts analyze 3582(c)(2) motions in two steps: first determining whether the application of the amendment would result in a reduced guideline range, and, if it does, then determining whether to reduce the sentence after considering the § 3553(a) factors. *Dillon v. United States*, 560 U.S. 817, 826 (2010). The decision whether to reduce an affected sentence is discretionary.

Amendment 821 changes the calculation of a defendant's criminal history category for offenses committed while under a criminal justice sentence. Prior to the amendment, defendants who committed the charged offense while under a criminal justice sentence received two additional criminal history points. After the amendment, no additional criminal history points are added if the defendant has six criminal history points or less, and one additional criminal history point is added if the defendant has seven or more points. U.S.S.G. § 4A1.1(e). The total points determine a defendant's criminal history category, which is then applied to the offense level to determine the guideline range. U.S.S.G. § 5A.

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§ 2255, construing a motion under the former statute is a more liberal construction of petitioner's pleading.

At sentencing, the calculation of Cannady's criminal history category included two points for having committed the offense while under a criminal sentence pursuant to the operative sentencing guidelines at the time. Revised PSR ¶¶ 196–98. This resulted in a total criminal history score of eight, which put him in a criminal history category of IV. *Id.* Were Cannady resentenced under Amendment 821, his criminal history score would be six, and his criminal history category would be III. U.S.S.G. Ch. 5 Pt. A. Applied to his offense level of 31, his guideline range would be 219 to 252 months. *Id.* Cannady's range has been lowered based on the amendment, and the Court thus has discretion to reduce the sentence within the amended range.

However, the Court declines to exercise that discretion. Cannady's current sentence of 235 months falls squarely within the amended range, and the Court's review of the § 3553(a) factors strongly counsels against a reduction in sentence. Cannady's conduct was serious—he committed armed robbery of ten banks, threatening people at gunpoint and stealing over $700,000. Plea Agreement at 8–10. A lesser sentence would not promote respect for the law, provide just punishment for the offense, or afford adequate deterrence. 18 U.S.C. § 3553(a)(2)(A)–(B). Additionally, Cannady has a lengthy history of theft, robbery, weapons, and violence dating back to 1980 and continuing to the present. Revised PSR ¶¶ 189–203. A lesser sentence would not adequately protect the public from his further crimes. 18 U.S.C. § 3553(a)(2)(C). As the Court stated in its prior statement of reasons: "The high end of the range, or beyond, would have been appropriate . . . ." Statement of Reasons, No. 5:21-cr-181-SB-1, Dkt. No. 44. Indeed, Defendant would have received a higher sentence but for his age.

Because the Court would impose the same sentence again even under the amended guidelines, the Court rejects Cannady's motion for reduction of sentence. To the extent that Cannady claims that his counsel was deficient in failing to raise an amendment that had not yet become effective, the claim is meritless and in any event did not result in any prejudice.

V.

Cannady has not shown that the alleged failures by his counsel were either deficient or prejudicial. The Court therefore DENIES the petition. The Court also denies Cannady's request for a certificate of appealability. A court may issue a certificate only when the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *accord Slack v. McDaniel*, 529 U.S. 473, 478 (2000) (certificate should issue when "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional

right."). Cannady has not satisfied this standard. Finally, the Court denies Cannady's request for resentencing under 18 U.S.C. § 3852(c)(2) based on its application of the § 3553(a) factors.

Date: January 16, 2024

Stanley Blumenfeld, Jr.
United States District Judge

Additional material from this filing is available in the Clerk's Office.