"Don't Move": Redefining "Physical Restraint" in Light of a United States Circuit Court Divide

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INTRODUCTION

Elianer Dimache and an accomplice entered the First Palmetto Bank in Myrtle Beach, South Carolina, just after 5:00 PM on May 4, 2008.[1] Dimache approached a bank teller and asked for change.[2] While the teller was getting the change, Dimache jumped over the counter, pulled out a gun, and said, "You know the drill."[3] After directing the bank teller to place money in a bag held by his accomplice, Dimache pointed his gun at two other tellers and ordered them to remain on the floor in silence.[4] Instructing the bank tellers to count to 100 before moving, the pair left the bank with almost $2,000.[5]

Twelve years earlier, in New York City, Michael Anglin forced his way into the City College Branch of the Chemical Bank minutes before it opened.[6] After brandishing a gun, Anglin demanded that the tellers lie immobile on the floor and instructed them to not look at him.[7] Anglin's accomplice then entered the bank, and the two eventually left the premises with $610,000.[8]

Although these crimes have similar fact patterns, federal courts across varying circuits have regarded the defendants' actions during the course of the bank robberies differently. In July 2010, Dimache pled guilty to armed robbery per a plea agreement.[9] During sentencing deliberations, Dimache's sentence was set to between seventy-eight and ninety-seven months in prison.[10] To determine sentence length, the trial court used the United States Sentencing Commission Guidelines Manual (USSC Guidelines Manual).[11] Dimanche's sentence included three enhancements on top of the armed robbery base offense,[12] including the application of "a

1. United States v. Dimache, 665 F.3d 603, 604 (4th Cir. 2011).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. United States v. Anglin, 169 F.3d 154, 157 (2d Cir. 1999).
7. *Id.*
8. *Id.*
9. *Dimache*, 665 F.3d at 604.
10. *Id.* at 605.
11. *Id.* The United States Sentencing Commission has the duty to distribute the United States Sentencing Commission Guidelines Manual to all federal courts in the United States. 28 U.S.C. § 994. The USSC Guidelines Manual is to be used by federal courts to determine "the sentence to be imposed in a criminal case," including the decision to impose a fine, probation, or term of imprisonment. 28 U.S.C. § 994.
12. *Dimache*, 665 F.3d at 605 ("Three enhancements . . . were applied by the probation officer to Dimache's base offense level. First, the base offense level was increased two levels because the property of a post office or financial institution was taken . . . . Second, a five-level enhancement was applied because a firearm was brandished or possessed . . . . Third, a two-level enhancement was applied because the bank tellers were physically restrained to facilitate commission of, or escape from, the bank robbery . . . .").

two-level enhancement . . . because the bank tellers were physically restrained to facilitate commission of, or escape from, the bank robbery."[13] "Physically restrained," per the definition included in the USSC Guidelines Manual, means "the forcible restraint of the victim such as by being tied, bound, or locked up."[14] Dimache appealed the physical restraint enhancement.[15] In *United States v. Dimache*, the Fourth Circuit Court of Appeals agreed with the lower court's decision.[16]

In *United States v. Anglin*, on the other hand, the federal government indicted Anglin on eight counts—including, but not limited to, conspiracy to commit a bank robbery, committing the robbery, and committing the robbery with a gun—and he was eventually sentenced to 156 months in prison, including the two-level enhancement for physical restraint.[17] Anglin appealed the sentence, arguing, in part, that he had not physically restrained the bank tellers but merely ordered the tellers to get down on the floor at gunpoint; Anglin argued that such action did not merit the two-level sentencing enhancement.[18] The Second Circuit Court of Appeals agreed.[19] The court held that because Anglin's alleged restraint was not physical in the strict sense of the word—like tying up a victim or locking a victim in a room—the two-level sentencing enhancement was not appropriate.[20] Thus, Anglin's original sentence of 156 months was reduced to 140 months.[21]

As of January 2020, eleven of the federal circuit courts have weighed in on this issue, offering sometimes contradictory holdings on whether brandishing a gun during a robbery and ordering bystanders or victims to remain immobile is sufficient to apply the two-level sentencing enhancement for physical restraint.[22] The source of this discord lies in the

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13. *Id.*

14. U.S. SENT'G COMM'N, GUIDELINES MANUAL, § 1B.1, cmt. 1(L) (2018) [hereinafter U.S. SENT'G COMM'N].

15. *Dimache*, 665 F.3d at 605–06.

16. *Id.* at 609.

17. United States v. Anglin, 169 F.3d 154, 156 (2d Cir. 1999).

18. *Id.* at 159.

19. *Id.* at 164.

20. *Id.*

21. Anglin v. United States, Nos. 97-CR-292, 99-CV-10265, 2000 WL 964947, at *1 (S.D.N.Y. July 12, 2000).

22. Bernie Pazanowski, *Brandishing Gun Not Physical Restraint for Sentencing Purposes*, BLOOMBERG L. (July 18, 2019), https://news.bloomberglaw.com/us-law-week/brandishing-gun-not-physical-restraint-for-sentencing-purposes [https://perma.cc/TT9V-AKAJ]. *See generally* United States v. Bell, 947 F.3d 49 (3d Cir. 2020); United States v. Herman, 930 F.3d 872 (7th Cir. 2019); United States v. Garcia, 857 F.3d 708 (5th Cir. 2017); United States v. Dimache, 665 F.3d 603 (4th Cir. 2011); United States v. Stevens, 580 F.3d 718 (8th Cir. 2009); United States v. Miera, 539 F.3d 1232 (10th Cir. 2008); United States v. Wallace, 461 F.3d 15 (1st Cir. 2006); 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. Gonzalez, 183 F.3d 1315 (11th Cir. 1999).

USSC Guidelines Manual, which provides only two phrases relating to physical restraint: the sentencing enhancement guideline[23] and a broad and misleading definition of what physical restraint actually means.[24] These unclear guidelines have forced federal courts to guess when it is proper to apply the enhancement, creating an increasing amount of precedent interpreting the guideline in varying ways.[25]

To reduce sentencing disparities[26] and clarify the application of the sentencing guide to the physical restraint enhancement for a robbery conviction,[27] this Comment argues that the United States Sentencing Commission (USSC) must amend the USSC Guidelines Manual to provide federal courts with a clearer and more concise definition of physical restraint. Additionally, although there are many state-level sentencing systems throughout the United States,[28] this Comment only focuses on the federal sentencing guidelines for robbery because of the disparate way in which these guidelines are applied from circuit to circuit.[29]

Part I of this Comment discusses the history and creation of the USSC Guidelines Manual. Part II surveys the current circuit splits and the rationale of the various courts. Finally, Part III argues that the USSC should amend the USSC Guidelines to provide courts with a clearer definition of physical restraint, limiting it to only include physical acts of restraint.

I. THE UNITED STATES SENTENCING COMMISSION GUIDELINES

A. Creation of the United States Sentencing Commission Guidelines

Before the Sentencing Reform Act of 1984 (SRA) was passed, creating the USSC, Congress delegated to the judiciary almost all

23. U.S. SENT'G COMM'N, *supra* note 14, at § 2B3.1(b)(4)(B).

24. *Id.* at § 1B.1, cmt. 1(L).

25. *See* Pazanowski, *supra* note 22.

26. *See generally* Ryan W. Scott, *The Effects of* Booker *on Inter-Judge Sentencing Disparity*, 22 FED. SENT'G REP. 104 (2009) (describing how inter-judge sentencing disparities remains even after the 2005 *Booker* decision).

27. *See Herman*, 930 F.3d at 874.

28. For a discussion of different state sentencing guideline configurations, see Kelly Lyn Mitchell, *State Sentencing Guidelines: A Garden Full of Variety*, FED. PROB. J., Sept. 2017, at 29.

29. Pazanowski, *supra* note 22. *See generally* United States v. Bell, 947 F.3d 49 (3d Cir. 2020); United States v. Herman, 930 F.3d 872 (7th Cir. 2019); United States v. Garcia, 857 F.3d 708 (5th Cir. 2017); United States v. Dimache, 665 F.3d 603 (4th Cir. 2011); United States v. Stevens, 580 F.3d 718 (8th Cir. 2009); United States v. Miera, 539 F.3d 1232 (10th Cir. 2008); United States v. Wallace, 461 F.3d 15 (1st Cir. 2006); 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. Gonzalez, 183 F.3d 1315 (11th Cir. 1999).

discretion to determine the duration of criminal sentences.[30] During this pre-SRA period, the judicial system adopted the rehabilitation model to guide sentencing decisions.[31] The rehabilitation model is based on the premise that the judge would set the maximum prison sentence; then a parole board would reevaluate the prisoner periodically to determine if the prisoner had been "rehabilitated" and thus, was ready for release.[32] Based upon this sentencing system, there were large sentencing disparities between circuits, prisoners, and judges, in addition to general confusion about how much prison time a specific prisoner should serve.[33] Thus, Congress passed the SRA in 1984 to alleviate the sentencing disparities and uncertainties that were associated with sentencing in federal courts.[34]

The USSC was formed to "rectify the 'rulelessness' of sentencing law."[35] The purpose of the USSC was to avoid unwarranted sentencing disparities for defendants that have similar records and have been found guilty of similar crimes while still taking into account flexibility for mitigating or aggravating factors.[36]

Additionally, the SRA delegated the broad authority to review and justify the federal sentencing process to the USSC.[37] Therefore, in 1987, the USSC created "a detailed set of guidelines and policy statements that included a sentencing table."[38] The sentencing guidelines, now referred to as the USSC Guidelines Manual, categorized "offense behavior and offender characteristics."[39] Those categories then correspond to "ranges, [given in month increments, that] specify an appropriate sentence for each class of convicted persons."[40] In short, the SRA required federal courts to choose a sentence from the USSC Guidelines Manual's range during sentencing.[41] Use of the USSC Guidelines Manual was mandatory[42] until

30. Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 186 (1993).

31. *See* S. REP. NO. 98-225, at 38 (1983).

32. *Id.*

33. *See id.* at 38–39.

34. *Id.*

35. Russell D. Covey, Essay, *Rules, Standards, Sentencing, and the Nature of Law*, 104 CALIF. L. REV. 447, 454 (2016).

36. 28 U.S.C. § 991(b).

37. U.S. SENT'G COMM'N, *supra* note 14, at § 1A.2.

38. U.S. SENT'G COMM'N, FEDERAL SENTENCING: THE BASICS 4 (2015) [hereinafter FEDERAL SENTENCING: THE BASICS]; *see also* 28 U.S.C. § 994(a).

39. U.S. SENT'G COMM'N, *supra* note 14, at § 1A.2.

40. *Id.*

41. *Id.*

42. *See* 28 U.S.C. §§ 994–95.

2005, when the United States Supreme Court held that courts should consider factors other than those outlined in the manual.[43]

B. How Courts Calculate a Criminal Sentence Using the USSC Guidelines Manual

The first step in calculating criminal sentences using the USSC Guidelines Manual is to determine the base offense.[44] Each base offense has a corresponding "base offense level."[45] The base levels range from one to forty-three, the latter typically corresponding to a life sentence.[46] For example, the base level for first-degree murder is forty-three,[47] whereas the base level for trespass is four.[48] When general robbery is the base offense, the base level is twenty.[49]

After a federal probation officer determines the base offense and base offense level,[50] it is decided whether any "specific offense characteristics" apply to the commission of the crime.[51] Such characteristics include aggravating and mitigating factors related to a particular offense.[52] For instance, a "special offense characteristic" for robbery considers whether a firearm was discharged or not.[53] Thus, if a defendant robbed a convenience store and discharged a firearm during the course of the robbery, the defendant's offense level would be raised from the level twenty baseline for robbery to twenty-seven due to the special offense characteristic of discharging a gun.[54]

The offense levels of a defendant correspond to the USSC Guideline Manual's Sentencing Table (Table).[55] The Table consists of forty-three offense levels, which are listed on the vertical axis and overlap with the preceding and succeeding levels within the Table.[56] The offense levels correspond to the offense level evaluated by the court and bestowed upon

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43. *See infra* Section I.C; *see also* United States v. Booker, 543 U.S. 220, 244–45 (2005); 18 U.S.C. § 3553(a).

44. U.S. SENT'G COMM'N, *supra* note 14, at § 2A; FEDERAL SENTENCING: THE BASICS, *supra* note 38, at 15–18.

45. FEDERAL SENTENCING: THE BASICS, *supra* note 38, at 15.

46. U.S. SENTENCING COMM'N, *supra* note 14, at § 5A.

47. *Id.* at § 2A1.1(a).

48. *Id.* at § 2B2.3(a).

49. *Id.* at § 2B3.1(a).

50. FEDERAL SENTENCING: THE BASICS, *supra* note 38, at 6.

51. *Id.* at 15.

52. *Id.*

53. U.S. SENTENCING COMM'N, *supra* note 14, at § 1B.2; FEDERAL SENTENCING: THE BASICS, *supra* note 38, at 15.

54. U.S. SENTENCING COMM'N, *supra* note 14, at § 2B3.1(b)(2)(A).

55. *Id.* at § 1A.4(h).

56. *Id.* at § 5A.

the defendant based on the crime committed.[57] In addition to the offense level, the court takes into account the criminal history of the defendant, which is categorized into points and listed on the horizontal axis of the Table.[58] Thus, when determining the length of imprisonment that corresponds to the defendant's situation, the court must consider both the defendant's offense level and criminal history.[59]

SENTENCING TABLE
(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0–6	0–6	0–6	0–6	0–6	0–6
	2	0–6	0–6	0–6	0–6	0–6	1–7
	3	0–6	0–6	0–6	0–6	2–8	3–9
	4	0–6	0–6	0–6	2–8	4–10	6–12
Zone A	5	0–6	0–6	1–7	4–10	6–12	9–15
	6	0–6	1–7	2–8	6–12	9–15	12–18
	7	0–6	2–8	4–10	8–14	12–18	15–21
	8	0–6	4–10	6–12	10–16	15–21	18–24
	9	4–10	6–12	8–14	12–18	18–24	21–27
Zone B	10	6–12	8–14	10–16	15–21	21–27	24–30
	11	8–14	10–16	12–18	18–24	24–30	27–33
	12	10–16	12–18	15–21	21–27	27–33	30–37
Zone C	13	12–18	15–21	18–24	24–30	30–37	33–41
	14	15–21	18–24	21–27	27–33	33–41	37–46
	15	18–24	21–27	24–30	30–37	37–46	41–51
	16	21–27	24–30	27–33	33–41	41–51	46–57
	17	24–30	27–33	30–37	37–46	46–57	51–63
	18	27–33	30–37	33–41	41–51	51–63	57–71
	19	30–37	33–41	37–46	46–57	57–71	63–78
	20	33–41	37–46	41–51	51–63	63–78	70–87
	21	37–46	41–51	46–57	57–71	70–87	77–96
	22	41–51	46–57	51–63	63–78	77–96	84–105
	23	46–57	51–63	57–71	70–87	84–105	92–115
	24	51–63	57–71	63–78	77–96	92–115	100–125
	25	57–71	63–78	70–87	84–105	100–125	110–137
	26	63–78	70–87	78–97	92–115	110–137	120–150
	27	70–87	78–97	87–108	100–125	120–150	130–162
Zone D	28	78–97	87–108	97–121	110–137	130–162	140–175
	29	87–108	97–121	108–135	121–151	140–175	151–188
	30	97–121	108–135	121–151	135–168	151–188	168–210
	31	108–135	121–151	135–168	151–188	168–210	188–235
	32	121–151	135–168	151–188	168–210	188–235	210–262
	33	135–168	151–188	168–210	188–235	210–262	235–293
	34	151–188	168–210	188–235	210–262	235–293	262–327
	35	168–210	188–235	210–262	235–293	262–327	292–365
	36	188–235	210–262	235–293	262–327	292–365	324–405
	37	210–262	235–293	262–327	292–365	324–405	360–life
	38	235–293	262–327	292–365	324–405	360–life	360–life
	39	262–327	292–365	324–405	360–life	360–life	360–life
	40	292–365	324–405	360–life	360–life	360–life	360–life
	41	324–405	360–life	360–life	360–life	360–life	360–life
	42	360–life	360–life	360–life	360–life	360–life	360–life
	43	life	life	life	life	life	life

Figure 1: USSC Guidelines Manual's Sentencing Table[60]

57. *Id.* at § 1A.4(h).
58. *Id.* at § 5A.
59. *Id.*
60. *Id.*

According to the Table, the robbery Dimache committed had a base offense level of twenty.[61] First, his level increased to twenty-two because he took property from a financial institution.[62] Next, because Dimache brandished a weapon, his level rose to twenty-seven.[63] Then, the level increased to twenty-nine because the bank tellers were physically restrained during the robbery.[64] Finally, the court reduced Dimache's base level to twenty-six because Dimache accepted responsibility for the crimes.[65] Therefore, with Dimache's Category III criminal history, he would be sentenced to a prison sentence ranging from seventy-eight to ninety-seven months.[66]

C. Modern Changes to the Commission and the USSC Guidelines Manual

In the 2005 case *United States v. Booker*, the United States Supreme Court struck down the requirement that federal courts use the USSC Guidelines Manual.[67] Freddie J. Booker was charged with possession and intent to distribute at least fifty grams of cocaine base.[68] Due to Booker's criminal history and the jury's finding on the quantity of drugs Booker possessed, the USSC Guidelines Manual required the lower court judge to select a base level offense resulting in a sentence of no less than 210 and no more than 262 months in prison.[69]

However, there was a post-trial proceeding where the court concluded by a preponderance of the evidence that Booker had possessed an additional 566 grams of cocaine.[70] With these new findings, the USSC Guidelines Manual required that the judge select a sentence from 360 months to life imprisonment.[71] "Thus, instead of the sentence of [twenty-one] years and [ten] months that the judge could have imposed on the basis of the facts proved to the jury beyond a reasonable doubt, Booker received a [thirty]-year sentence."[72]

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61. United States v. Dimache, 665 F.3d 603, 605 (4th Cir. 2011); U.S. SENT'G COMM'N, *supra* note 14, at § 2B3.1(a).

62. *Dimache*, 665 F.3d at 605; U.S. SENT'G COMM'N, *supra* note 14, at § 2B3.1(b)(1).

63. *Dimache*, 665 F.3d at 605; U.S. SENT'G COMM'N, *supra* note 14, at § 2B3.1(b)(2)(C).

64. *Dimache*, 665 F.3d at 605; U.S. SENT'G COMM'N, *supra* note 14, at § 2B3.1(b)(4)(B).

65. *Dimache*, 665 F.3d at 605; U.S. SENT'G COMM'N, *supra* note 14, at § 3E1.1(a).

66. *Dimache*, 665 F.3d at 605.

67. United States v. Booker, 543 U.S. 220, 244–45 (2005).

68. *Id.* at 227.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

On appeal from the Seventh Circuit Court of Appeals, the Supreme Court held that "the existing guideline system violated the Constitution by permitting judges to find facts that raised the maximum guideline range by a preponderance of the evidence (as opposed to juries making such findings beyond a reasonable doubt)."[73]

Since then, federal courts have been directed to use the *Booker* three-step sentencing process.[74] The first step requires courts to calculate the sentencing range in accordance with the USSC Guidelines Manual.[75] Next, courts consider the policy statements or commentary in the USSC Guidelines manual and determine whether to depart from the sentencing range recommendations.[76] Finally, the court must consider 18 U.S.C. § 3553(a)[77] and all of its sentencing factors,[78]

73. FEDERAL SENTENCING: THE BASICS, *supra* note 38, at 12. *See generally Booker*, 543 U.S. 220.

74. FEDERAL SENTENCING: THE BASICS, *supra* note 38, at 12.

75. *Id.*

76. *Id.*

77. Part of the Sentencing Reform Act, dealing with the imposition of a sentence, was codified at 18 U.S.C. § 3553.

78. The factors of 18 U.S.C. § 3553(a) include consideration of:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—
>
> > (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> >
> > (B) to afford adequate deterrence to criminal conduct;
> >
> > (C) to protect the public from further crimes of the defendant; and
> >
> > (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;
>
> (4) the kinds of sentence and the sentencing range established for—
>
> > (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
> >
> > > (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section M 994(p) of title 28); and
> > >
> > > (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or
> >
> > (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);
>
> (5) any pertinent policy statement—
>
> > (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act

including the specific circumstances of the case, the defendant's character, and the correlation between the seriousness of the offense and the protection of the public with regard to the length of the sentence.[79] The use of 18 U.S.C. § 3553(a) allows judges to consider the USSC Guidelines Manual in conjunction with other sentencing objectives.[80] After applying the *Booker* analysis, a court can then more appropriately decide whether a sentence outside of the USSC Guidelines Manual range should be imposed.[81]

Since *Booker*, courts must consider both the USSC Guidelines Manual and the *Booker* process to ensure all factors are considered when determining a fair sentence across defendants who have committed similar crimes. Even with the Supreme Court's modification of the federal sentencing procedures in *Booker*, federal courts have continued to heavily rely on the USSC Guidelines Manual to determine appropriate sentences and impose sentencing enhancements upon defendants.[82]

II. CIRCUIT COURT SPLIT ON THE PHYSICAL RESTRAINT SENTENCING ENHANCEMENT

Federal courts have reached conflicting conclusions as to when the physical restraint enhancement should be applied in accordance with the USSC Guidelines Manual, resulting in vastly different sentences for similar crimes.[83] According to the USSC Guidelines Manual, a robbery sentence should be increased by two levels if a defendant physically restrains a victim or victims to facilitate the commission of the offense or to facilitate escape.[84] Per the USSC Guidelines Manual,

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> of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
>
> (B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.
>
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
>
> (7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a).

79. *Id.*; *see also* Lynn Adelman & Jon Deitrich, *Fulfilling* Booker*'s Promise*, 11 ROGER WILLIAMS U. L. REV. 521, 523 (2006).

80. United States v. Booker, 543 U.S. 220, 224 (2005).

81. FEDERAL SENTENCING: THE BASICS, *supra* note 38, at 12.

82. *See* United States v. Dimache, 665 F.3d 603, 609 (4th Cir. 2011); United States v. Stevens, 580 F.3d 718, 720 (8th Cir. 2009); United States v. Miera, 539 F.3d 1232, 1234 (10th Cir. 2008); United States v. Gonzalez, 183 F.3d 1315, 1327 (11th Cir. 1999); United States v. Wallace, 461 F.3d 15, 33 (1st Cir. 2006).

83. *See Dimache*, 665 F.3d at 605; *Stevens*, 580 F.3d at 720; *Miera*, 539 F.3d at 1234; *Gonzalez*, 183 F.3d at 1327; *Wallace*, 461 F.3d at 24.

84. U.S. SENT'G COMM'N, *supra* note 14, at § 2B3.1(b)(4)(B).

"physically restrained" is defined as "the forcible restraint of the victim such as by being tied, bound, or locked up."[85]

As mentioned above,[86] the Table considers both the crime committed by the defendant and the defendant's past criminal history when calculating the defendant's criminal sentence.[87] For example, if the defendant is a first-time offender, the sentencing results for robbery with physical restraint could be anywhere from thirty-three to forty-one months.[88] Comparatively, the sentencing for a similar defendant who has committed a similar crime with the physical restraint enhancement could be between forty-one and fifty-one months.[89] Therefore, similar defendants who have committed similar crimes could receive sentences that differ by eight to ten months, depending on the court's interpretation of the USSC Guidelines Manual and the physical restraint sentencing guideline.[90]

The following section will survey the justifications that the different circuit courts have adopted when choosing to apply, or not to apply, the physical restraint sentencing enhancement to show how different interpretations of physical restraint can lead to disparate sentencing outcomes. Some circuit courts interpret physical restraint in a broad sense, meaning any sort of verbal command that restricts the victim's ability to move, while others interpret it in a strict or narrow sense, meaning physical restraints must be just that—physical. The different interpretations of physical restraint in robbery cases by various circuit courts solidifies the need for a clearer definition of physical restraint in the USSC Guidelines Manual.

A. Broad Understanding of Physical Restraint

The First, Fourth, Eighth, Tenth, and Eleventh Circuits have held that courts should interpret the physical restraint enhancement more broadly.[91] These circuits tend to focus on the USSC Guidelines Manual's definition of "physically restrained," which is defined as "the forcible restraint of the victim such as by being tied, bound, or locked up."[92] At first glance, the

85. *Id.* at § 1B.1, cmt. 1(L).

86. *See* Section I.B.

87. U.S. SENT'G COMM'N, *supra* note 14, at § 1B.1, cmt. 1(L).

88. *Id.*

89. *Id.*

90. *Id.*

91. *See* United States v. Dimache, 665 F.3d 603, 607 (4th Cir. 2011); United States v. Stevens, 580 F.3d 718, 721 (8th Cir. 2009); United States v. Miera, 539 F.3d 1232, 1234 (10th Cir. 2008); United States v. Wallace, 461 F.3d 15, 33–34 (1st Cir. 2006); United States v. Gonzalez, 183 F.3d 1315, 1327 (11th Cir. 1999).

92. U.S. SENT'G COMM'N, *supra* note 14, at § 1B.1, cmt. 1(L).

text seems rather specific, but these circuit courts tend to interpret the idiom "such as" to indicate "that the illustrations of physical restraint are listed by way of example rather than limitation."[93] In addition to this general broad interpretation, each circuit court has considered other factors and set more specific standards with regard to the physical restraint sentencing enhancement.[94] The following cases showcase the application of the broad interpretation of the physical restraint enhancement.

In *United States v. Wallace*, the defendant Wallace entered a small gun shop in Providence, Rhode Island, brandishing a gun and instructing the store's owner and his assistant not to move.[95] Wallace was then charged on four counts, including robbery and brandishing a firearm during a crime of violence, and sentenced to 204 months.[96] Wallace argued on appeal that his sentence was calculated incorrectly, in part because of the court's application of the physical restraint enhancement.[97] The First Circuit held that although there was no physical contact between the defendant, his co-conspirator, and the victims of the armed robbery, the victims were nonetheless physically restrained.[98] The court's decision stemmed, in part, from the actions of Wallace's co-conspirator, who prevented the victims from leaving the store during the course of the robbery by jumping in front of them.[99] Additionally, the court emphasized that its conclusion that the defendant's conduct rose to the level of physical restraint was influenced by Wallace and his co-conspirator's close proximity to the victims and the intense nature of the robbery.[100]

In the case considered earlier,[101] *Dimache*, the Fourth Circuit applied the physical restraint sentencing enhancement to an armed bank robbery where the defendant pointed the gun at the victim, which "restrict[ed] the victim's movements and ensur[ed] the victim's compliance with the desires of the defendant."[102] The court focused on the fact that the victim's freedom of movement was restrained even though the defendant never physically touched the victim.[103] Further, the court emphasized that the size of the area where the victim was restrained, big or small, does not

93. *Gonzalez*, 183 F.3d at 1327 (quoting United States v. Jones, 32 F.3d 1512, 1518 (11th Cir. 1994)).

94. *See Wallace*, 461 F.3d at 34–35; *Dimache*, 665 F.3d at 609; *Stevens*, 580 F.3d at 721; *Miera*, 539 F.3d at 1234; *Gonzalez*, 183 F.3d at 1327.

95. *Wallace*, 461 F.3d at 20.

96. *Id.* at 21.

97. *Id.* at 19–20.

98. *Id.* at 34–35.

99. *Id.*

100. *Id.*

101. *See supra* Part I.

102. United States v. Dimache, 665 F.3d 603, 607 (4th Cir. 2011).

103. *Id.* at 609.

impact whether the victim was indeed physically restrained by the defendant brandishing a gun and ordering the victim not to move.[104]

In another case, Donald Lee Stevens pled guilty to armed bank robbery and using or brandishing a firearm during a crime of violence after robbing a bank in Arkansas.[105] Stevens appealed on grounds that the district court incorrectly applied the two-level sentencing enhancement for physical restraint.[106] The Eighth Circuit held that when the defendant made "threats of imminent bodily harm for noncompliance with [his] demands" with a gun and forced the victims into a bank vault, this act "created no alternative to compliance with the implied, yet obvious, demand [for the victims] to remain in the vault, . . . even though the victims could have easily freed themselves."[107] Thus, the Eighth Circuit's understanding of physical restraint is not limited to tying or binding the victim and encompassed circumstances in which the defendant gives the victim no alternative but to comply "with his demand to restrain her movement."[108]

In *United States v. Miera*, defendant Jacob Mark Miera and an accomplice entered a bank in West Valley, Utah.[109] The duo told everyone inside the bank to "put their hands up" and commanded that the occupants "don't move."[110] Miera pled guilty to armed bank robbery.[111] He later appealed his forty-six-month sentence on grounds that the court had incorrectly applied the two-level sentencing enhancement for physical restraint.[112] The Tenth Circuit concluded that

> [f]or purposes of this enhancement, "[p]hysical restraint is not limited to physical touching of the victim. Rather, physical restraint occurs whenever a victim is specifically prevented at gunpoint from moving, thereby facilitating the crime. Keeping someone from doing something is inherent within the concept of restraint."[113]

In addition to keeping the victim from "doing something,"[114] the Tenth Circuit held that in order for the sentence to include the physical restraint enhancement, "*something more* must be done with the gun to physically restrain."[115] Under this definition, "something more" does not

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104. *Id.*
105. United States v. Stevens, 580 F.3d 718, 719 (8th Cir. 2009).
106. *Id.*
107. *Id.* at 721.
108. *Id.*
109. United States v. Miera, 539 F.3d 1232, 1233 (10th Cir. 2008).
110. *Id.*
111. *Id.* at 1234.
112. *Id.*
113. *Id.* (quoting United States v. Fisher, 132 F.3d 1327, 1329–30 (10th Cir. 1997)).
114. *Id.*
115. *Id.* at 1235 (quoting United States v. Pearson, 211 F.3d 524, 526–27 (10th Cir. 2000)).

include simply brandishing the gun or displaying the gun during the course of the crime.[116]

More specifically, in *Miera*, the court relied upon three circumstances during the course of the armed robbery to determine that the defendant had done "something more" during the commission of the crime.[117] First, the defendant pointed the gun around the room, which the court concluded would likely have the effect of physical restraint even if the defendant's action was done in an aimless fashion.[118] Second, when the defendant and his co-conspirator entered the bank, they said "don't move" to the bank patrons.[119] In the opinion of the court, this command coupled with the act of waving the gun around the room was clearly "something more" than just brandishing a gun.[120] Third, the defendant carried out these actions while standing in front of the door to the bank, which could be interpreted as a means to prevent any of the bank's customers from trying to escape during the course of the robbery.[121] Thus, the Tenth Circuit concluded that when all of these events were viewed together, "[t]here is no doubt that such conduct involved 'something more' [than merely holding a gun] and thereby appropriately resulted in a physical restraint enhancement."[122]

In *United States v. Gonzalez*, Francisco Gonzalez and the other defendants were convicted of conspiracy to possess cocaine with intent to distribute and related charges, including the use of a dangerous weapon in the commission of a drug offense, committing the crime in the presence of vulnerable victims, and the physical restraint of those victims.[123] Defendant Gonzalez appealed, in part, on grounds that the physical restraint enhancement should not have applied because no one was physically restrained during the course of the crime.[124] The Eleventh Circuit held that by holding the victims at gunpoint during the course of a home invasion, the defendant's actions were considered physical restraint, regardless of whether the victims were ever physically touched by the defendant.[125] The court interpreted the USSC Guidelines Manual definition of physical restraint as an example of physical restraint "rather than [a] limitation."[126]

116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* at 1236.
123. United States v. Gonzalez, 183 F.3d 1315, 1319 (11th Cir. 1999).
124. *Id.* at 1327.
125. *Id.*
126. *Id.*

The *Dimache* court generally summarized the broad interpretation of physical restraint: "The intended scope of the [physical restraint] enhancement is to punish a defendant who deprives a person of his physical movement, which can be accomplished by means other than those listed in [the Guidelines' physical restraint definition]."[127] From the First, Fourth, Eighth, Tenth, and Eleventh Circuits' holdings, it appears that these courts focus on a variety of factors, including whether a gun was brandished or whether the assailant told the victims to "not move." For instance, in *Miera*, the Tenth Circuit concluded that physical restraint stemmed from the defendant keeping the victim from doing something, like escaping, rather than the defendant physically restraining the victim.[128] Thus, the broad interpretation of physical restraint adopted by these circuit courts encompasses both the actions of the defendant and the reaction of the victim rather than solely focusing on the defendant's behavior.[129]

B. The Narrow Interpretation of Physical Restraint

Conversely, the Second, Third, Fifth, Seventh, Ninth, and D.C. Circuits have held that courts should only use the physical restraint enhancement if the restraint is truly physical.[130] Under this narrower interpretation, the majority of these circuit courts find that the physical restraint examples included in the USSC Guidelines Manual—"being tied, bound, or locked up"[131]—are examples that limit the application of the physical restraint enhancement to situations where the victim is actually physically restrained.[132] This reasoning stems from the belief that if the USSC considered other acts to be physical restraint, such examples would (or should) have been included in the USSC Guidelines Manual.[133]

Again, in *Anglin*, the Second Circuit held that the examples in the USSC Guidelines Manual, which states that physical restraint means "the forcible restraint of the victim such as by being tied, bound, or locked up,"[134] are flexible but act more as suggestions to interpret the USSC Guidelines Manual. Additionally, when drafting the physical restraint

127. United States v. Dimache, 665 F.3d 603, 609 (4th Cir. 2011).

128. *See* United States v. Miera, 539 F.3d 1232, 1235–36 (10th Cir. 2008).

129. *See* United States v. Herman, 930 F.3d 872, 877 (7th Cir. 2019) (Flaum, J., dissenting).

130. *See* United States v. Bell, 947 F.3d 49, 60 (3d Cir. 2020); *Herman*, 930 F.3d at 875–76; United States v. Garcia, 857 F.3d 708, 713–14 (5th Cir. 2017); United States v. Parker, 241 F.3d 1114, 1118–19 (9th Cir. 2001); United States v. Drew, 200 F.3d 871, 880 (D.C. Cir. 2000); United States v. Anglin, 169 F.3d 154, 164–65 (2d Cir. 1999).

131. U.S. SENT'G COMM'N, *supra* note 14, at § 1B.1, cmt. 1(L).

132. *See Herman*, 930 F.3d at 875–76; *Garcia*, 857 F.3d at 713; *Parker*, 241 F.3d at 1118; *Drew*, 200 F.3d at 880; *Anglin*, 169 F.3d at 164.

133. *Herman*, 930 F.3d at 875–76.

134. U.S. SENT'G COMM'N, *supra* note 14, at § 1B.1, cmt. 1(L).

enhancement, the USSC considered narrower situations.[135] Therefore, the court held that merely brandishing a gun and instructing people not to move does not trigger the physical restraint enhancement.[136] Absent this narrow interpretation of the USSC Guidelines Manual, the Second Circuit speculated that "virtually every robbery would be subject to the 2-level enhancement for physical restraint unless it took place in unoccupied premises."[137]

For example, in *United States v. Bell*, a defendant challenged the physical restraint enhancement to his sentence after he robbed a Metro PCS store with a weapon that appeared to be a firearm and throwing a store employee to the ground.[138] On appeal, the Third Circuit relied on five factors cribbed from other circuit court decisions to determine whether to apply the physical restraint enhancement in robbery cases.[139] First, the *Bell* court held that to apply the physical restraint enhancement there must be "something more than a psychological restraint"; the restraint must have some physical aspect.[140] Second, the defendant must have restrained the "victim's freedom of movement in some manner."[141] Third, the defendant must have left the victim with no alternative other than compliance with their order.[142] Fourth, echoing the Fourth and Tenth Circuits,[143] there must be a durational consideration when applying the physical restraint enhancement due to the language included in the USSC Guidelines Manual,[144] which implies a restraint that is more than momentary.[145] Lastly, the court concluded that "'[i]t is the perpetrator's act of enclosing or confining the victim in a space or with a barrier, actual or threatened, that constitutes the action meriting enhancement of the offense level.'"[146]

The *Bell* court neatly summarized these factors: "[A] district court should determine if the defendant's actions involved the use of physical force that limited the victim's freedom of movement, with a sustained focus on the victim for some period of time which provided the victim

135. *See Anglin*, 169 F.3d at 164.
136. *Id.*
137. *Id.* at 165.
138. United States v. Bell, 947 F.3d 49, 52 (3d Cir. 2020).
139. *Id.* at 56.
140. *Id.* at 57.
141. *Id.*
142. *Id.* at 58.
143. *See* United States v. Dimache, 665 F.3d 603, 609 (4th Cir. 2011); United States v. Miera, 539 F.3d 1232, 1234 (10th Cir. 2008).
144. U.S. SENT'G COMM'N, *supra* note 14, at § 1B.1, cmt. 1(L).
145. *Bell*, 947 F.3d at 59.
146. *Id.* at 60 (quoting United States v. Copenhaver, 185 F.3d 178, 183 (3d Cir. 1999)).

with no alternative but compliance."[147] All of these factors are to be balanced by district courts in the Third Circuit when deciding whether to apply the enhancement.[148]

By comparison, in *United States v. Garcia*, Jaime Shakur Garcia and two other accomplices entered a Texas gun store wearing ski masks and carrying guns[149] and ordered an employee to get on the floor.[150] Garcia later pled guilty to one count of possessing and discharging a firearm in furtherance of a crime of violence, as well as one count of robbery under the Hobbs Act.[151] On appeal, Garcia contended that the lower court incorrectly applied the physical restraint enhancement.[152] The Fifth Circuit agreed and determined that merely brandishing a gun during the course of a robbery was not enough to rise to the level of physical restraint[153] because "the defendants did not do anything with their firearms that [went] beyond what would normally occur during an armed robbery."[154] In other words, the defendants' acts did not automatically create a physical restraint situation because the defendants must have done something more with the gun to be considered to have physically restrained the victims.

Similarly, in *United States v. Herman*, the court considered the element of coercion when examining physical restraint. While at a friend's house in Hammond, Indiana, a defendant pulled out a revolver, pointed it at his friend and friend's mother, and said, "Look . . . stay seated. I don't want to blow you guys back, but I will if I have to."[155] The defendant then commanded the two victims not to move before fleeing from the house.[156] Herman appealed his sentence with specific regard to the application of the physical restraint enhancement.[157] The Seventh Circuit also supported a narrower reading of the USSC Guidelines Manual's examples of the physical restraint enhancement.[158] The court's decision focused, in part, on the USSC Guidelines Manual's omission of psychological coercion

147. *Id.*

148. *Id.*

149. United States v. Garcia, 857 F.3d 708, 710 (5th Cir. 2017).

150. *Id.* The Hobbs Act makes it a federal crime for "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose." 19 U.S.C. § 1951(a).

151. *Garcia*, 857 F.3d at 711–12.

152. *Id.*

153. *Id.* at 713–14.

154. *Id.* at 713.

155. United States v. Herman, 930 F.3d 872, 873 (7th Cir. 2019).

156. *Id.*

157. *Id.*

158. *Id.* at 875–76.

from its examples.[159] The court used this reasoning to determine that there was no need to apply the physical restraint enhancement when the defendant pulled out a gun and directed the two individuals not to move, even though such coercion could result in the victims feeling that they are unable to move.[160]

Further, the *Herman* court noted that in cases where physical restraint has been found to have occurred, courts should generally focus on the actions of a defendant rather than the reaction of a victim.[161] More specifically, "the victim's reaction does not determine whether there is or is not physical restraint."[162] In other words, if a defendant waives a gun at a victim and directs them not to move, there is still some discretion left to the victim to decide whether to ignore or obey the order. Therefore, according to the Seventh Circuit in *Herman*, the victim's physical response to the defendant's directive is not something that belongs within the scope of the physical restraint enhancement.[163]

However, the Seventh Circuit did not consider its narrower view of the physical restraint enhancement as a limit on a judge's ability to impose an appropriate sentence. Rather, the court conceded that a judge is still free to consider psychological coercion—like telling a victim not to move while brandishing a gun—"under 18 U.S.C. § 3553(a)(1), as part of 'the nature and circumstances of the offense.'"[164] Therefore, if a defendant's behavior seems to be "just as bad as a physical restraint," a defendant could still receive a sentence that is just as severe as if they had truly physically restrained their victims.[165] The Seventh Circuit reasoned that this reading of the USSC Guidelines Manual gives judges more discretion in how to apply the enhancement and reduces the strain of using the physical restraint enhancement when it is not appropriate or necessary.[166]

In a Ninth Circuit case, a defendant was convicted of conspiracy, bank robbery, and firearm offenses after robbing a bank.[167] The defendant appealed partly to reverse the physical restraint sentencing enhancement.[168] The court emphasized the need for a "sustained focus on the restrained person that lasts long enough for the robber to direct the

159. *Id.* at 875.
160. *Id.* at 875–76.
161. *Id.* at 876.
162. *Id.*
163. *Id.*
164. *Id.* at 877.
165. *Id.*
166. *Id.*
167. United States v. Parker, 241 F.3d 1114, 1116 (9th Cir. 2001).
168. *Id.* at 1118.

victim into a room or order the victim to walk somewhere" in order for the defendant's actions to rise to the level of the physical restraint enhancement.[169] The Ninth Circuit, agreeing with the Second Circuit's *Anglin* decision,[170] stated that "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."[171] Thus, the court held that the behavior of pulling the bank teller off the ground by the hair did not rise to the level of the physical restraint enhancement.[172]

In the D.C. Circuit case, *United States v. Drew*, a defendant threatened his wife with a firearm while commanding that she come out of the closet where she were hiding; he then ordered her to leave their bedroom and walk down the stairs while holding her at gunpoint.[173] The defendant pled guilty to possession of a firearm while subject to a court order and eventually appealed the conviction on grounds that the physical restraint sentencing enhancement was incorrectly applied.[174] The appellate court agreed with the broader interpretation of physical restraint. However, the court also found that the examples provided in the USSC Guidelines Manual ("the phrase 'being tied, bound, or locked up'"[175]) denote that physical restraint "requires the defendant either to restrain the victim through bodily contact or to confine the victim in some way."[176] More plainly, the D.C. Circuit reasoned that "the required restraint must, as the [USSC Guideline Manual] language plainly recites, be physical."[177] Therefore, similar to the Second Circuit's reasoning in *Anglin*,[178] the D.C. Circuit Court reasoned that Drew's conduct does not meet the USSC's definition of physical restraint and that whether Drew's victim felt restrained was irrelevant to the analysis.[179]

As a result, the Second, Third, Fifth, Seventh, Ninth, and D.C. Circuits all concluded that, for purposes of the sentencing enhancement, the restraint must actually be physical—actions like locking a victim in a room or tying up a victim will qualify but simply saying, "Don't move!"

169. *Id.*
170. *See* United States v. Anglin, 169 F.3d 154, 165 (2d Cir. 1999).
171. *Parker*, 241 F.3d at 1118–19.
172. *Id.* at 1119.
173. United States v. Drew, 200 F.3d 871, 875 (D.C. Cir. 2000).
174. *Id.* at 871.
175. U.S. SENT'G COMM'N, *supra* note 14, § 1B.1, cmt. 1(L).
176. *Drew*, 200 F.3d at 880.
177. *Id.*
178. United States v. Anglin, 169 F.3d 154, 164–65 (2d Cir. 1999).
179. *Id.*

will not.[180] And unlike the broad interpretation of the USSC Guidelines Manual, the narrow interpretation of these circuit courts focuses on the actions of a defendant and does not consider the reaction of a victim with regard to physical restraint.[181]

III. LIMITATION OF THE SENTENCING GUIDELINES TO ONLY INCLUDE ACTS OF TRUE PHYSICAL RESTRAINT

The United States Supreme Court has not yet weighed in on the circuit split regarding how to interpret the definition of physical restraint. Short of such a ruling, the only other remedy to the confusion would be for the United States Sentencing Commission to modify the Guidelines. Therefore, this Comment argues that the USSC should amend the USSC Guidelines Manual to include a more specific definition, namely one that limits physical restraint as it applies to the two-level enhancement for robbery to only include restraint conducted by a defendant that is purely physical.

Following the narrower interpretation of physical restraint recognized in the Second, Third, Fifth, Seventh, Ninth, and D.C. Circuits,[182] this Comment proposes that the definition be changed to the following: "'physically restrained' means the forcible restraint of the victim by the direct physical actions of the defendant and does not include psychological coercion experienced by the victim. Examples of such acts include, but are not limited to, the defendant tying, binding, or locking up the victim." With this crucial change, robbery sentences involving a firearm across the nation will become more standardized, supporting the purpose and intent of the USSC and the USSC Guidelines Manual. Also, the resulting sentences will more accurately reflect the actions of the defendant and not the experiences of the victim, which courts can take into consideration by other means.

180. *See* United States v. Bell, 947 F.3d 49, 56–57 (3d Cir. 2020); United States v. Herman, 930 F.3d 872, 875–76 (7th Cir. 2019); United States v. Garcia, 857 F.3d 708, 713–14 (5th Cir. 2017); United States v. Parker, 241 F.3d 1114, 1118–19 (9th Cir. 2001); *Drew*, 200 F.3d at 880; *Anglin*, 169 F.3d at 164–65.

181. *See Anglin*, 169 F.3d at 164–65; *Bell*, 947 F.3d at 56–57; *Garcia*, 857 F.3d at 713–14; *Herman*, 930 F.3d at 875–76; *Parker*, 241 F.3d at 1118–19; *Drew*, 200 F.3d at 880.

182. *Anglin*, 169 F.3d at 164; *Bell*, 947 F.3d at 56–57; *Garcia*, 857 F.3d at 713; *Herman*, 930 F.3d at 875–76; *Parker*, 241 F.3d at 1118; *Drew*, 200 F.3d at 880.

A. Intent of the United States Sentencing Commission to Standardize Sentencing

The United States Sentencing Commission's goal when implementing the USSC Guidelines Manual was to standardize the process of federal sentencing.[183] The circuit split over the physical restraint definition deviates from this goal because courts are applying the two-level enhancement for physical restraint in differing ways for similar crimes.[184] By clarifying and narrowing the definition of physical restraint, courts will have clearer language to base their understanding of when physical restraint has occurred; thus, the location of the crime and the presiding court will have less of an impact upon the duration of the defendant's sentence.

Additionally, outside of the USSC's purpose, 18 U.S.C. § 3553(a)(6) states that judges should consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."[185] While judges have the ability to prevent sentencing disparities within their courtrooms or within their circuits, it is difficult to work across circuits. This factor supports the contention that the physical restraint definition needs to be clarified in order to reduce sentencing disparities because it shows that Congress is still concerned with non-uniform sentencing, even though federal courts are no longer required to exclusively follow the USSC Guidelines Manual when making sentencing decisions.

Further, from the plain language expressed in the current definition of physical restraint, it appears that the USSC intended the sentencing enhancement to apply only to a defendant's use of physical restraint and not to the reaction or possible psychological impact experienced by a victim.

Similar to the sentiment expressed by the Seventh Circuit in *Herman*, if the USSC had intended for psychological coercion to be considered with regards to the physical restraint definition and enhancement, then the USSC should made that intent explicit.[186] Without any psychological coercion language explicitly stated in the USSC Guidelines Manual, courts are taking it upon themselves to unnecessarily read between the lines of the USSC Guidelines Manual rather than adhering to the plain language.

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183. 28 U.S.C. § 991.

184. *See generally* United States v. Dimache, 665 F.3d 603, 609 (4th Cir. 2011); United States v. Stevens, 580 F.3d 718, 721 (8th Cir. 2009); United States v. Miera, 539 F.3d 1232, 1234 (10th Cir. 2008); United States v. Gonzalez, 183 F.3d 1315, 1327 (11th Cir. 1999); United States v. Wallace, 461 F.3d 15, 34–35 (1st Cir. 2006); *Bell*, 947 F.3d 49; *Herman*, 930 F.3d 872; *Garcia*, 857 F.3d 708; *Parker*, 241 F.3d 1114; *Drew*, 200 F.3d 871; *Anglin*, 169 F.3d 154.

185. 18 U.S.C. § 3553(a)(6).

186. *See Herman*, 930 F.3d at 875.

Therefore, by narrowing the USSC Guideline Manual's definition of physical restraint to only true physical actions taken by a defendant against a victim during the course of a robbery, courts will have a more explicit definition of physical restraint to assist in a consistent application of the physical restraint enhancement.

B. Reflection of the Defendant's Actions, Not the Reaction of the Victim

When reading the USSC's physical restraint definition,[187] it is easy to see how the text can be interpreted in different ways—a fact evinced by the circuit split.[188] Even though the definition seeks to focus on physical actions, it does not clarify whether the physical restraint must be conducted by a defendant or merely experienced by a victim along the lines of psychological coercion. However, this Comment argues that a victim's reaction to a defendant's actions should not be the determination of whether the physical restraint enhancement is applied. Instead, the enhancement should only be applied if the defendant's actions truly result in the victim being unable to move due to some kind of physical restraint. As the Second Circuit pointed out in *Anglin*,[189] this application prevents the indiscriminate application of the sentencing enhancement in every garden-variety robbery.

The decision of whether a defendant's sentence should be increased by the physical restraint enhancement should not turn on whether the victim of the crime felt as though they were physically restrained. While a victim's experience can be considered by courts to determine a defendant's sentence,[190] whether the physical restraint enhancement is applied should not turn upon a victim's interpretation of the situation because different victims in similar situations are not guaranteed to act the same way. For example, when Dimanche told the bank tellers to get on the ground, one teller might have obeyed the command, whereas another might have run away.[191] The unpredictable nature of victims' reactions increases the possibility of sentencing disparities as a sentence could be unnecessarily increased based upon factors that have nothing to do with a defendant's actions. Therefore, when deciding whether to apply the physical restraint enhancement, courts should only consider the actions of the defendant, not the victim's reaction.

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187. U.S. SENT'G COMM'N, *supra* note 14, at § 1B.1, cmt. 1(L).

188. *See* Pazanowski, *supra* note 22. *See generally Bell*, 947 F.3d 49; *Herman*, 930 F.3d 872; *Garcia*, 857 F.3d 708; *Dimache*, 665 F.3d 603; *Stevens*, 580 F.3d 718; *Miera*, 539 F.3d 1232; *Wallace*, 461 F.3d 15; *Parker*, 241 F.3d 1114; *Drew*, 200 F.3d 871; *Anglin*, 169 F.3d 154; *Gonzalez*, 183 F.3d 1315.

189. *Anglin*, 169 F.3d at 154.

190. *See* 18 U.S.C. § 3553(a)(2)(A).

191. *See Dimache*, 665 F.3d at 604.

Nonetheless, this point of clarification in the definition of physical restraint is not designed to completely limit a judge's discretion during sentencing. Instead, similar to the point made by the Seventh Circuit in *Herman*,[192] judges may still take "the nature and circumstances of the offense"—like psychological coercion or a victim's reaction to a defendant during the course of a crime—into consideration when making their sentencing decision.[193] Given the flexible nature of the statutory sentencing factors, it seems unnecessary for judges to consider a victim's reaction when applying the physical restraint enhancement.

The USSC Guidelines Manual's definition of physical restraint must be narrowed to include only truly physical actions taken by a defendant and clarified to not include a victim's reactions. This change will support the sentence standardization purpose of the United States Sentencing Commission and will reflect a defendant's actions alone when considering sentencing without completely narrowing a court's discretion under 18 U.S.C. § 3553(a).[194]

CONCLUSION

Despite the best efforts of the USSC, disparate sentences continue to be a problem in the federal courts. This is evident by the current circuit split regarding the definition of physical restraint and the applicability of the two-level enhancement for physical restraint during the course of a robbery. Courts that elect to use a broad interpretation of physical restraint view the definition as non-exhaustive and consider all forms of restraint, both physical and psychological, to qualify for the two-level enhancement. On the other hand, those courts that use a narrow definition consider a defendant's actions as physical restraint only if the actions are purely physical and do not take into account the victim's reaction.

This discrepancy in the courts has led to different outcomes in similar cases. To rectify this problem without the United States Supreme Court's intervention, this Comment argues that the United States Sentencing Commission should amend the USSC Guidelines Manual to limit physical restraint to only physical conduct carried out by a defendant in an attempt to restrain a victim during the course of a robbery. The definition should be narrowed to exclude psychological coercion, keeping with the purpose and language provided by the United States Sentencing Commission when

192. *See Herman*, 930 F.3d at 875.

193. 18 U.S.C. § 3553(a)(1).

194. 18 U.S.C. § 3553(a) codified sentencing factors to be considered by federal courts. These factors include, but are not limited to, the nature and circumstances of the offense, the kinds of sentences available to the offender, public policy, and "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a).

drafting the USSC Guidelines Manual. This exclusion to the USSC Guidelines Manual could assist courts in making more uniform sentencing decisions with regards to physical restraint considerations and reduce sentencing inconsistencies across the country. Under this exclusion, defendants like Dimache and Anglin, who commit similar crimes but receive very different punishments, will be held to the same sentencing standards.