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## Restraints of the Body or of the Mind: Conflicting Interpretations of the Physical Restraint Sentencing Enhancement

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# Restraints of the Body or of the Mind: Conflicting Interpretations of the Physical Restraint Sentencing Enhancement

## *Introduction*

Imagine two criminal defendants, Defendant *A* and Defendant *B*. Defendant *A* committed a bank robbery in Georgia.<sup>1</sup> During the course of the robbery, he forced the employees at gunpoint to empty their cash drawers and open the safe.<sup>2</sup> During this interaction, Defendant *A* never made physical contact with any of the victims.<sup>3</sup> Soon after, he was arrested and tried in federal court. The trial court instituted a two-level sentencing enhancement for using physical restraint during the commission of a robbery.<sup>4</sup> On appeal, the Eleventh Circuit upheld this enhancement, concluding that the presence of a gun “ensured the victims’ compliance and effectively prevented them from leaving the room.”<sup>5</sup>

Defendant *B* committed a bank robbery in New York.<sup>6</sup> At gunpoint, he instructed the employees to get on the floor and proceeded to steal over half a million dollars.<sup>7</sup> After he was arrested, he was tried in federal court. As in the previous case, the trial court instituted a two-level enhancement for using physical restraint during the commission of a robbery.<sup>8</sup> On appeal, the Second Circuit disagreed with the physical restraint enhancement, vacated the sentence, and remanded for resentencing.<sup>9</sup> The Second Circuit held that for this enhancement to apply, there must be “a restraint of movement by the use of some artifact by which the victim is ‘tied’ or ‘bound’ . . . or by the use of a space where the victim is ‘locked up.’”<sup>10</sup> So, although Defendant *A* and Defendant *B* committed very similar crimes, they suffered two significantly different punishments based on the circuit in which they were sentenced.

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1. *See* *United States v. Jones*, 32 F.3d 1512, 1514 (11th Cir. 1994).

2. *Id.* at 1515.

3. *Id.* at 1518.

4. *Id.*

5. *Id.* at 1519.

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

7. *Id.* at 157.

8. *Id.* at 156–57.

9. *Id.* at 163.

10. *Id.* at 164; *see also* U.S. SENT’G GUIDELINES MANUAL § 2B3.1(b)(4)(B) (U.S. SENT’G COMM’N 2018).

To prevent disparity in punishments for similar crimes, like those in the hypotheticals above, Congress implemented federal sentencing guidelines under the Sentencing Reform Act of 1984 (“SRA”).<sup>11</sup> The hope was to create more certainty and fairness in federal criminal sentencing.<sup>12</sup> Under this new sentencing regime, a judge may apply additional sentencing enhancements that move the offense level up or down, leading to longer or shorter sentences.<sup>13</sup> Sentencing enhancements are applied for specific offenses, different from the elements of the crime charged, that are committed in furtherance of a crime. For example, for the crime of robbery, there is an enhancement for physical restraint.<sup>14</sup> This provision states “if any person was physically restrained to facilitate commission of the offense or to facilitate escape, increase by [two] levels.”<sup>15</sup>

A robbery is committed if a person unlawfully takes the personal property of another against the victim’s will “by means of actual or threatened force.”<sup>16</sup> If the defendant restrained the victim during the robbery, he could be punished for the crime of robbery and receive the additional sentencing enhancement for the act of restraint.<sup>17</sup> According to the Sentencing Guidelines, robbery has a base offense level of twenty, which requires a minimum sentence of thirty-three to forty-one months’ imprisonment.<sup>18</sup> The two-level physical restraint enhancement raises the base offense level to twenty-two, increasing the minimum sentence to forty-one to fifty-one months’ imprisonment.<sup>19</sup>

Currently there is a circuit split on how to interpret this enhancement. One interpretation holds a strict reading of the guideline text and requires a literal physical restraint (e.g., the victim is tied up, locked in a room, or otherwise physically immobilized).<sup>20</sup> The other interpretation holds that

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11. *An Overview of the United States Sentencing Commission*, U.S. SENT’G COMM’N 1, [https://www.ussc.gov/sites/default/files/pdf/about/overview/USSC\\_Overview.pdf](https://www.ussc.gov/sites/default/files/pdf/about/overview/USSC_Overview.pdf) (last visited Feb. 9, 2022).

12. *Id.*

13. *Id.* at 2.

14. U.S. SENT’G GUIDELINES MANUAL § 2B3.1(b)(4)(B).

15. *Id.*

16. 18 U.S.C. § 1951(b)(1).

17. U.S. SENT’G GUIDELINES MANUAL § 2B3.1(b)(4)(B).

18. *See id.* ch. 5, pt. A, sent’g tbl.

19. *See id.*; *id.* § 2B3.1(b)(4)(B).

20. *See, e.g., United States v. Rosario*, 7 F.3d 319, 321 (2d Cir. 1993) (holding that the defendant physically restrained the victim by standing on his neck, effectively immobilizing him while defendant robbed him); *United States v. Parker*, 241 F.3d 1114, 1118 (9th Cir.

psychological anguish or coercion, brought about by being threatened with a gun, is enough to establish physical restraint.<sup>21</sup> The discrepancy of these two interpretations goes directly against the fairness and certainty goals of the SRA because the same act is punished differently simply based on the governing circuit. Congress wanted uniformity in federal sentencing based on the defendant's conduct, and this conflict in interpretation eviscerates that goal by creating two different standards of punishment for the same act.

This Comment explores the competing interpretations of the physical restraint enhancement for the crime of robbery. Part I discusses the history and goal of the SRA. Part II examines the Second, Fifth, Seventh, Ninth, and D.C. Circuits, which follow the strict interpretation approach. This approach does not allow the enhancement to be applied for mere psychological restraint, but rather requires a literal physical restraint. Part III analyzes the First, Fourth, Eighth, Tenth, and Eleventh Circuits, which apply a more liberal interpretation of this enhancement in which the psychological effect of being held at gunpoint constitutes physical restraint. Part IV examines the conflict between these two interpretations and discusses which interpretation better furthers the goals of the SRA. This Comment concludes that a strict reading of the guideline text—which requires *actual* restraint—is the appropriate application of this enhancement for there to be consistency in criminal sentencing.

### *I. A Brief History*

#### *A. Sentencing Reform Act of 1984*

Before Congress enacted the SRA, sentences were determined exclusively by the judge and parole officer.<sup>22</sup> The sentencing judge and

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2001) (holding that the defendant physically restrained the victim by holding her by her hair); *United States v. Bell*, 947 F.3d 49, 61 (3d Cir. 2020) (holding that the defendant did not physically restrain the victim when he merely pointed a gun at him and threw him to the ground).

21. *See, e.g.*, *United States v. Jones*, 32 F.3d 1512, 1519 (11th Cir. 1994) (holding that forcing victims at gunpoint into another room was a physical restraint because the “presence of handguns ensured the victims’ compliance”); *United States v. Stevens*, 580 F.3d 718, 721 (8th Cir. 2009) (holding that ordering victims to the ground at gunpoint and moving them to two distinct locations was a physical restraint); *United States v. Miera*, 539 F.3d 1232, 1236 (10th Cir. 2008) (holding that blocking the exit while threatening victims with a gun was a physical restraint).

22. *Mistretta v. United States*, 488 U.S. 361, 363 (1989).

defendant's parole officer considered "their own assessments of the offender's amenability to rehabilitation" to determine the appropriate sentence.<sup>23</sup> This sentencing scheme aimed to rehabilitate the defendant in the hope that he would not return to criminal activity upon release.<sup>24</sup> Typically, appellate courts gave "virtually unconditional deference" to the sentencing judge's decision, because the "sentencing judge 'sees more and senses more' than the appellate court."<sup>25</sup> In this sentencing structure the broad discretion of judges came through a "three-way sharing" system.<sup>26</sup> Under this system, Congress set the maximum punishment, the judge "imposed a sentence within the statutory range," and the parole officer could provide the judge a report with additional information about the convicted defendant to aid in applying a proper sentence.<sup>27</sup> The judge was not confined to the sole issue of guilt; rather, the judge could consider the entirety of the defendant's circumstances (such as the defendant's life and characteristics) to implement an appropriate punishment.<sup>28</sup> This led to wide variations in punishment because each sentence was highly subjective.<sup>29</sup>

Originally, the criminal justice system sought to "achieve fundamental changes in the characters, personalities, and attitudes of convicted offenders" through criminal punishments.<sup>30</sup> This rehabilitative ideal was the "dominant American theory of penal treatment" through the mid-1960s.<sup>31</sup> Courts began to move away from considering rehabilitation to be the goal of sentencing based on findings that it was an unattainable goal.<sup>32</sup> As society changed, so did the view of criminal sentencing. For example, the family structure dissolved, with government becoming far more involved in child-rearing than it ever had been before.<sup>33</sup> More families relied on public schooling, and the family as an economic unit began to diminish with the

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23. *Id.*

24. *Id.*

25. *Id.* at 364.

26. *Id.*

27. *See id.* at 365; *Williams v. New York*, 337 U.S. 241, 246 (1949).

28. *Williams*, 337 U.S. at 247.

29. *See id.*

30. Francis A. Allen, Address, *The Decline of the Rehabilitative Ideal in American Criminal Justice*, 27 CLEV. ST. L. REV. 147, 148 (1978).

31. *Id.* at 149.

32. *Mistretta*, 488 U.S. at 365 (citing NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* 24-43 (1974) and FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* (1981)).

33. Allen, *supra* note 30, at 153-54.

industrializing society.<sup>34</sup> With government becoming more pervasive in public life, people began to defer to the discretion of public officials.<sup>35</sup> As social functions changed, so too did the criminal justice system. Society as whole also saw less value in rehabilitation of criminals and was more concerned “that criminal penalties [were] vigorously imposed.”<sup>36</sup> This shift was due to the lack of change in the recidivism rate.<sup>37</sup>

While rehabilitation remains a goal of the criminal justice system, the punishment’s goal now also includes retribution, deterrence, and protection of the population.<sup>38</sup> As courts moved away from focusing on rehabilitation, Congress began to address the issue of wide disparities in the sentences being imposed. Ultimately, Congress created the United States Sentencing Commission under the SRA to address this issue.<sup>39</sup>

The Commission’s goal was to limit the inconsistency of punishments for federal offenders by establishing federal sentencing guidelines to encapsulate criminal conduct.<sup>40</sup> This system attempted to create “an effective, fair sentencing system” based on honesty, uniformity, and proportionality.<sup>41</sup> Under the old sentencing structure there was confusion due to the inconsistency of imposed sentences. Offenders usually served about one-third of the sentence imposed by the court because the parole board had the authority to set the actual term of imprisonment—which was often less than the court’s sentence.<sup>42</sup> The new sentencing structure implemented by the Commission abolished parole.<sup>43</sup> So now, the sentence imposed by the court is the sentence the offender serves.<sup>44</sup>

Under the new Guidelines, sentences are determined by the offense conduct (i.e., the crime) and the defendant’s criminal history.<sup>45</sup> Each

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34. *Id.*

35. *Id.* at 155.

36. *Id.*

37. *See id.* at 156.

38. Stanley A. Cohen, *An Introduction to the Theory, Justifications and Modern Manifestations of Criminal Punishment*, 27 MCGILL L.J. 73, 74 (1981).

39. *About*, U.S. SENT’G COMM’N, <https://www.ussc.gov/about-page> (last visited Oct. 7, 2021).

40. *See id.*

41. U.S. SENT’G GUIDELINES MANUAL ch. 1, pt. A1.3 (U.S. SENT’G COMM’N 2018).

42. *Id.*

43. *Id.*

44. *Id.* (“[T]he abolition of parole makes the sentence imposed by the court the sentence the offender will serve, less approximately fifteen percent for good behavior.”).

45. *See id.* pt. A.2.

offense conduct includes a base offense level pre-determined by the Commission.<sup>46</sup> The criminal history category is based off the defendant's prior criminal conduct. Courts refer to the Sentencing Table to determine months of imprisonment.<sup>47</sup> This table lists offense levels of 1 to 43 on the Y-axis and criminal history categories of I to VI on the X-axis.<sup>48</sup> The judge imposes a sentence within the range found at the intersection of the axes. However, the Commission recognized that a chart could not classify every possible criminal act; therefore, courts are permitted to "depart from a guideline-specified sentence only when it finds 'an aggravating or mitigating circumstance . . . not adequately taken into consideration . . . that should result in a sentence different from that described.'"<sup>49</sup>

In 1989, the constitutionality of the Guidelines was challenged in *Mistretta v. United States*. The defendant claimed that the Commission itself "was constituted in violation of the established doctrine of separation of powers, and that Congress delegated excessive authority to the Commission to structure the Guidelines."<sup>50</sup> The defendant argued that Congress granted excessive legislative discretion to another branch of government in violation of the nondelegation doctrine.<sup>51</sup> This doctrine "mandate[s] that Congress generally cannot delegate its legislative power to another Branch."<sup>52</sup> However, the Court noted that this does not "prevent Congress from obtaining the assistance of its coordinate Branches."<sup>53</sup> In this case, Congress did not give the Commission free reign to develop the Guidelines on its own. Congress gave detailed guidance for every step of the development process, such as formulation of offense categories, length of sentencing ranges, and directives on maximum sentences.<sup>54</sup> The Court held that "there [was no] absence of standards for the guidance of the Administrator's action"; therefore, the nondelegation doctrine was not violated.<sup>55</sup> The delegation of authority was "sufficiently specific and detailed to meet constitutional requirements."<sup>56</sup>

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46. *See id.* ch. 2, introductory cmt.

47. *Id.* ch. 5, pt. A, introductory cmt., sentencing tbl.

48. *Id.*

49. *Id.* ch. 1, pt. A1.4(b) (quoting 18 U.S.C. § 3553(b)).

50. *Mistretta v. United States*, 488 U.S. 361, 370 (1989).

51. *Id.* at 371.

52. *Id.* at 372.

53. *Id.*

54. *Id.* at 374–77.

55. *Id.*

56. *Id.* at 374.

The Court rejected the notion that the branches of government “must be entirely separate and distinct” in response to the defendant’s claim that the Commission violated the separation of powers doctrine.<sup>57</sup> Rather, the Constitution “enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”<sup>58</sup> In *Mistretta*, the defendant claimed that Congress delegated authority to the Judiciary that had only ever been exercised by Congress or the Executive.<sup>59</sup> This upset the balance of power by requiring judges to cooperate with a political entity to create the Guidelines, thus merging the Judiciary into a political, or legislative, role.<sup>60</sup> The Court disagreed and held that this delegation of authority did not violate the separation of powers.<sup>61</sup> The Court has recognized two dangers in regard to cases that involve the Judiciary: “first, that the Judicial Branch neither be assigned nor allowed ‘tasks that are more properly accomplished by [other] branches,’”<sup>62</sup> and “second, that no provision of law ‘impermissibly threatens the institutional integrity of the Judicial Branch.’”<sup>63</sup> The Commission did not threaten these concerns, and the Court held that it was constitutional.<sup>64</sup>

In 2005, the Guidelines’ constitutionality was challenged based on the mandatory minimum sentencing it prescribed in *United States v. Booker*.<sup>65</sup> The Court held that while the Guidelines under the SRA are constitutional, they are merely advisory, not required.<sup>66</sup> The SRA requires the sentencing court to consider the Guidelines’ ranges as set forth by the Commission, but courts are permitted “to tailor the sentence in light of other statutory concerns as well.”<sup>67</sup> A sentencing court may depart from the Guidelines and implement a different sentence as long as the court fully explains the reason for the departure.<sup>68</sup> Before the SRA, appealing a sentence was very difficult

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57. *Id.* at 380.

58. *Id.* at 381 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1983) (Jackson, J., concurring)).

59. *Id.* at 383–84.

60. *Id.* at 383.

61. *Id.* at 384.

62. *Id.* at 383 (quoting *Morrison v. Olson*, 487 U.S. 654, 656 (1988)).

63. *Id.* (quoting *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851 (1986)).

64. *Id.* at 384.

65. 543 U.S. 220, 245 (2005).

66. *Id.*

67. *Id.*

68. U.S. SENT’G GUIDELINES MANUAL ch. 1, pt. A1.2 (U.S. SENT’G COMM’N 2018).



due to the deference appellate courts gave to trial courts; now, appellate courts review under the abuse-of-discretion standard.<sup>69</sup> Defendants can appeal a sentence for the following reasons: (1) to determine if the Guidelines were correctly applied, or (2) if the court departed from the Guidelines, to determine “the reasonableness of the departure.”<sup>70</sup>

Congress had three goals in implementing the SRA: (1) to “enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system”; (2) to have “reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders”; and (3) to have “proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.”<sup>71</sup> When circuits differ on how to implement the Guidelines or enhancements, these goals are lost.<sup>72</sup> Different sentences for similar crimes are imposed based on the conflicting interpretations, leading to a disparity in sentencing.<sup>73</sup>

#### *B. Issues with Physical Restraint Enhancement*

The crime of robbery has several enhancements that courts can apply to adjust the sentence based on additional acts committed in furtherance of the robbery. Physical restraint is one such enhancement, and it allows for a two-level adjustment to the base offense level of robbery.<sup>74</sup> The way this enhancement has been applied among the circuits has led to inconsistencies in sentencing that are antithetical to the SRA’s objective. For example, some circuits apply this enhancement only when a defendant physically immobilizes the victim through physical contact during the commission of a robbery; other circuits, however, apply the enhancement when a defendant threatens his victim with a gun during the robbery. This is an important issue because the differing interpretations lead to a two-level sentencing disparity for the same or similar crime, which is what the Commission sought to avoid when instituting the Guidelines.

The Federal Sentencing Guidelines state that during the commission of a robbery, “if any person was physically restrained to facilitate commission of the offense or to facilitate escape, increase [sentencing] by [two]

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69. *Koon v. United States*, 518 U.S. 81, 99 (1996).

70. U.S. SENT’G GUIDELINES MANUAL ch. 1, pt. A1.2.

71. *Id.* pt. A1.3.

72. *See An Overview of the United States Sentencing Commission*, *supra* note 11.

73. *See supra* notes 20–21.

74. U.S. SENT’G GUIDELINES MANUAL § 2B3.1(b)(4)(B).

levels.”<sup>75</sup> The issue here is how to interpret the words “physical restraint.” The circuits that follow a strict interpretation of this language hold that the victim must literally be physically restrained (e.g., bound, tied, locked up).<sup>76</sup> In contrast, the circuits that follow a liberal interpretation of the language allow for the victims’ psychological feelings of being restrained (e.g., being threatened with a gun) to be a factor in determining if the enhancement is appropriate.<sup>77</sup> To limit this discrepancy of sentencing practices, the circuits need to be unified in their interpretation of this enhancement.

## *II. A Strict Interpretation of the Physical Restraint Enhancement*

Circuits in the strict interpretation category adhere to a textual approach for the phrase “physical restraint” and require the victim to have been physically affected by the defendant for this enhancement to apply.

### *A. The Second Circuit*

In *United States v. Rosario*, the defendant, William Rosario, assaulted a postal worker when he was delivering mail.<sup>78</sup> After knocking the postal worker to the ground, Rosario stood on his throat and stole his wallet and keys.<sup>79</sup> A few days later, Rosario was arrested.<sup>80</sup> He gave the police a credit card as a form of identification, but the credit card had someone else’s name on it.<sup>81</sup> He had acquired the credit card by using the postal worker’s keys to steal from mailboxes.<sup>82</sup> The postal worker then identified Rosario from a photo array as the man who had robbed him, and Rosario was convicted.<sup>83</sup> During sentencing, the trial court imposed a two-level sentencing enhancement for physical restraint for the act of Rosario standing on the postal worker’s neck.<sup>84</sup>

On appeal, Rosario argued the district court improperly applied the two-level enhancement for physical restraint during the commission of a

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75. *Id.*

76. *See supra* note 20.

77. *See supra* note 21.

78. 7 F.3d 319, 320 (2d Cir. 1993).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

robbery.<sup>85</sup> First, Rosario contended that two enhancements the court applied to his sentence resulted in double counting.<sup>86</sup> Double counting occurs when a defendant is sentenced for a crime and receives an additional enhancement for an act that is an included element in the original charge.<sup>87</sup> Here, Rosario claimed that the use of force element for a robbery was essentially the same as physical restraint.<sup>88</sup> Therefore, sentencing him for both would be double counting.<sup>89</sup> The Second Circuit disagreed with Rosario's application of the enhancement. The court noted that he "ignore[d] the difference between the use of force in committing a robbery, and forcible restraint of a victim's mobility in order to facilitate the crime."<sup>90</sup> And, if physical restraint were meant to be an element of robbery, the Guidelines would not have included it as an enhancement distinct from the elements of the crime.<sup>91</sup>

Second, Rosario argued that he did not truly physically restrain the postal worker. He claimed that to apply this enhancement, one must use "some device or means of restraint beyond manual holding" to confine a victim.<sup>92</sup> His actions, he argued, were "mere physical contact" and did not rise to the level of physical restraint.<sup>93</sup> The Second Circuit disagreed with this assertion as well: "[T]he victim 'could do nothing about [his] situation because of the physical restraint.'"<sup>94</sup> Even though the victim was not restrained by an object, he was still physically affected to the point that he had no choice but to comply. Therefore, the Second Circuit upheld the district court's finding that Rosario had physically restrained the postal worker by standing on his neck.<sup>95</sup>

In *United States v. Paul*, Wensley Paul and his codefendants robbed a pharmacy.<sup>96</sup> During the robbery, one of Paul's codefendants threatened the clerk with a gun and ordered him not to move.<sup>97</sup> The codefendant then

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85. *Id.* at 320–21.

86. *See id.* at 321.

87. *See id.*

88. *Id.*

89. *See id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* (quoting *United States v. Doubet*, 969 F.2d 341, 347 (7th Cir. 1992)).

95. *Id.*

96. 904 F.3d 200, 201 (2d Cir. 2018).

97. *Id.*

gestured toward another clerk with the gun and forced him to open the cash register.<sup>98</sup> The codefendants then took the cash and other items before leaving the store.<sup>99</sup> Paul served as a lookout throughout the robbery, and after he was arrested, Paul pled guilty to the robbery charge.<sup>100</sup> The district court then imposed the physical restraint enhancement over Paul's objection. Paul appealed, arguing that the physical restraint enhancement was improperly applied.<sup>101</sup>

The Second Circuit held that the enhancement was improper because, otherwise, "virtually every robbery would be subject to the [two]-level enhancement for physical restraint unless it took place in unoccupied premises."<sup>102</sup> Additionally, the court relied on its holding in *United States v. Anglin*. In *Anglin*, the defendant robbed a bank at gunpoint.<sup>103</sup> The Second Circuit held that "displaying a gun and telling people to get down and not to move, without more, is insufficient" for the physical restraint enhancement.<sup>104</sup>

The court also relied on the commentary to the Guidelines in which the Commission included acts such as tying, binding, or locking the victim up to illustrate the intent of the enhancement.<sup>105</sup> Expanding on the precedent set in *Anglin* and the Guidelines commentary, the *Paul* court agreed with the Second Circuit that though these acts may not include every possible physical restraint, they are "intended as meaningful signposts . . . to understand[] the Sentencing Commission's enhancement purpose."<sup>106</sup> Since there was no actual contact between the defendant or his codefendants and the victims, the physical restraint enhancement was improperly applied.<sup>107</sup>

### B. The Third Circuit

In *United States v. Copenhaver*, Brian Copenhaver robbed a hotel and assaulted a hotel employee with a gun.<sup>108</sup> During the robbery, the defendant never used physical contact to restrict the victim's movement, but the court

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98. *Id.*

99. *Id.* at 201–02.

100. *Id.* at 202.

101. *Id.*

102. *Id.* at 203 (quoting *United States v. Anglin*, 169 F.3d 154, 165 (2d Cir. 1999)).

103. *See id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *See id.* at 201, 204.

108. 185 F.3d 178, 179 (3d Cir. 1999).

still held that the physical restraint enhancement applied.<sup>109</sup> Copenhaver struck the hotel employee in the head with the gun, made the employee enter another office, and then forced the employee into a fireplace and placed a screen across it.<sup>110</sup> Copenhaver was arrested, convicted, and sentenced for the crime—which included a two-level enhancement for physical restraint.<sup>111</sup> The issue on appeal was whether the act of forcing the employee into the fireplace at gunpoint constituted physical restraint as per the Guidelines.<sup>112</sup>

Copenhaver argued that his actions were not a physical restraint because the Guidelines “require[] an exertion of physical force upon the victim.”<sup>113</sup> The Third Circuit disagreed and stated that “[n]o actual touching is required to effect physical restraint.”<sup>114</sup> The purpose of forcing the victim into the fireplace was to prevent him from interfering with the crime or calling for help.<sup>115</sup> The victim “was confined to the fireplace and had no alternative but compliance.”<sup>116</sup> The court also noted that “the fact that the barrier was not impenetrable does not negate physical restraint.”<sup>117</sup> Rather, “[i]t is the perpetrator’s act of enclosing or confining the victim in a space or with a barrier, actual or threatened,” that determines physical restraint.<sup>118</sup> The court held that the “act of enclosing or confining the victim in a space or with a barrier” is enough to apply the physical restraint enhancement.<sup>119</sup> Though the defendant did not physically touch the victim, he was physically immobilized by being confined in the fireplace.<sup>120</sup>

### C. The Fifth Circuit

In *United States v. Garcia*, Jaime Garcia and two other defendants robbed a gun store in Lubbock, Texas, and left with nine stolen firearms.<sup>121</sup> During the robbery, the robbers ordered an employee to get on the floor by

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109. *See id.* at 183.

110. *Id.* at 179.

111. *Id.* at 180.

112. *Id.*

113. *Id.* at 181.

114. *Id.* at 182.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 183.

119. *Id.*

120. *Id.* at 182–83.

121. 857 F.3d 708, 710 (5th Cir. 2017).

holding a gun to his head.<sup>122</sup> Another defendant, also armed with a firearm, stood near the exit while the third defendant smashed display cases to steal the enclosed firearms.<sup>123</sup> An employee in the backroom heard the sound of breaking glass and ran to the front of the store.<sup>124</sup> A gunfight ensued, resulting in one employee being shot in the ankle and the defendants' escaping.<sup>125</sup> Garcia was eventually arrested and charged with robbery, and the court applied the two-level physical restraint enhancement.<sup>126</sup>

However, both the government and defense objected to this enhancement, noting the Fifth Circuit's precedent in *United States v. Hickman*.<sup>127</sup> In *Hickman*, the court held that "merely brandishing a weapon at a victim cannot support an enhancement under this section of the Guidelines."<sup>128</sup> Here, one of the defendants, Markus Chopane, conducted a series of group robberies while armed with a gun.<sup>129</sup> Each of these robberies occurred in a similar manner. Chopane and various assailants would hold a store employee at gunpoint and demand the employee give them the cash that was in the safe and tills.<sup>130</sup> After arrest, Chopane admitted that during one of these robberies he had held a gun and "tapped" an employee on the shoulder with it, but he argued that he never tied up, bound, or locked up victims to warrant the enhancement.<sup>131</sup> The Fifth Circuit noted that if it were to hold that brandishing a weapon were a physical restraint, "there would be no limiting principle on the application of this enhancement; every armed robbery would be enhanced by the physical restraint provision."<sup>132</sup>

Regardless of this precedent, the district court in *Garcia* adopted the parole officer's pre-sentence report, which included the physical restraint enhancement.<sup>133</sup> Garcia appealed on the grounds that this enhancement was

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122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* (quoting *United States v. Hickman*, 151 F.3d 446, 461 (5th Cir. 1998), *reh'g granted and vacated*, *United States v. Hickman*, 165 F.3d 1020 (5th Cir. 1999), *aff'd in part and vacated in part*, *United States v. Hickman*, 179 F.3d 230 (5th Cir. 1999)).

129. *Hickman*, 151 F.3d at 451.

130. *See id.* at 451–52.

131. *Id.* at 461.

132. *Id.* at 461–62.

133. *Garcia*, 857 F.3d at 710.

improperly applied.<sup>134</sup> The Fifth Circuit agreed.<sup>135</sup> The court noted that examples of physical restraint in the Guidelines “involve[] a restraint of movement by the use of some artifact by which the victim is ‘tied’ or ‘bound’ . . . or by the use of a space where the victim is ‘locked up.’”<sup>136</sup> In this case, the defendant “allowed the [victims] to remain where they were and never forced them to move to a confined space.”<sup>137</sup> Had the defendant moved the victims to a confined location and physically restricted their movement, then the enhancement would have applied.<sup>138</sup> But the actions here were not “even remotely similar to tying, binding, or locking up the victims,” so the physical restraint enhancement was improper.<sup>139</sup>

The Fifth Circuit acknowledged the fact that other circuits have held that the threat of a gun, or standing by the exit with a gun, is a physical restraint.<sup>140</sup> But the court asserted that these actions “make explicit what is implicit in all armed robberies: that the victims should not leave the premises.”<sup>141</sup> The physical restraint enhancement exists to punish defendants for extra offenses they commit during the commission of a crime, and the Fifth Circuit held that the presence of a weapon or blocking of an exit is inherently a part of committing a robbery, not an extra offense.<sup>142</sup>

#### *D. The Seventh Circuit*

In *United States v. Herman*, the defendant, Joshua Herman, was invited to his future victims’ house.<sup>143</sup> Upon arrival he noticed a handgun tucked into the purse of one of his future victims.<sup>144</sup> Herman asked if he could see the gun, and the victim consented.<sup>145</sup> Herman then drew his own revolver

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134. *Id.* at 711.

135. *Id.* at 713–14.

136. *Id.* at 712 (alterations in original) (quoting *United States v. Anglin*, 169 F.3d 154, 164 (2d Cir. 1999)).

137. *Id.*

138. *Id.*; see also *United States v. Frank*, 223 F. App’x 412, 413 (5th Cir. 2007) (per curiam) (finding physical restraint where defendant forced casino employees into a manager’s office at gunpoint and instructed them not to leave).

139. *Garcia*, 857 F.3d at 712.

140. *Id.*

141. *Id.* at 713.

142. *Id.*

143. 930 F.3d 872, 873 (7th Cir. 2019).

144. *Id.*

145. *Id.*

and ordered the victims to stay in the house and not follow him.<sup>146</sup> He tried to leave with his revolver and the victim's gun.<sup>147</sup> However, the victims disobeyed and pursued him, resulting in Herman firing a shot at them.<sup>148</sup> Herman was arrested and charged with multiple counts—one of which included robbery of the victim's gun and a two-level physical restraint enhancement.<sup>149</sup> Herman appealed on the basis that the district court misapplied this enhancement.<sup>150</sup>

The Seventh Circuit acknowledged the difference of opinion among other circuits regarding this enhancement, but it ultimately adopted the strict-interpretation approach. Relying on its precedent in *United States v. Doubet*, the court stated that “simply ‘herding victims into a defined area’” does not reach the threshold of physical restraint.<sup>151</sup> Something more is required. In *Doubet*, the defendant ordered bank employees into a back room at gunpoint.<sup>152</sup> He left them in a bathroom within the back room and ordered them not to come out—the room was never locked.<sup>153</sup> In this case, the court held that the victims were “effectively secured by Doubet’s threats of death while carrying the [gun],” so that constituted physical restraint.<sup>154</sup>

Though forcing the victims into a confined space is not enough for physical restraint, the combination of Doubet’s actions with his threats that someone was watching the door “served as a figurative lock and key sufficient to constitute a physical restraint.”<sup>155</sup> However, in *Herman*, the defendant did not order his victims to another location—he ordered them *not* to move.<sup>156</sup> Since there was no “something more,” like the additional threats in *Doubet*, the court held that this did not constitute physical restraint.<sup>157</sup>

Comparing *Doubet* with *Herman*, it is important to distinguish that in *Doubet* the victims complied with the directive and in *Herman* the victims did not. The court noted that “cases that have found physical restraint have

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146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 874.

150. *Id.*

151. *Id.* at 875 (quoting *United States v. Doubet*, 969 F.2d 341, 346 (7th Cir. 1992)).

152. *Doubet*, 969 F.2d at 342.

153. *See id.*

154. *Id.* at 347.

155. *Id.*

156. *Herman*, 930 F.3d at 873.

157. *Id.* at 875–77.



focused on the action of the defendant, not on the reaction of the victim.”<sup>158</sup> If the defendant is threatening the victim with a gun, it is ultimately up to the victim how to respond (e.g., complying, running away). The mere existence of the threat does not incapacitate the victims and make them physically unable to move. For example, as noted in *Herman*, the victims did not comply with the threat and pursued Herman.<sup>159</sup> The court held that the victim’s response does not belong “within the scope of the physical restraint guideline.”<sup>160</sup>

The court further noted that there are other avenues to which a judge may look to punish the defendant for the psychological harm. For instance, a judge can consider “psychological coercion under 18 U.S.C. § 3553(a)(1), as part of ‘the nature and circumstances of the offense.’”<sup>161</sup> In doing so, the victim will get justice for psychological harm, but the defendant will not be improperly sentenced by conflating that harm with the physical restraint enhancement.

#### *E. The Ninth Circuit*

In *United States v. Parker*, Chris Parker committed a series of bank robberies over the course of four months.<sup>162</sup> Parker was found guilty on all counts in the indictment for his participation in these robberies—two of which (Counts Two and Four) included the use of a firearm.<sup>163</sup> Because of this, his sentence included the two-level enhancement for physical restraint.<sup>164</sup> For Count Two, Parker’s accomplice grabbed a bank teller by the hair.<sup>165</sup> The court noted that this act constituted a physical restraint, but the question was whether Parker was liable for the actions of his accomplice: “U.S.S.G § 1B1.3(b) (2000) holds a defendant accountable at sentencing for all reasonably foreseeable acts and omissions of others in furtherance of a jointly undertaken criminal activity.”<sup>166</sup> The Ninth Circuit

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158. *Id.* at 876.

159. *Id.* at 873.

160. *Id.* at 876.

161. *Id.* at 877.

162. 241 F.3d 1114, 1117 (9th Cir. 2001).

163. *Id.*

164. *Id.*

165. *Id.* at 1118.

166. *Id.*

held that it was reasonably foreseeable that this type of restraint could happen during a robbery, so Parker was liable for that conduct.<sup>167</sup>

The robbery at issue in Count Four involved a robber pointing a gun at a bank teller and ordering her to the floor.<sup>168</sup> Parker argued that this conduct was not within the meaning of the physical restraint enhancement.<sup>169</sup> The court focused on the “sustained focus” standard to determine if this enhancement was appropriate.<sup>170</sup> This standard requires a “*sustained focus* on the restrained person that lasts long enough for the robber to direct the victim into a room or order the victim to walk somewhere.”<sup>171</sup> The court held that “briefly pointing a gun” at someone and giving them a command does not constitute physical restraint.<sup>172</sup> Additionally, there would be no limiting principle if this were to constitute physical restraint because “nearly all armed bank robberies will presumably involve such acts.”<sup>173</sup>

#### F. The D.C. Circuit

In *United States v. Drew*, the defendant, Wilbert Drew, broke into his estranged wife’s house and came in through the window.<sup>174</sup> After hearing the sound of breaking glass, his ex-wife locked herself in the bedroom and called 911.<sup>175</sup> Drew broke into the bedroom and ordered her downstairs while pointing a shotgun at her.<sup>176</sup> He continually threatened to kill her while forcing her downstairs.<sup>177</sup> At one point, Drew pulled the trigger, but

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167. *Id.*; see also *United States v. Carter*, 219 F.3d 863, 868 (9th Cir. 2000); *United States v. Shaw*, 91 F.3d 86, 89 (9th Cir. 1996).

168. *Parker*, 241 F.3d at 1118.

169. *Id.*

170. *Id.* at 1118–19.

171. *Id.* at 1118.

172. *Id.*

173. *Id.* at 1118–19.

174. 200 F.3d 871, 875 (D.C. Cir. 2000). Because Drew agreed to plead guilty to “possession of a firearm while subject to a court order,” the government dismissed all other charges against him, including one for armed burglary. *Id.* However, the physical restraint enhancement applied by the court was the exact same as the physical restraint enhancement for robbery. Compare *id.* at 876 (applying the two-level enhancement under § 3A1.3 of the Sentencing Guidelines where “a victim was physically restrained”), with U.S. SENT’G GUIDELINES MANUAL § 2B3.1(b)(4)(B) (U.S. SENT’G COMM’N 2018) (applying a two-level enhancement where “any person was physically restrained to facilitate commission of the offense”).

175. *Drew*, 200 F.3d at 875.

176. *Id.*

177. *Id.*

the gun did not discharge.<sup>178</sup> After this, his wife and their sons tried to disarm him.<sup>179</sup> The police arrived during the struggle and placed Drew under arrest.<sup>180</sup> He was convicted and appealed on the basis that the physical restraint enhancement had been improperly applied.<sup>181</sup>

The D.C. Circuit held that Drew's actions did not constitute physical restraint for purposes of the sentencing enhancement.<sup>182</sup> The court stated that "[t]he most pertinent definition of 'physical' is 'of the body as opposed to the mind, as, *physical* exercise.'"<sup>183</sup> The court also pointed to the commentary of the Guidelines, which states that physical restraint includes acts such as "being tied, bound, or locked up."<sup>184</sup> This circuit interpreted the commentary to the Guidelines to be illustrative of how a victim must be restrained—"through bodily contact or to confine[ment] . . . in some way."<sup>185</sup> While the victim may have felt restrained, "[t]he required restraint must, as the language plainly recites, be physical."<sup>186</sup>

Fear is not an adequate condition for the circuits that follow the strict-interpretation approach to apply the physical restraint enhancement. The circuits in this category agree that psychological restraint is insufficient to apply this enhancement without it being in conjunction with an actual physical restraint. For example, the defendant does not necessarily have to touch the victim, as noted in *Copenhaver*, but the actions of the defendant must cause the victim to be physically unable to interfere with the commission of the crime or be unable to escape. This can happen through being tied up, bound, or moved to a specified area and confined to that space. While those are the most common examples of physical restraint, the list is not exhaustive. If the victim is physically affected by a direct action of the defendant in a way that immobilizes the victim, the circuits following this interpretation of the Guidelines will apply the physical restraint enhancement.

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178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 880.

182. *Id.*

183. *Id.* (quoting *United States v. Anglin*, 169 F.3d 154, 164 (2d Cir. 1999)).

184. *Id.*

185. *Id.*

186. *Id.*

### *III. A Liberal Interpretation of the Physical Restraint Enhancement*

Circuits in this category allow the victim's feelings of restraint to affect how they apply the physical restraint enhancement. The psychological impact of the defendant's actions on the victim matters just as much as if they were physically restrained.

#### *A. The First Circuit*

In September 2000, Timi Wallace entered a firearms dealership, pointed a gun at the store owner, and ordered him not to move.<sup>187</sup> Another employee attempted to flee the store, and Wallace's accomplice drew his gun and ordered her to stop.<sup>188</sup> The accomplice then ordered the assistant to open the gun case and proceeded to steal six high caliber handguns.<sup>189</sup> After they had secured the guns, Wallace and his accomplice left the store.<sup>190</sup> Later, the store owner identified Wallace from a photograph as the man who pointed a gun at him during the robbery.<sup>191</sup> Wallace evaded arrest until 2004, when he was then convicted for all counts on the indictment, including armed robbery with a two-level physical restraint enhancement.<sup>192</sup> Wallace appealed and argued that the district court misapplied the Guidelines.<sup>193</sup>

Wallace argued that neither he nor his accomplice physically restrained the victims because "they did not physically touch the victims or force them into a separate and confined space."<sup>194</sup> The government argued that even without physical contact, the victims were essentially immobilized by the defendants pointing guns at them at close range and ordering them not to move.<sup>195</sup> In addition to holding the victims at gun point, the First Circuit also noted that Wallace's accomplice "jumped in front of [the assistant] when she tried to escape," physically blocking her path.<sup>196</sup> The court held that this was physical restraint because "[k]eeping someone from doing

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187. United States v. Wallace, 461 F.3d 15, 20 (1st Cir. 2006).

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 21–22.

193. *Id.* at 30.

194. *Id.* at 33.

195. *Id.*

196. *Id.* at 34.

*something* is inherent within the concept of restraint.”<sup>197</sup> Even though the victims were not moved to another room or confined to a space, the court held that they were effectively immobilized due to “the close proximity of the armed robbers to the victims, and the posturing of the defendant and co-conspirator when one of the victims tried to escape.”<sup>198</sup>

#### *B. The Fourth Circuit*

In *United States v. Dimache*, Elianer Dimache went into a bank and asked a teller for change.<sup>199</sup> As she was getting the change, Dimache leapt over the counter, pointed a gun at her, and ordered her to put the money in a bag.<sup>200</sup> He then pointed the gun at the other tellers and ordered them to get down on the floor.<sup>201</sup> After that encounter, Dimache left the bank with \$1,778.<sup>202</sup> During the investigation, police interviewed Dimache and he denied involvement even though there was video surveillance of the robbery.<sup>203</sup> Eventually, he was indicted for three counts and pled guilty to armed bank robbery.<sup>204</sup> The probation office included the two-level physical restraint enhancement in its sentencing report, and Dimache objected to this provision.<sup>205</sup> The district court overruled the objection and applied the enhancement.<sup>206</sup> Dimache appealed, arguing that the physical restraint enhancement required more than pointing the gun at the tellers, ordering them to the floor, and commanding them not to move.<sup>207</sup>

The Fourth Circuit held that the enhancement was appropriate “when the defendant points the gun at the victim, thereby restricting the victim’s movements and ensuring the victim’s compliance with the desires of the defendant.”<sup>208</sup> In reaching this decision, the Fourth Circuit relied on its holding in *United States v. Wilson*. In *Wilson*, Wilson and his co-defendant

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197. *Id.* at 34–35.

198. *Id.* at 34.

199. 665 F.3d 603, 604 (4th Cir. 2011).

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* at 604–05.

206. *Id.* at 605.

207. *Id.* at 606.

208. *Id.* at 607 (citing *United States v. Wilson*, 198 F.3d 467, 472 (4th Cir. 1999); *United States v. Wallace*, 461 F.3d 15, 33 (1st Cir. 2006); *United States v. Fisher*, 132 F.3d 1327, 1329–30 (10th Cir. 1997)).

held a victim in her car at gunpoint and prevented the victim from exiting or starting her car until she gave them both her money and the car.<sup>209</sup> The court held that the victim was physically restrained and that the “enhancement is proper ‘if the act of physical restraint adds to the basic crime.’”<sup>210</sup> Wilson also argued that the enhancement would result in double counting.<sup>211</sup> However, physical restraint is not an element of the crime of carjacking, nor is it an element of the crime of robbery, so double counting was not implicated in either case. In *Dimache*, the defendants prevented the tellers “from both leaving the bank and thwarting the bank robbery” by pointing guns at them, so they were effectively physically restrained.<sup>212</sup>

*Dimache* also argued that since the tellers were confined in a large, open area, they were not physically restrained in the same way as the victim in *Wilson* who was confined to a much smaller space: the car.<sup>213</sup> The court rejected this argument, stating that “[t]he size of the area is not controlling[] because . . . [the] enhancement turns on whether the victim’s freedom of movement was restrained.”<sup>214</sup> The tellers’ freedom of movement was restrained enough through the defendant’s conduct for the physical restraint enhancement to apply.<sup>215</sup>

### C. The Eighth Circuit

In *United States v. Stevens*, Donald Stevens and his accomplice, wearing masks and rubber gloves, committed an armed bank robbery.<sup>216</sup> During the robbery, they ordered the bank employees into the breakroom at gunpoint and forced the employees to turn over their keys and phones.<sup>217</sup> Stevens and his accomplice then ordered the employees into the bank vault and closed the door—but they did not lock it.<sup>218</sup> Stevens was caught and convicted of armed bank robbery, and an additional two-level enhancement was applied to his sentence for physical restraint.<sup>219</sup> He appealed, arguing that he did not

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209. *Id.* at 608.

210. *Id.* (quoting *Wilson*, 198 F.3d at 472).

211. *Wilson*, 198 F.3d at 472 n.\*.

212. *Dimache*, 665 F.3d at 608.

213. *Id.* at 609.

214. *Id.*

215. *Id.* (affirming the district court’s application of the section 2B3.1(b)(4)(B) sentencing enhancement).

216. 580 F.3d 718, 719 (8th Cir. 2009).

217. *Id.*

218. *Id.*

219. *Id.* at 719–20.

physically restrain the employees because the vault door was never locked.<sup>220</sup>

The Eighth Circuit disagreed. The presence of the gun combined with the threat of “imminent bodily harm for noncompliance with their demands” was enough to “ensure[] the employees would comply.”<sup>221</sup> Though the door of the vault was not locked, the court held that the threat of harm was so significant that there was “no alternative to compliance.”<sup>222</sup> Additionally, the court noted that the defendants did far more than merely brandish a weapon. They moved the victims to “two distinct locations at gun point and closed them in a vault under circumstances clearly implying they should remain there or risk physical harm.”<sup>223</sup> Though the employees were not locked in the vault, the threat of harm was so prevalent that they were unable to escape or call for help; therefore, they were physically restrained.<sup>224</sup>

Similarly, in *United States v. Kirtley*, the defendant, William Kirtley, robbed a bank and forced the bank tellers to lie on the floor.<sup>225</sup> He also ordered them to tie their feet together.<sup>226</sup> During the interaction, Kirtley trained his gun on them and threatened to harm the tellers if they did not comply.<sup>227</sup> After the employees followed his orders, Kirtley stole the cash from a drawer and fled.<sup>228</sup> The bank employees then contacted the police and Kirtley was arrested.<sup>229</sup> He was convicted, and his sentence included the two-level physical restraint enhancement.<sup>230</sup> Kirtley appealed and argued that the district court improperly applied the physical restraint enhancement.<sup>231</sup> He argued that he did not physically restrain the victims and that “asking the tellers to tie their feet together with his materials” did not fit within the meaning of the enhancement.<sup>232</sup>

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220. *Id.* at 720.

221. *Id.* at 721.

222. *Id.*

223. *Id.*

224. *Id.*

225. 986 F.2d 285, 285 (8th Cir. 1993).

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.* at 286.

Relying on the standard set in *Doubet*, the Eighth Circuit reiterated its holding that “a defendant physically restrains persons if the defendant creates circumstances allowing the persons no alternative but compliance.”<sup>233</sup> Due to the presence of the gun and Kirtley’s threatening behavior, the tellers had no choice but to do as they were ordered.<sup>234</sup> Kirtley also argued that the bank employees were not physically restrained because they were able to easily free themselves after he had left.<sup>235</sup> The court disagreed with this assertion as well, and it again relied on *Doubet* where the court found that victims were physically restrained, even though they were in an unlocked room, because the defendant’s death threats left them no option but to comply.<sup>236</sup> Therefore, Kirtley, by training his gun on the victims and giving them no alternative but to comply, had physically restrained them within the meaning of the enhancement.<sup>237</sup>

#### D. The Tenth Circuit

In *United States v. Davis*, Percy Davis and a codefendant robbed a bank while armed with rifles.<sup>238</sup> Davis held a teller at gunpoint while she filled a bag with money, and the codefendant ordered everyone else to the bank lobby at gunpoint to lie on the floor.<sup>239</sup> Throughout the robbery, Davis and the codefendant kept their rifles pointed at the heads of the employees and customers.<sup>240</sup> They were arrested and convicted, and Davis’s sentence included the two-level enhancement for physical restraint.<sup>241</sup> Davis appealed, arguing that the district court improperly applied this enhancement and that his actions did not fit within the meaning of the enhancement.<sup>242</sup>

The Tenth Circuit relied on its precedent set in *United States v. Fisher*.<sup>243</sup> In *Fisher*, the defendant, Ray Fisher, was the lookout for a bank robbery, during which his co-conspirators hit a security guard with a gun and held

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233. *Id.* (citing *United States v. Doubet*, 969 F.2d 341, 347 (7th Cir. 1992)).

234. *Id.*

235. *Id.*

236. *Id.* (citing *Doubet*, 969 F.2d at 347).

237. *Id.*

238. 29 F. App’x 535, 536 (10th Cir. 2002).

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. 132 F.3d 1327 (10th Cir. 1997).



him at gunpoint for the duration of the robbery.<sup>244</sup> The court held that “[p]hysical restraint is not limited to physical touching of the victim . . . . [but] occurs whenever a victim is specifically prevented at gunpoint from moving, thereby facilitating the crime.”<sup>245</sup> The court further noted in *Fisher* that “[k]eeping someone from doing something is inherent within the concept of restraint.”<sup>246</sup> Thereby, *Fisher* established the Tenth Circuit’s view that holding someone at gunpoint is enough restraint to apply the physical restraint enhancement.<sup>247</sup>

Davis argued that his case was factually distinct from *Fisher* because there was less “contact, compulsion, and direct physical contact” with the victims than in *Fisher*.<sup>248</sup> The court rejected this argument and stated that those specific factors are irrelevant in the physical restraint analysis.<sup>249</sup> Again, the psychological coercion of the victims feeling like their freedom was restricted was an adequate restraint for the Tenth Circuit to hold that the physical restraint enhancement should apply.<sup>250</sup>

#### *E. The Eleventh Circuit*

In *United States v. Jones*, Keyvee Jones and his codefendants entered a bank brandishing weapons and ordered the tellers to empty their cash drawers.<sup>251</sup> They then ordered the branch manager to open the safe.<sup>252</sup> After they collected the cash, the robbers ordered the customers and employees into the vault, closed the door, and left.<sup>253</sup> After the robbers’ departure, one of the victims opened the vault and called for help.<sup>254</sup> Jones and the codefendants then led police on a high-speed chase and escaped.<sup>255</sup> Finally, Jones was arrested a few weeks after the robbery.<sup>256</sup> Jones was convicted, and his sentence included the two-level enhancement for physical

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244. *Id.* at 1328.

245. *Davis*, 29 F. App’x at 537 (first alteration in original) (quoting *Fisher*, 132 F.3d at 1329–30).

246. *Fisher*, 132 F.3d at 1330.

247. *See id.*

248. *Davis*, 29 F. App’x at 537.

249. *Id.*

250. *See id.*

251. 32 F.3d 1512, 1514–15 (11th Cir. 1994).

252. *Id.* at 1515.

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

restraint.<sup>257</sup> He appealed this enhancement, claiming that the evidence did not prove that he had physically restrained anyone during the robbery.<sup>258</sup>

The Eleventh Circuit held that this too was physical restraint.<sup>259</sup> In evaluating what constitutes physical restraint, the court noted that “[t]he use of the modifier ‘such as’ in the [Guidelines commentary] indicates that the illustrations of physical restraint ‘are listed by way of example rather than limitation.’”<sup>260</sup> Like the other circuits that apply a more liberal interpretation of this enhancement, the Eleventh Circuit held that a victim is physically restrained if the defendant has “create[d] circumstances allowing the persons no alternative but compliance.”<sup>261</sup> The defendants “restricted their victims’ mobility and capacity to observe events to facilitate the robbery.”<sup>262</sup> Even if no threats were made, the “obvious presence of handguns ensured the victims’ compliance and effectively prevented them from leaving the room.”<sup>263</sup> The presence of the guns sufficiently immobilized the victims, so the court held the physical restraint enhancement was appropriate.<sup>264</sup>

#### IV. Conflict and Resolution

The circuits that hold a strict interpretation of the physical restraint enhancement worry that expanding this enhancement to include psychological restraint would cause the two-level enhancement to apply to virtually all robberies.<sup>265</sup> It would, in effect, cause physical restraint to become an element of the crime of robbery. However, as the Fifth Circuit noted in *Garcia*, the presence of a gun is standard procedure for most robberies.<sup>266</sup> Further, this view holds that in determining if physical

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257. *Id.* at 1518.

258. *Id.*

259. *Id.* at 1519.

260. *Id.* at 1518 (alteration in original) (quoting *United States v. Rosario*, 7 F.3d 319, 320–21 (2d Cir. 1993) (per curiam)).

261. *Id.* at 1519 (quoting *United States v. Kirtley*, 986 F.2d 285, 286 (8th Cir. 1993) (per curiam)).

262. *Id.*

263. *Id.*

264. *Id.*

265. See *United States v. Garcia*, 857 F.3d 708, 713 (5th Cir. 2017); *Rosario*, 7 F.3d at 321; *United States v. Parker*, 241 F.3d 1114, 1118–19 (9th Cir. 2001); *United States v. Bell*, 947 F.3d 49, 57 (3d Cir. 2020).

266. *Garcia*, 857 F.3d at 713.

restraint occurred, a court must look to the actions of the defendants, and not to the reaction of the victims.<sup>267</sup>

The circuits that apply a more liberal interpretation and allow psychological restraint to qualify for the enhancement state that when a person is being threatened with a gun, they are, in effect, restrained.<sup>268</sup> It is arguable that most people will comply under that very real threat of physical harm. This threat then restricts the victims' freedom because they are unable (or unwilling) to try to escape or prevent the facilitation of the crime.<sup>269</sup> However, that is not an absolute guarantee, as seen by the victims' response in *Herman*.<sup>270</sup>

The issue with these conflicting interpretations is that it offers two very different sentencing schemes for very similar crimes. This is exactly what the SRA sought to prevent.<sup>271</sup> If a defendant is in a strict interpretation circuit and brandished a gun during a robbery, he will not receive that two-level enhancement. But if he is in a liberal interpretation circuit, he will. For an example of the significance of a two-level enhancement, consider the sentencing in *United States v. Stevens*. The defendant, Donald Stevens, committed a bank robbery during which he ordered the employees into the vault at gunpoint but did not lock it.<sup>272</sup> Without the physical restraint enhancement, his guideline range was forty-six to fifty-seven months' incarceration.<sup>273</sup> This enhancement, along with the defendant's other applicable enhancements and criminal history, increased the guideline range to fifty-seven to seventy-one months' incarceration.<sup>274</sup> That is an increase of fourteen months, not because of the crime's severity, but because of the circuit in which the defendant committed the crime.

The solution is not to ignore the use of firearms during a robbery, but to create uniformity among how the circuits apply this specific enhancement to reduce the ongoing sentencing disparity. In fact, there is a solution for the use of a firearm during a robbery, outside of the physical restraint enhancement, already established in the Guidelines. Notably, there is a

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267. *United States v. Herman*, 930 F.3d 872, 876 (7th Cir. 2019).

268. *See Jones*, 32 F.3d at 1519; *United States v. Stevens*, 580 F.3d 718, 721 (8th Cir. 2009); *United States v. Miera*, 539 F.3d 1232, 1234 (10th Cir. 2008).

269. *See, e.g., Jones*, 32 F.3d at 1519.

270. *Herman*, 930 F.3d at 876 (observing that the defendant's threats did not prevent the victims from following him).

271. *See Cohen*, *supra* note 38, at 74.

272. *Stevens*, 580 F.3d at 719.

273. *Id.* at 720.

274. *Id.*

specific enhancement in the robbery guideline for discharging a firearm, using a firearm, and brandishing or possessing a firearm.<sup>275</sup> Each of these enhancements requires a higher increase than the two-level increase required by the physical restraint enhancement. They are respectively seven-level, six-level, and five-level enhancements.<sup>276</sup> This provides an avenue for courts to punish use of a firearm in the commission of a robbery, without relying on conflicting interpretations of the physical restraint enhancement.

Specifically, with regard to the conflicting interpretations of what constitutes physical restraint, the circuits should all adopt the strict, textual interpretation. The case that guides the reasoning for adopting this approach is *United States v. Herman*. There, the Seventh Circuit makes clear that a criminal defendant should only be punished for the acts they committed, and not for the reactions of their victims.<sup>277</sup> This is an important consideration because each person may react differently to being held at gunpoint.<sup>278</sup> The Seventh Circuit states that “the victim’s reaction does not determine whether there is or is not physical restraint.”<sup>279</sup> The victim’s reaction to the defendant’s psychological coercion or restraint “is not something that logically belongs within the scope of the physical-restraint guideline.”<sup>280</sup>

While it is arguable that most people would comply, the victims in *Herman* proved that the mere threat of violence does not literally immobilize a victim to the point of being physically restrained.<sup>281</sup> To promote the kind of consistency and fairness that the Guidelines seek to impose on sentencing, it is necessary to take into account only the defendant’s actions.<sup>282</sup> By focusing on the defendant’s actions, there would be more uniformity in sentencing because the Guidelines are specifically tailored to account for the defendant’s conduct, not the victim’s reaction.<sup>283</sup>

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275. U.S. SENT’G GUIDELINES MANUAL § 2B3.1(b)(2)(A) (U.S. SENT’G COMM’N 2018).

276. *Id.*

277. *United States v. Herman*, 930 F.3d 872, 876 (7th Cir. 2019).

278. *Id.*

279. *Id.*

280. *Id.*

281. *See id.*

282. *Id.*

283. *See* U.S. SENT’G GUIDELINES MANUAL ch.5, intro. cmt. (U.S. SENT’G COMM’N 2018) (“In determining the type of sentence to impose, the sentencing judge should consider the nature and seriousness of the [offender’s] conduct . . . and the pertinent offender characteristics.” (emphases added)).

There is no separate category in the Guidelines for a victim's responses to a defendant's actions.<sup>284</sup> There are only categories of criminal offenses that encapsulate criminal conduct.<sup>285</sup> Therefore, when considering an appropriate sentence, the court should only evaluate the conduct of the defendant.

When there are conflicting interpretations among the circuits with respect to a particular guideline or enhancement, the Commission has the ability to amend the Sentencing Guidelines without necessarily having to wait for the Supreme Court to grant certiorari to hear such a case.<sup>286</sup> "The Commission has the authority to submit guideline amendments each year to Congress between the beginning of a regular Congressional session and May 1."<sup>287</sup> Congress has made the Commission a permanent agency to continually evaluate and modify sentencing practices to further the mission of establishing a uniform, fair, and certain sentencing scheme.<sup>288</sup>

As the Fifth Circuit noted in *Hickman*, to allow the physical restraint enhancement to apply only when a victim is threatened with a gun would essentially add an element to the crime of robbery because "there would be no limiting principle on the application of this enhancement."<sup>289</sup> To avoid this conflict, the Guidelines should be amended to specify that the restraint must be actual physical contact between the defendant and the victim, not merely psychological anguish or coercion.

The Commission could add language to the physical restraint enhancement to establish this. For example, it could change the

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284. The Guidelines include a section called "Victim-Related Adjustments." *Id.* § 3A. This section does not account for the victim's reaction to a crime. Rather, it provides a category for types of victims (e.g., "Vulnerable Victim" for a minority victim of a racially hate crime, "Official Victim" for a government official victim of a crime). *See id.* § 3A1.1-.2. These categories go to the status of the victim, but not their response to the defendant's actions.

285. *See id.* § 2A-2X (listing crimes under U.S.S.C. Chapter 2, "Offense Conduct").

286. *Braxton v. United States*, 500 U.S. 344, 348 (1991) ("The Commission [has] . . . [a] statutory duty 'periodically [to] review and revise' the Guidelines." (last alteration in original) (quoting 28 U.S.C. § 994(o))); *see also* Elliot Edwards, Note, *Eliminating Circuit-Split Disparities in Federal Sentencing Under the Post-Booker Guidelines*, 92 IND. L.J. 817, 825-26 (2017).

287. U.S. SENT'G GUIDELINES MANUAL ch. 1, pt. A, statutory mission.

288. *Id.*

289. *United States v. Hickman*, 151 F.3d 446, 461-62 (5th Cir. 1998), *reh'g granted and vacated*, *United States v. Hickman*, 165 F.3d 1020 (5th Cir. 1999), *aff'd in part and vacated in part*, *United States v. Hickman*, 179 F.3d 230 (5th Cir. 1999).

enhancement<sup>290</sup> to read “if any person was physically restrained *through direct physical contact with the perpetrator*, increase by 2 levels.” Alternatively, the Commission could provide commentary to section 2B3.1 instructing courts to use the firearm provision (section 2B3.1(b)(2)) in all instances in which a firearm is present during a robbery.<sup>291</sup> Either of these amendments would clarify the interpretation of physical restraint and solve the inconsistent application of this enhancement.

#### V. Conclusion

It is likely that some form of sentencing disparity will exist until the end of time, and there is simply no way to create a list of all possible crime variations. However, it is possible for courts to reduce disparity for particular crimes, such as those discussed in this Comment, if they can agree on an interpretation. The interpretation of the physical restraint enhancement that most closely aligns with the goals of the SRA is the strict, literal interpretation. It is clearer that physical restraint occurs when a defendant uses direct contact to restrict a victim’s movement. It is, of course, more difficult to glimpse inside a victim’s head to ascertain her mental state during a past event. As noted in *United States v. Herman*, the threat of a gun does not always effectively immobilize the victim—the victim still technically can fight back.<sup>292</sup> Further, to create a certain and fair sentencing scheme, the criminal justice system should seek to punish the defendants for their actions, not their victims’ reactions.

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290. U.S. SENT’G GUIDELINES MANUAL § 2B3.1(b)(4)(B) (“[I]f any person was physically restrained to facilitate commission of the offense or to facilitate escape, increase by 2 levels.”).

291. *Id.* § 2B3.1(b)(2).

292. 930 F.3d 872, 876 (7th Cir. 2019).