

FOR PUBLICATION

In the
United States Court of Appeals
For the Eleventh Circuit

No. 23-13326

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ANTONIO BROWN,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 8:22-cr-00336-KKM-CPT-1

Before JORDAN, JILL PRYOR, and NEWSOM, Circuit Judges.

NEWSOM, Circuit Judge:

Antonio Brown pleaded guilty to two armed robberies and was sentenced to 17 years' imprisonment. He raises three challenges on appeal. First, he argues that the government breached his plea agreement and that the district court erred by failing to

remedy the breach sua sponte. Second, Brown asserts that the district court erred by imposing a two-level sentencing enhancement applicable to convicted robbers who “physically restrain[]” their victims. And third, he contends that the district court imposed a substantively unreasonable sentence.

With respect to the first issue, we hold that the district court didn’t err because the government didn’t breach the plea agreement. With respect to the second issue, though, we hold that, in light of recent amendments to the physical-restraint Sentencing Guideline that apply retroactively, the district court plainly erred in applying the two-level enhancement. We therefore vacate Brown’s sentence and remand for resentencing. Having done so, we needn’t reach Brown’s substantive-reasonableness challenge to his sentence.

I

A

Brown and his co-defendant, Steven Jackson, robbed two auto-parts stores in Tampa, Florida. Armed with handguns and wearing masks, the two men first entered an O’Reilly Auto Parts. They brandished their guns and ordered the employees to give them the money in the cash registers and the contents of the store’s safe. The employees handed over about \$300 from the registers but couldn’t open the safe. After collecting the cash, Brown and Jackson ordered the employees and a customer to lie down in the back of the store and stay there while the two fled.

Brown and Jackson next targeted an Advance Auto Parts, where events unfolded similarly. They entered the store, brandished their weapons, and ordered the employees to empty the safe and the cash registers. Once again, the employees couldn't open the safe, but they forked over about \$1,140 from the registers. And once again, Brown and Jackson directed the employees to the back of the store and told them to lie down, at which point the pair fled. Surveillance footage captured them escaping both stores in a distinctive vehicle.

Later that evening, police officers spotted Brown driving a car matching the description of the one involved in the robberies and pulled him over for a traffic violation. After smelling marijuana in the car, the officers searched it and found the clothing and mask that Brown had worn during the hold-ups, Jackson's wallet, and about \$1,000 in cash. Both men were ultimately arrested.

B

Brown was charged with five counts: two counts of Hobbs Act robbery, in violation of 18 U.S.C. §§ 1951(a)–(b) and 18 U.S.C. § 2; one count of conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. §§ 1951(a)–(b); and two counts of brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. §§ 924(c)(1)(A)(ii) and 18 U.S.C. § 2.

Brown pleaded guilty to all counts except one of the brandishing counts, which would have carried a mandatory seven-year consecutive sentence, *see* 18 U.S.C. §§ 924(c)(1)(A)(ii), but which the

government agreed to drop as part of the plea deal. The government also agreed to recommend a within-guidelines sentence, but it expressly reserved the right to report “all information concerning the background, character, and conduct of the defendant, to provide relevant factual information, including the totality of the defendant’s criminal activities, . . . to respond to comments made by the defendant or defendant’s counsel, and to correct any misstatements or inaccuracies.” Plea Agreement at 12, Dkt. No. 63.

In the run-up to sentencing, a probation officer prepared a pre-sentence investigation report (PSR). The PSR recommended two enhancements: a five-level enhancement under U.S.S.G. § 2B3.1(b)(2)(C), which applies to instances in which the offender “brandished” a firearm, and a two-level enhancement under § 2B3.1(b)(4)(B), which, at the time, applied to instances in which a convicted robber “physically restrained” a victim. The PSR also detailed Brown’s lengthy criminal history. Because much of the Brown’s history was unscored, the PSR identified it as warranting an upward departure from the Guidelines range. After the preparation of the PSR but before sentencing, the district court notified the parties that it was considering a departure.

The district court then held two successive sentencing hearings. At the first hearing, the prosecutor acknowledged that the government was bound by the plea agreement to recommend “[n]o more than” a top-of-the-Guidelines sentence, which he urged the court to impose. Sent’g Hr’g Tr. I at 17, Dkt. No. 136. Brown, for his part, objected to the facts in the PSR, arguing that two of his

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prior convictions weren't actually for separate crimes. The court stayed sentencing for three weeks to allow the parties to investigate that issue.

Brown's sentencing resumed at a second hearing a few weeks later. Because the record of Brown's past convictions indicated that they were indeed for separate crimes, he withdrew his factual objection to the PSR. The prosecutor reiterated the government's view that "the top of the Guidelines is the appropriate sentence." Sent'g Hr'g Tr. II at 8, Dkt. No. 137. He opined that a top-of-the-Guidelines sentence "would be possibly considered lenient by some," but he acknowledged that the government had "agreed to advocate for" it. *Id.* at 7. After considering the 18 U.S.C. § 3553(a) factors—with a particular focus on Brown's criminal history—the district court decided to vary upward. The court sentenced Brown to 204 months' imprisonment: 120 months for the Hobbs Act charges, and a consecutive 84 months for the brandishing charge.¹

After Brown appealed and the case was fully briefed, the Sentencing Commission amended § 2B3.1(b)(4)(B), abrogating our

¹ Brown had a total offense level of 25 (including the two-level § 2B3.1(b)(4)(B) "physical[] restrain[t]" enhancement at issue here) and a criminal-history category of III, which resulted in a Guidelines range of 70–87 months for the Hobbs Act charges. In the absence of the "physical[] restrain[t]" enhancement, a total offense level of 23 with the same criminal-history category would have netted a range of 57–71 months. *See* U.S.S.G. ch. 5, pt. A.

previous interpretation of it. We ordered and the parties filed supplemental briefs addressing the amendment's relevance.

II

Ordinarily, we review de novo both whether the government breached a plea agreement, *United States v. Hunter*, 835 F.3d 1320, 1324 (11th Cir. 2016), and the district court's "interpretation and application of the Sentencing Guidelines," *United States v. Dupree*, 57 F.4th 1269, 1272 (11th Cir. 2023) (en banc). But when a defendant raises his challenges for the first time on appeal, we review for plain error. See *Puckett v. United States*, 556 U.S. 129, 135–36 (2009) (breach of plea agreement); *United States v. Aguilar-Ibarra*, 740 F.3d 587, 592 (11th Cir. 2014) (interpretation of the Sentencing Guidelines).

The plain-error standard comprises four factors: The defendant must show (1) that the district court committed an error (2) that is plain and (3) that affects his substantial rights. *Rosales-Mireles v. United States*, 585 U.S. 129, 134 (2018). If the defendant succeeds in demonstrating those three prerequisites, we may exercise our discretion to correct the error if (4) it "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* at 135 (citation modified).

III

Because Brown didn't raise his challenges regarding a breach of the plea agreement and the two-level sentencing enhancement in the district court, we review both for plain error. Our analysis proceeds in two parts. First, we hold that the government didn't

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breach Brown’s plea agreement and, accordingly, that the district court didn’t plainly err by failing to remedy the breach sua sponte. Second, we hold that because U.S.S.G. § 2B3.1(b)(4)(B) was amended after the district court announced Brown’s sentence, and because the amendment applies retroactively, the district court (through no fault of its own) plainly erred in imposing the two-level “physical[] restrain[t]” enhancement.

A

We first consider whether the government breached Brown’s plea agreement and whether the district court erred by failing to remedy that alleged breach sua sponte. The government didn’t breach the agreement, so the court didn’t err.

The government must keep the promises it makes in an agreement “that induce[] the defendant to plead guilty.” *United States v. Sosa*, 782 F.3d 630, 637 (11th Cir. 2015) (quoting *United States v. Horsfall*, 552 F.3d 1275, 1281 (11th Cir. 2008)). To assess whether the government breached, we (1) “determine the scope of the government’s promises” and (2) “ask whether the government’s actions were inconsistent with what the defendant reasonably understood when he entered his guilty plea.” *Id.* (citation modified). A court should not read implied-in-law terms into a plea agreement. See *United States v. Benchimol*, 471 U.S. 453, 455 (1985) (per curiam).

In the plea agreement, the government agreed to recommend a within-Guidelines sentence. And at the two sentencing hearings, the prosecutor made good on that promise. At the first

hearing, he acknowledged that the government was bound by the plea agreement to recommend “[n]o more than” a top-of-the-Guidelines sentence. Sent’g Hr’g Tr. I at 17–19. And at the second hearing, he said that “the top of the Guidelines is . . . appropriate.” Sent’g Hr’g Tr. II at 8. He acknowledged that a top-of-the-Guidelines sentence “would be possibly considered lenient by some,” but he reiterated that the government had “agreed to advocate for” it. *Id.* at 7. Consistent with its position from the outset, the prosecutor opposed Brown’s request for a lower sentence, because, he said, “the top of the Guidelines should be the lowest the Court should go.” *Id.* at 7–8.

On appeal, Brown contends that the prosecutor was obliged to advocate for, and not in any way undermine, the recommended sentence—an obligation, Brown says, that the prosecutor breached when he implied that he regretted the government’s sentencing promise. For support, Brown relies heavily on our predecessor court’s decision in *United States v. Grandinetti*, 564 F.2d 723 (5th Cir. 1977). We held that the plea agreement in that case entitled the defendant to “a forceful and intelligent recommendation” of the agreed-upon sentence, and that the prosecutor breached the agreement by questioning the “legality” and “propriety” of the sentence and thereby “in effect[] argu[ing] against it.” *Id.* at 725, 727. Brown insists that the prosecutor’s tepid recommendation here is comparable to the conduct we condemned in *Grandinetti*.

Respectfully, we disagree, especially when we consider the Supreme Court’s ensuing decision in *United States v. Benchimol*, 471

U.S. 453, 455 (1985) (per curiam). There, the Court clarified that the government has no obligation to “enthusiastically” recommend a particular sentence unless the plea-bargaining parties contracted for such enthusiasm. *Id.* at 455. Notably, the Court distinguished *Grandinetti* as a case about “reservations” more substantive than mere “less-than-enthusiastic support for leniency.” *Id.* at 456. Together, it seems to us, *Grandinetti* and *Benchimol* stand for the proposition that the government doesn’t breach a plea agreement by offering a halfhearted or grudging recommendation; rather, to breach the agreement, the prosecutor must functionally “argue[] against it.” See *Grandinetti*, 564 F.2d at 727.

In subsequent cases, we have continued to flesh out the distinction between prosecutorial comments that breach a plea agreement and those that don’t. Most conspicuous is *United States v. Levy*, 374 F.3d 1023 (11th Cir. 2004), *vacated on other grounds*, 545 U.S. 1101 (2005), *reinstated*, 416 F.3d 1273 (11th Cir. 2005). There, the prosecutor said that he might be able to present evidence to support a sentencing enhancement but that, “with a heavy heart,” he couldn’t do so because his “hands [were] bound” by the agreement’s terms. *Id.* at 1028. Even on those facts—which seem to us if anything a bit worse than those in this case—we held that the government “clearly did *not* violate [the] plea agreement.” *Id.* at 1034 (emphasis added); see also, e.g., *United States v. Carrazana*, 921 F.2d 1557, 1569 (11th Cir. 1991) (finding no breach even where, despite the government’s agreement not to make any recommendation regarding the length of the sentence, the prosecutor said that

he “[couldn’t] believe” that the defense would recommend a 20-year sentence).

The prosecutor’s comments here weren’t nearly as troubling as those in *Grandinetti*; he never, for instance, raised “personal reservations,” *Benchimol*, 471 U.S. at 456, about the “legality” or the objective “propriety” of Brown’s sentence, *Grandinetti*, 564 F.2d at 725. Nor, for that matter, did he melodramatically lament that it was only with a “heavy heart” that he was going along with the recommended sentence. *Levy*, 374 F.3d at 1028. The worst that can be said of the prosecutor’s comments here is that he acknowledged that a top-of-the-Guidelines sentence “would be possibly considered lenient by some.” Sent’g Hr’g Tr. II at 7. Under the law as it has developed since *Grandinetti*, that’s not a breach.

B

Next, we consider whether the district court plainly erred by imposing a two-level sentencing enhancement applicable to offenders who “physically restrain[]” robbery victims. U.S.S.G. § 2B3.1(b)(4)(B) (2021).

Recall the four prongs for plain-error review: As an initial matter, the defendant must show (1) that the district court erred, (2) that the court’s error was plain, and (3) that the error affects his substantial rights. *Rosales-Mireles*, 585 U.S. at 134. If those boxes are checked, we will correct the error if (4) it “seriously affects the fairness, integrity or public reputation of judicial proceedings.” *Id.* at 135 (quoting *Molina-Martinez v. United States*, 578 U.S. 189, 194 (2016)). Importantly here, we consider the plainness of the alleged

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error “at the time of appellate consideration,” not at the time it occurred. *United States v. Cingari*, 952 F.3d 1301, 1305 n.1 (11th Cir. 2020) (quoting *United States v. Rodriguez*, 398 F.3d 1291, 1299 (11th Cir. 2005)).

It will take a bit of explaining, but we conclude that because (1) the relevant Sentencing Guideline was amended after Brown’s sentencing hearing in a way that renders it inapplicable to his conduct, and (2) the amendment applies retroactively, the district court plainly erred.

1

First up, error. In light of the recent amendment of U.S.S.G. § 2B3.1(b)(4)(B), which we conclude is properly applied retroactively, we conclude that the district court erred. We’ll assess the error in two steps: by detailing the amendment and then by evaluating the propriety of the amendment’s retroactive application.

a

In 2022, when Brown was sentenced, § 2B3.1(b)(4)(B) provided for a two-level enhancement “if any person was physically restrained to facilitate commission of the offense or to facilitate escape.” U.S.S.G. § 2B3.1(b)(4)(B) (2021). At that time, the Guidelines’ commentary defined the term “physically restrained” as “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) (2021); *see id.* § 2B3.1 cmt. n.1 (2021) (incorporating § 1B1.1’s definition). Despite the commentary’s references to tying, binding, and locking, we interpreted the term “physically restrained” broadly, holding that it applied

whenever “a defendant creates circumstances allowing his victims no alternative but compliance.” *United States v. Deleon*, 116 F.4th 1260, 1263 (11th Cir. 2024) (citation modified); *accord United States v. Jones*, 32 F.3d 1512, 1519 (11th Cir. 1994). So, for example, we held that a robber “physically restrained” a store clerk when he pointed a gun at him and demanded money. *See Deleon*, 116 F.4th at 1264. That interpretation—with which some of our judges disagreed²—put us on one side of a circuit split alongside the First, Fourth, Sixth, and Tenth Circuits. *United States v. Wallace*, 461 F.3d 15, 34–35 (1st Cir. 2006); *United States v. Dimache*, 665 F.3d 603, 608 (4th Cir. 2011); *United States v. Howell*, 17 F.4th 673, 692 (6th Cir. 2021); *United States v. Miera*, 539 F.3d 1232, 1235–36 (10th Cir. 2008). On the other side, the Second, Third, Fifth, Seventh, and Ninth Circuits interpreted § 2B3.1(b)(4)(B) more narrowly—in particular, to require more than the “psychological coercion of pointing a gun.” U.S.S.G. app. C, amend. 832 (2025); *see also United States v. Anglin*, 169 F.3d 154, 164 (2d Cir. 1999); *United States v. Bell*, 947 F.3d 49, 57 (3d Cir. 2020); *United States v. Garcia*, 857 F.3d 708, 713–14 (5th Cir. 2017); *United States v. Herman*, 930 F.3d 872, 877 (7th Cir. 2019); *United States v. Parker*, 241 F.3d 1114, 1118–19 (9th Cir. 2001).

Last year, to “address[the] circuit conflict[]” that had arisen regarding § 2B3.1(b)(4)(B)’s meaning, the Sentencing Commission amended the Guideline to make the enhancement applicable when

² *See Deleon*, 116 F.4th at 1265–66 (Rosenbaum, J., concurring); *id.* at 1270 (Newsom, J., concurring).

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“any person’s freedom of movement was restricted through physical contact or confinement, such as by being tied, bound, or locked up.” U.S.S.G. § 2B3.1(b)(4)(B); *see also id.* app. C, amend. 832 (2025) (“This two-part amendment addresses circuit conflicts involving § 2B3.1 (Robbery) . . .”).

Here’s the change in graphic form, with the new language in bold:

[I]f any ~~person was physically restrained~~ **person’s freedom of movement was restricted through physical contact or confinement, such as by being tied, bound, or locked up**, to facilitate commission of the offense or to facilitate escape, increase by 2 levels.

Most conspicuously, the amendment made two changes. First, it scrapped the term “physically restrained” in favor of a reference to the restriction of a person’s “freedom of movement” through “physical contact or confinement.” And second, it brought the exemplary clause—“such as by being tied, bound, or locked up”—from the commentary into the text of the Guideline itself.

As a reminder, during each of his robberies, Brown brandished a firearm and ordered people to lie down in the back of the store while he fled, but there is no evidence that he used “physical contact” of the sort described in the amended Guideline, let alone that he “tied, bound, or locked up” anyone. Brown’s conduct, therefore, triggered the § 2B3.1(b)(4)(B) enhancement under our previous interpretation, but may well not trigger the enhancement

under the amended version’s plain text. Put simply, the two-level enhancement might not apply to him anymore.

b

Of course, the amended text matters only if the new Guideline applies retroactively. Generally, when reviewing the district court’s application of the Guidelines, we “appl[y] the version of the [G]uidelines in effect on the date of the sentencing hearing.” *United States v. Jerchow*, 631 F.3d 1181, 1184 (11th Cir. 2011) (quoting *United States v. Descent*, 292 F.3d 703, 707 (11th Cir. 2002)). If, though, a subsequent amendment “clarifies” rather than substantively changes a Guideline, we will apply it retroactively. *Id.* A clarifying amendment applies retroactively because rather than *change* a Guideline’s meaning, it simply *confirms* its preexisting meaning. See *id.*; *Descent*, 292 F.3d at 707–08. Accordingly, our task here is to determine whether the 2025 amendment of § 2B3.1(b)(4)(B) “is substantive or clarifying.” *Jerchow*, 631 F.3d at 1185. Applying the traditional considerations, we conclude that the amendment is “clarifying” and, therefore, applies retroactively.

We consider four factors in determining whether an amendment is clarifying or substantive. First, we ask “whether the amendment alters the text of the Guideline or alters only the commentary.” *Id.* On the one hand, changes to actual Guideline text “strongly suggest[]” that an amendment is substantive. *United States v. Summers*, 176 F.3d 1328, 1331 (11th Cir. 1999). On the other, if an amendment “simply moves longstanding commentary to the [Guideline] text,” then it may be clarifying. *United States v. Horn*,

129 F.4th 1275, 1300 (11th Cir. 2025). Second, we ask “whether the Commission has described an amendment as clarifying or whether its statements in the amendment commentary reflect a substantive change in the punishment for an offense.” *Jerchower*, 631 F.3d at 1185. Importantly, we have observed that if a Guideline amendment reflects the Commission’s intent to resolve a circuit split, the amendment is more likely to be clarifying than substantive. *See id.* at 1187; *Horn*, 129 F.4th at 1301. Third, we ask “whether the Commission has included the amendment in the list of retroactive amendments in § 1B1.10([d]).”³ *Jerchower*, 631 F.3d at 1185. Omission from that list suggests that an amendment is substantive. *Descent*, 292 F.3d at 709. Fourth and finally, we ask whether an amendment overturns circuit precedent. If it does, that “suggests a substantive change.” *Jerchower*, 631 F.3d at 1185. If, by contrast, the amendment simply “clarifies a meaning that was inherent in the original Guideline,” then it “could be considered clarifying.” *Id.* (quoting *Summers*, 176 F.3d at 1331).

On balance, we conclude that these factors indicate that the 2025 amendment of § 2B3.1(b)(4)(B) is clarifying, rather than substantive—and, therefore, that it applies retroactively. Let us explain.

First, as already noted, the amendment’s primary change is to pull language from the commentary—essentially verbatim—

³ When *Jerchower* was decided, this list was in § 1B1.10(c); it’s now in § 1B1.10(d).

into the Guideline’s text. Again, before the amendment, the commentary defined the term “physically restrained” as “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) (2021); *see id.* § 2B3.1 cmt. n.1 (2021) (incorporating § 1B1.1’s definition). As amended, the Guideline’s text states, almost identically, that the enhancement applies if “any person’s freedom of movement was restricted through physical contact or confinement, *such as by being tied, bound, or locked up.*” U.S.S.G. § 2B3.1(b)(4)(B) (2025) (emphasis added). As already explained, under our precedent, an amendment’s “move[ment of] longstanding commentary to the [Guideline’s] text” indicates that the amendment is clarifying rather than substantive. *Horn*, 129 F.4th at 1300.

Second, the Commission’s own description of the amendment suggests that it is clarifying: The Commission said that the amendment of § 2B3.1(b)(4)(B) was designed “[t]o promote uniformity and consistency in [G]uideline application” by resolving a circuit split, U.S.S.G. app. C, amend. 832 (2025), and, even more expressly, that it “adopt[ed] the approach” taken by the Second, Third, Fifth, Seventh, and Ninth Circuits. *Id.* Notably, the Supreme Court has underscored the Commission’s congressionally authorized mission to “make whatever *clarifying* revisions to the Guidelines conflicting judicial decisions might suggest.” *Braxton v. United States*, 500 U.S. 344, 348 (1991) (emphasis added). And, accordingly, the Court has said that it will exercise “restrain[t] and circumspect[ion] in using [its] certiorari power” to address Guideline-related circuit splits—precisely to permit the Commission to resolve

such splits via clarifying, retroactive amendments. *Id.* (indicating that the Commission’s “unusual explicit *power* to decide whether and to what extent its amendments reducing sentences will be given retroactive effect” counsels giving the Commission the first crack at resolving circuit splits). Here, the Commission seems to have viewed the amendment as ratifying one side’s interpretation of § 2B3.1(b)(4)(B) rather than giving the provision an entirely new meaning—a point in favor of treating the amendment as clarifying.⁴

Third, the amendment isn’t listed in § 1B1.10(d)’s catalogue of retroactive amendments—which, under our precedent, counsels in favor of treating it as substantive. *See Descent*, 292 F.3d at 709.⁵

⁴ It’s true, as the government says, that the Commission didn’t explicitly use a form of the term “clarifying” in describing the § 2B3.1(b)(4)(B) amendment, as it did in describing the contemporaneous § 4A1.2 amendment. *See* U.S.S.G. app. C, amend. 832 (2025). As we understand it, though, our precedent privileges substance over form, and doesn’t require any magic-words recitation.

⁵ One caveat about the third factor: Our decision in *Descent* didn’t cite any authority to support its suggestion that an amendment’s inclusion in § 1B1.10(d) is probative of its clarifying nature. The underlying statutes, 28 U.S.C. § 994(o) and 18 U.S.C. § 3582(c)(2), appear to grant the Commission broad authority to make retroactive amendments “in consideration of comments and data coming to its attention.” 28 U.S.C. § 994(o). And it’s not clear why that authority wouldn’t at least permit the Commission to make retroactive substantive amendments. So it may turn out that an amendment listed in § 1B1.10(d) could be either clarifying or substantive—and, therefore, that the list itself is at least partially orthogonal to the substantive/clarifying distinction. But it’s neither here nor there—*Descent* is binding on us, and, under its direction, we conclude that the § 2B3.1(b)(4)(B) amendment’s omission from the list weighs in favor of treating it as substantive.

After *Descent*, we held that this factor doesn't weigh heavily when the Guideline amendment doesn't result in reduced terms of imprisonment. See *Horn*, 129 F.4th at 1301 (“[A]lthough Amendment 827 is not included in a list of retroactive amendments in § 1B1.10(d), that fact does not weigh heavily here, since § 1B1.10 pertains only to amendments that result in reduced terms of imprisonment, which is not applicable.”). Because Amendment 832 likewise doesn't result in reduced terms of imprisonment—quite the opposite, in fact—the third factor doesn't weigh heavily either way.

Fourth, in amending § 2B3.1(b)(4)(B), the Commission abrogated *Deleon* and the other cases on our side of the circuit split. Ordinarily, a revision that overturns existing precedent is deemed to be substantive. But not always; we have to assess the particular circumstances of the abrogation. Here, the Commission resolved a robust circuit split over § 2B3.1(b)(4)(B)'s proper interpretation. The circuits had taken diametrically opposed views, all but eliminating a “third way,” so to speak. Because the Commission was choosing between two stark alternatives, one side's reading of the Guideline was essentially *bound* to be adopted, and the other side's was essentially *bound* to be abrogated. And importantly, as already explained, in adopting the amended version, the Commission didn't so much break new ground as it rejected one view (ours) and adopted another—indicating, we think, that the amendment “clarifie[d] a meaning that was inherent in the original Guideline” all along. *Jerchow*, 631 F.3d at 1185 (quoting *Summers*, 176 F.3d at

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1331). So to the extent the fourth factor cuts one way, we think it actually favors treating the amendment as clarifying.

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On balance, the pertinent factors indicate to us that the amendment of § 2B3.1(b)(4)(B) was clarifying rather than substantive. Accordingly, we hold that the amendment applies retroactively—meaning that the district court erred in relying on our old law to impose the two-level enhancement.

2

Second, plainness. “An error is plain if it is obvious and clear under current law” at the time we conduct our review. *United States v. Johnson*, 981 F.3d 1171, 1179 (11th Cir. 2020) (citation modified); see *Cingari*, 952 F.3d at 1305 n.1 (observing that the plainness of the alleged error is determined “at the time of appellate consideration” (quoting *Rodriguez*, 398 F.3d at 1299)). Section 2B3.1(b)(4)(B) *now* clearly states that, to qualify for the enhancement, a defendant must employ “physical contact or confinement.” Accordingly, it is now clear that the district court applied the wrong legal standard at sentencing, relying instead on our previous interpretation of the old version of the Guideline. Therefore, the district court’s error was plain.

The government contends that any error couldn’t have been plain because (1) the enhancement was proper under then-existing precedent and (2) only an intervening decision from the Supreme Court or this Court can make an error plain that wasn’t clear at the time it occurred. Even a clarifying amendment isn’t like a court

decision, the government asserts, because it doesn't clarify "what the [provision] has always meant." Supplemental Br. of Appellee at 4 (quotation marks omitted) (quoting *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 n.12 (1994)). With respect, we disagree. That's exactly what a clarifying amendment does. Indeed, as already explained, under our precedent, a clarifying amendment applies retroactively precisely *because* it doesn't change a Guideline but rather explains what the Guideline meant all along. *See supra* at 14; *Descent*, 292 F.3d at 707–08. Accordingly, in light of the 2025 amendment, which we have held to be clarifying and thus retroactively applicable, the district court's imposition of the two-level enhancement wasn't proper at the time of sentencing, regardless of what our then-existing precedent said. *Cf. Henderson v. United States*, 568 U.S. 266, 269 (2013) ("[A]s long as the error was plain as of . . . the time of appellate review . . . the error is 'plain' within the meaning of [Rule 52(b)].").

3

Third, whether the error affects Brown's substantial rights. *See Rosales-Mireles*, 585 U.S. at 134–35. Candidly, there's evidence going both ways. We conclude, though, that there is "a reasonable probability that, but for the error," Brown would have received a different sentence. *Id.* (*Molina-Martinez*, 578 U.S. at 194).

As a general matter, "a defendant who has shown that the district court mistakenly deemed applicable an incorrect, higher Guidelines range" demonstrates prejudice to his substantial rights.

United States v. Thomas, 108 F.4th 1351, 1356 (11th Cir. 2024) (quoting *Molina-Martinez*, 578 U.S. at 200). But not always. Evidence “that the district court thought the sentence it chose was appropriate irrespective of the Guidelines range,” *Molina-Martinez*, 578 U.S. at 200, or the fact that the sentence is well above the Guidelines range, “can be a powerful indicator that a guidelines error did not impact a defendant’s substantial rights,” *Thomas*, 108 F.4th at 1357 (citation modified).

To be sure, the district court here offered a lengthy discussion of its decision to vary upward, focusing on Brown’s criminal history and his pattern of recidivism. But it’s unclear whether the court did so (1) because it thought the sentence length was appropriate irrespective of the Guidelines range or (2) because it thought a 33-month upward variance was appropriate irrespective of the Guidelines range *and then* applied that variance to the top of the range. If the latter, it’s possible that, without the two-level enhancement, the court would have applied the same upward variance but anchored it to a lower Guidelines range. And the court didn’t issue what we call a “*Keene* statement”—*i.e.*, it didn’t say that it would impose the same sentence regardless of any error in its Guidelines calculations. See *United States v. Keene*, 470 F.3d 1347, 1348 (11th Cir. 2006).

For these reasons, we conclude that there is a reasonable probability—not an absolute certainty, but a reasonable probability—that Brown’s sentence would have been different absent the

two-level enhancement. Accordingly, we hold that the error prejudiced his substantial rights.

4

Lastly, our discretion. As the Supreme Court recently clarified, “[a] plain Guidelines error that affects a defendant’s substantial rights is precisely the type of error that ordinarily warrants relief.” *Rosales-Mireles*, 585 U.S. at 139. If we declined to correct this error, we would “risk [the] unnecessary deprivation of liberty” and thereby “undermine[] the fairness, integrity, [and] public reputation of judicial proceedings.” *Id.* at 140. We will, therefore, exercise our discretion to correct the error here.

* * *

To summarize, the district court plainly erred by applying the two-level enhancement based on our prior interpretation of the relevant Guideline. Now that the Guideline has been amended to clarify its original meaning, Brown should have a shot at resentencing under the proper legal standard.

To be clear, nothing in this opinion precludes the district court on remand from concluding (again) that a 204-month sentence is appropriate. District courts are uniquely suited to consider and balance the totality of a criminal defendant’s circumstances, and we afford them great deference in determining variances absent errors of the sort we have corrected today. *See Concepcion v.*

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United States, 597 U.S. 481, 501 (2022); *Gall v. United States*, 552 U.S. 38, 51 (2007).⁶

IV

We hold that the government did not breach the plea agreement, and we therefore **AFFIRM** Brown’s convictions. But because the district court plainly erred in applying § 2B3.1(b)(4)(B)’s two-level sentencing enhancement, we **VACATE** his sentence and **REMAND** for resentencing.

⁶ As already noted, because we vacate Brown’s sentence and remand for resentencing, we needn’t address his separate argument that his sentence was substantively unreasonable.