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## Brandishing "Plus": The Difference between Five and Seven under the United States Federal Sentencing Guidelines

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### Cover Page Footnote

The author would like to thank her family and friends for their constant love and support. She would also like to personally thank Vipal Patel for all of the advice, expertise, and guidance throughout the process of writing this Comment.

# BRANDISHING “PLUS”: THE DIFFERENCE BETWEEN FIVE AND SEVEN UNDER THE UNITED STATES FEDERAL SENTENCING GUIDELINES

*Chelsea R. Small\**

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*“The enhancement for physical restraint is applicable when the defendant uses force to impede others from interfering with commission of the offense.”<sup>1</sup>*

## I. INTRODUCTION

Imagine you are at a bank, minding your own business and waiting to withdraw some cash before going on a family vacation. A masked person enters the premises, brandishing a firearm, and begins making demands: “Stop! Don’t move, or I will shoot you!” The robber turns and looks at you. You are clearly and visibly petrified over what is happening. He points the gun directly at you and tells you that you better not move or you will not live another day to see your family.

Contrast this with another similar example. You are pumping gas at your local Circle K before leaving for a trip with your family. You go inside the store to get some snacks before the road trip. You grab the snacks and are waiting in line to pay. Out of nowhere, a masked gunman enters the doors of the Circle K, yelling, “This is a stickup! Nobody moves!” You are in shock and accidentally make eye contact with the gunman. He points the gun at you and says, “If you know what’s good for you, you won’t move.” He proceeds to steal the cash from the register.

In either of these situations, are you physically restrained by the robber? That is the million-dollar question. The circuit courts disagree on what exactly constitutes physical restraint under the United States Sentencing Guidelines (“Sentencing Guidelines”). The circuits agree that for brandishing the firearm during the commission of the robbery, the robber—if convicted federally—will receive at sentencing a five-level enhancement under the applicable advisory Sentencing Guidelines.<sup>2</sup> The Sentencing Guidelines call for an *additional* two-level increase “if any person was physically restrained to facilitate commission of the offense . . . .”<sup>3</sup> The question examined in this Comment is whether and under what circumstances this additional two-level enhancement for physical restraint applies.

Stated precisely, the circuit courts disagree about what exactly is needed beyond brandishing a gun to apply the two-level sentencing enhancement for “physical restraint” under the Sentencing Guidelines.<sup>4</sup> Some circuits are of the opinion that for the physical restraint enhancement to apply, something truly physical is required, such as being locked in a room,

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<sup>1</sup> United States v. Fisher, 132 F.3d 1327, 1329 (10th Cir. 1997).

<sup>2</sup> U.S. SENT’G GUIDELINES MANUAL § 2B3.1(b)(2)(C) (U.S. SENT’G COMM’N 2018).

<sup>3</sup> *Id.* § 2B3.1(b)(4)(B).

<sup>4</sup> Bernie Pazanowski, *Brandishing Gun Not Physical Restraint for Sentencing Purposes*, BLOOMBERG LAW (July 18, 2019, 2:39 PM), <https://news.bloomberglaw.com/us-law-week/brandishing-gun-not-physical-restraint-for-sentencing-purposes>.

bound, or tied up.<sup>5</sup> On the other hand, other circuits agree that brandishing a weapon with something as little as a statement of “don’t move” is enough to invoke the physical restraint enhancement.<sup>6</sup>

Under the Sentencing Guidelines, to brandish a weapon means that all or part of the weapon is displayed or is otherwise made present to another person for the purposes of intimidating.<sup>7</sup> It does not matter whether the weapon was directly visible to that person.<sup>8</sup> Brandishing a gun is clear and obvious, which is why it makes sense that the circuits tend to agree on when this five-level enhancement applies during sentencing.<sup>9</sup> Physical restraint is different, and there are conflicting definitions of what exactly constitutes physical restraint.<sup>10</sup> According to the Sentencing Guidelines, physically restrained “means the forcible restraint of the victim such as by being tied, bound, or locked up.”<sup>11</sup> However, one commentator defines physical restraint as including “holding or pinning the victim, holding the victim at gunpoint, locking the victim in a confined space, psychologically coercing the victim to accompany the defendant, or inducing a third person to kidnap the victim.”<sup>12</sup>

This Comment seeks to explain what is currently required for the additional two-level enhancement for physical restraint in each circuit and ultimately seeks to resolve the current circuit split. It will consist of four parts outside of this introduction. Part II will give a brief background of the advisory Sentencing Guidelines and briefly explain relevant sections of the Sentencing Guidelines and statutes that a person may be charged under and, if convicted, could be sentenced to the two-level enhancement. Part III will delve into the circuit split regarding the physical restraint sentencing enhancement by using case examples to explain each circuit court’s reasoning for their rulings on the issue. Part IV will consist of the proposed resolution, which is that brandishing a gun along with an action, including a threat, that prevents the victim from moving should be considered physical restraint for purposes of the two-level sentence enhancement. Part IV will also include a proposed test for reference when deciding whether the enhancement applies. Finally, Part V will consist of the conclusion.

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Annotated 2018 Chapter 1*, U.S. SENT’G COMM’N (Nov. 1, 2018), <https://www.ussc.gov/guidelines/2018-guidelines-manual/annotated-2018-chapter-1#NaN>.

<sup>8</sup> *Id.*

<sup>9</sup> *See generally* U.S. SENT’G GUIDELINES MANUAL § 2B3.1(b)(2)(C) (U.S. SENT’G COMM’N 2018).

<sup>10</sup> *See id.* § 1B1.1 cmt. L; *see also* JAMES BUCHWALTER & THOMAS SMITH, 12A CYC. OF FED. PROC. § 50:41 (3d ed. 2022).

<sup>11</sup> U.S. SENT’G GUIDELINES MANUAL § 1B1.1 cmt. L (U.S. SENT’G COMM’N 2018).

<sup>12</sup> BUCHWALTER & SMITH, *supra* note 10, § 50:41.

## II. BACKGROUND

This Part will give a brief explanation of the United States Sentencing Commission (“Sentencing Commission”) that created the Sentencing Guidelines, as well as a brief explanation of the Sentencing Guidelines themselves. It is important to discuss the history of the Sentencing Guidelines because, over time, they have been changed from mandatory to advisory.<sup>13</sup> This change is noteworthy and worth mentioning in this Comment, because the advisory system promotes “certainty and predictability in sentencing, thereby enabling the parties to better anticipate the likely sentence based on the individualized facts of the case.”<sup>14</sup> This idea relates to the main objective of this Comment, which is to create uniformity in sentencing across the circuits.

This Part also briefly explains two sections of the Sentencing Guidelines that directly apply to the issue this Comment is seeking to address. These Sentencing Guidelines sections include the Application section, which gives important definitions relevant to this Comment, and the Robbery Guideline, which mentions the physical restraint two-level enhancement.<sup>15</sup> This Comment also briefly addresses two robbery statutes that defendants may be convicted under before reaching the sentencing phase: the Federal Bank Robbery Act and the Hobbs Act.<sup>16</sup>

### A. *History of the United States Sentencing Guidelines*

Congress created the Sentencing Commission as “an independent body charged with the task of establishing sentencing policies and practices for the Federal criminal justice system.”<sup>17</sup> The Sentencing Commission fulfills this purpose by issuing the Sentencing Guidelines to provide direction to the judges regarding the type and length of sentences to impose in a case they are deciding.<sup>18</sup> “Since the beginning, the Commission has also included ‘application notes’ in ‘commentary’ that accompanies the guidelines.”<sup>19</sup> The Sentencing Reform Act of 1984 “delegates broad authority to the Commission to review and rationalize the federal sentencing process.”<sup>20</sup> The Sentencing Commission’s initial guidelines took effect on November 1, 1987.<sup>21</sup> The Sentencing Commission has authority to submit amendments to the guidelines each year, and these amendments will

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<sup>13</sup> U.S. SENT’G GUIDELINES MANUAL at ch. 1, pt. A (U.S. SENT’G COMM’N 2018).

<sup>14</sup> *Id.*

<sup>15</sup> See U.S. SENT’G GUIDELINES MANUAL § 2B3.1(b)(4)(B) (U.S. SENT’G COMM’N 2018).

<sup>16</sup> See discussion *infra* Parts II.B.i, II.B.ii.

<sup>17</sup> *United States v. Havis*, 927 F.3d 382, 385 (6th Cir. 2019) (citations omitted).

<sup>18</sup> *Id.*

<sup>19</sup> *United States v. Riccardi*, 989 F.3d 476, 484 (6th Cir. 2021).

<sup>20</sup> See U.S. SENT’G GUIDELINES MANUAL ch. 1, pt. A (U.S. SENT’G COMM’N 2018).

<sup>21</sup> *Id.*

automatically take effect 180 days after submission unless a law is enacted otherwise.<sup>22</sup>

The Sentencing Guidelines establish criteria that judges use to impose sentences on criminal defendants.<sup>23</sup> The court determines the base level of the offense that the defendant has committed and any specific characteristics of the offense.<sup>24</sup> The court also uses these guidelines to adjust the sentence for many reasons, including accepting responsibility for the crime.<sup>25</sup> One of the factors to be considered when imposing a sentence is the sentencing range established for the applicable category of offense committed by the defendant as set forth in the Sentencing Guidelines.<sup>26</sup> The Sentencing Reform Act of 1984’s “basic objective was to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system.”<sup>27</sup>

The United States Supreme Court acknowledged the continued importance of the Sentencing Guidelines in *United States v. Booker*.<sup>28</sup> In that case, the court reasoned that a guideline system would “continue to move sentencing in Congress’ preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary.”<sup>29</sup> An advisory guideline system continues to promote certainty and predictability in sentencing, thereby enabling parties to better anticipate the likely sentence based on the individualized facts of the case.<sup>30</sup> “A sentence imposed under the now-advisory Sentencing Guidelines is to be reviewed for ‘reasonableness.’”<sup>31</sup> District courts are not bound to apply the Sentencing Guidelines; however, they must take them into account when sentencing.<sup>32</sup>

### B. Pre-Guidelines: The Charging and Conviction Phase

Before a defendant can be sentenced for a crime, he or she must be charged and convicted for that specific offense.<sup>33</sup> In 2020, there were 1,297 cases of robbery reported to the Sentencing Commission.<sup>34</sup>

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<sup>22</sup> *Id.*

<sup>23</sup> *The Sentencing Guidelines*, FDA ENFORCEMENT MANUAL, 1520 (Dennis Tosh ed., 2005).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> 18 U.S.C. § 3553(a)(4)(A).

<sup>27</sup> U.S. SENT’G GUIDELINES MANUAL ch. 1, pt. A.1.3 (U.S. SENT’G COMM’N 2018).

<sup>28</sup> *Id.* at ch. 1, pt. A 2.; see 543 U.S. 220 (2005).

<sup>29</sup> *Booker*, 543 U.S. at 264–65.

<sup>30</sup> *Id.* at 263.

<sup>31</sup> *United States v. Ossai*, 485 F.3d 25, 32 (1st Cir. 2007) (citing *United States v. Alli*, 444 F.3d 34, 40 (1st Cir. 2006)).

<sup>32</sup> *Booker*, 543 U.S. at 264.

<sup>33</sup> See *How Courts Work*, A.B.A. (Sept. 9, 2019), [https://www.americanbar.org/groups/public\\_education/resources/law\\_related\\_education\\_network/how\\_courts\\_work/sentencing/](https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/sentencing/).

<sup>34</sup> *Quick Facts—Robbery Offenses*, U.S. SENT’G COMM’N (July 2021), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Robbery\\_FY20.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Robbery_FY20.pdf).

Twenty-two percent of defendants had their sentences increased for abducting or physically restraining a victim.<sup>35</sup> Before diving into the two most relevant sections of the Sentencing Guidelines for the purposes of this Comment, it is important to note that the defendants may be charged and convicted under two federal robbery statutes: the Federal Bank Robbery Act and the Hobbs Act.<sup>36</sup>

i. Federal Bank Robbery Act – 18 U.S.C. § 2113

Congress passed the Federal Bank Robbery Act in 1934 in response to an increase in serious interstate crimes.<sup>37</sup> Under the United States Code, the definition of robbery is as follows:

Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association . . . .<sup>38</sup>

In order to be convicted of robbery under the Federal Bank Robbery Act, the defendant must rob a bank, credit union, or savings and loan association.<sup>39</sup> Therefore, robbery of establishments that are not considered banks is not covered under this Act.<sup>40</sup>

ii. Hobbs Act – 18 U.S.C. § 1951

The Hobbs Act is another robbery statute that a defendant may be convicted of federally and, at sentencing, receive the two-level enhancement for physical restraint.<sup>41</sup> The Hobbs Act states, in relevant part:

Whoever 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 to do anything in violation of this section . . . .<sup>42</sup>

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<sup>35</sup> *Id.*

<sup>36</sup> 18 U.S.C. § 2113 (“Federal Bank Robbery Act”); 18 U.S.C. § 1951 (“Hobbs Act”).

<sup>37</sup> Jennifer M. Lota, Comment, *Analyzing 18 U.S.C. § 2113(A) of the Federal Bank Robbery Act: Achieving Safety and Upholding Precedent Through Statutory Amendment*, 7 SETON HALL CIR. REV. 445, 449 (2011).

<sup>38</sup> 18 U.S.C. § 2113(a).

<sup>39</sup> *Id.*

<sup>40</sup> See 77 C.J.S. *Robbery* § 99 (2021).

<sup>41</sup> See, e.g., *United States v. Camp*, No. 15-cr-20744, 2021 WL 4621848, at \*1–2 (E.D. Mich., Oct. 7, 2021).

<sup>42</sup> 18 U.S.C. § 1951(a).

Unlike the Federal Bank Robbery Act, it is clear that the Hobbs Act covers a large variety of crimes. “Federal prosecutors rely heavily on the Hobbs Act. It was the most serious charge in more than 1,000 prosecutions initiated in fiscal year 2019.”<sup>43</sup> The language shows and the Supreme Court has acknowledged that “the Hobbs Act is intended to employ the fullest extent of federal authority under the commerce clause.”<sup>44</sup>

*C. Post-Conviction: Which Guidelines are Relevant?*

The Sentencing Commission, when creating the Sentencing Guidelines, created a section devoted to instructions on applying the guidelines, which is section 1B1.1.<sup>45</sup> When a judge is sentencing a defendant convicted of robbery, he should look to section 2B3.1.<sup>46</sup> These two sections are the most relevant and important to understand for the purposes of this Comment.

i. U.S.S.G. § 1B1.1 – Application Instructions

Section 1B1.1 of the Sentencing Guidelines consists entirely of application instructions.<sup>47</sup> This section gives the court instructions on how to apply the guidelines, as well as how to apply any adjustments to the offense level.<sup>48</sup> This section also gives important definitions that are used throughout other sections in the Sentencing Guidelines.<sup>49</sup> It defines three terms relevant to the issue discussed in this Comment: firearm, brandished, and physically restrained.<sup>50</sup> A firearm is defined as [1] any weapon “which will or is designed to . . . expel a projectile by the action of an explosive; [2] the frame or receiver of any such weapon; [3] any firearm muffler or silencer; or [4] any destructive device.”<sup>51</sup> According to this definition, a “BB” or pellet gun “that uses air or carbon dioxide pressure to expel a projectile is a dangerous weapon but not a firearm.”<sup>52</sup>

For the purposes of this Comment, the firearm that is used must be brandished, and the person must be physically restrained during the commission of the offense. According to the Sentencing Guidelines:

“Brandished” . . . means that all or part of the weapon was displayed, or the presence of the weapon was otherwise made known to another person, in order to intimidate that person,

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<sup>43</sup> NORMAN ABRAMS ET AL., FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 275 (7th ed. 2020).

<sup>44</sup> *Id.* at 316.

<sup>45</sup> See U.S. SENT’G GUIDELINES MANUAL § 1B1.1 (U.S. SENT’G COMM’N 2018).

<sup>46</sup> *Id.* § 2B3.1.

<sup>47</sup> See generally *id.* § 1B1.1.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at § 1B1.1 cmt. n.1. (C), (H), (L).

<sup>51</sup> *Id.* at § 1B1.1 cmt. n.1. (H).

<sup>52</sup> *Id.*

regardless of whether the weapon was directly visible to that person. Accordingly, although the dangerous weapon does not have to be directly visible, the weapon must be present.

“Physically restrained” means the forcible restraint of the victim such as by being tied, bound, or locked up.<sup>53</sup>

These definitions are used frequently in the guidelines and, unless stated otherwise, are of general applicability.<sup>54</sup>

### iii. U.S.S.G. § 2B3.1 – Robbery

When sentencing a defendant and applying the Sentencing Guidelines, the first step is to identify the applicable guideline.<sup>55</sup> When faced with a conviction for robbery, the applicable guideline is U.S.S.G. § 2B3.1.<sup>56</sup> Section 2B3.1(b) states, in relevant part:

If a firearm was discharged, increase by 7 levels; (B) if a firearm was otherwise used, increase by 6 levels; (C) *if a firearm was brandished or possessed, increase by 5 levels*; (D) if a dangerous weapon was otherwise used, increase by 4 levels . . . .

If any person was abducted to facilitate commission of the offense or to facilitate escape, increase by 4 levels; or (B) *if any person was physically restrained to facilitate commission of the offense or to facilitate escape, increase by 2 levels.*<sup>57</sup>

Although there are many different steps to determine what an offender’s true sentence will be, each offense has a base level.<sup>58</sup> Under the Sentencing Guidelines, the base level offense for robbery is twenty.<sup>59</sup> Specific offense characteristics add different levels to the base offense level to determine a sentence range based on the specific crime committed.<sup>60</sup> As noted above, when a firearm is brandished or possessed, the base level increases by five levels.<sup>61</sup> If a person is physically restrained for the defendant

<sup>53</sup> *Id.* at § 1B1.1 cmt. n.1. (C), (L).

<sup>54</sup> *Id.* at § 1B1.1 cmt. n.1.

<sup>55</sup> U.S. SENT’G COMM’N, FEDERAL SENTENCING: THE BASICS 15 (2018).

<sup>56</sup> *Id.*

<sup>57</sup> U.S. SENT’G GUIDELINES MANUAL §§ 2B3.1(b)(2)(A), 2B3.1(b)(4)(A) (U.S. SENT’G COMM’N 2018) (emphasis added).

<sup>58</sup> U.S. SENT’G COMM’N, *supra* note 55, at 15.

<sup>59</sup> U.S. SENT’G GUIDELINES MANUAL § 2B3.1(a) (U.S. SENT’G COMM’N 2018).

<sup>60</sup> *See id.* § 2B3.1(b).

<sup>61</sup> *Id.* § 2B3.1(b)(2)(C).

to commit the crime or facilitate their escape, the base level increases by two levels.<sup>62</sup> If a firearm is brandished while committing the crime, and a person was physically restrained, the base level offense would therefore increase by seven levels.<sup>63</sup> The increase in levels equals an increase in the sentence.<sup>64</sup>

### III. A SUMMARY OF CASES: DIVING INTO THE CURRENT DIVISION AMONG THE CIRCUIT COURTS

It is important to note that each circuit court takes a slightly different approach to determine whether the physical restraint enhancement applies to a given defendant’s sentence.<sup>65</sup> Some circuits take more of a broad approach to physical restraint to encompass many things, and the other circuits take a more strict approach to physical restraint.<sup>66</sup> It is helpful to look at the circuits separately and analyze each of its opinions with regard to how each circuit applies the facts to the case at hand.

#### A. *The Broader Interpretation of Physical Restraint*

The First, Fourth, Sixth, Eighth, and Eleventh Circuits follow a broader interpretation of physical restraint.<sup>67</sup> These circuits interpret physical restraint to reach beyond the examples listed in the definition.<sup>68</sup> When a victim’s movement is restrained, and the victim has no alternative but compliance, the two-level enhancement for physical restraint normally applies in these circuits.<sup>69</sup> The following sections will briefly explain each circuit’s holding on the issue of physical restraint using case illustrations.

##### i. First Circuit

The First Circuit has repeatedly held that the examples listed in the definition of physical restraint are illustrative and not exhaustive.<sup>70</sup> For example, in *United States v. Ossai*, the defendant planned to rob a Dunkin’ Donuts store.<sup>71</sup> The defendant entered through the side door, carrying a handgun, and ordered the employee to lay down on the floor.<sup>72</sup> Then, he placed his hand and gun on the back of the employee’s neck and stated that he did not want to hurt the employee.<sup>73</sup> The defendant was caught

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<sup>62</sup> *Id.*; *id.* § 2B3.1(b)(4)(B).

<sup>63</sup> *See id.* § 2B3.1.

<sup>64</sup> AN OVERVIEW OF THE FEDERAL SENTENCING GUIDELINES, U.S. SENT’G COMM’N 1, [https://www.ussc.gov/sites/default/files/pdf/about/overview/Overview\\_Federal\\_Sentencing\\_Guidelines.pdf](https://www.ussc.gov/sites/default/files/pdf/about/overview/Overview_Federal_Sentencing_Guidelines.pdf).

<sup>65</sup> *See* discussion *infra* Parts III.A, III.B.

<sup>66</sup> *See* discussion *infra* Parts III.A, III.B.

<sup>67</sup> *See* discussion *infra* Parts III.A.i–vi.

<sup>68</sup> *See* discussion *infra* Parts III.A.i–vi.

<sup>69</sup> *See* discussion *infra* Parts III.A.i–vi.

<sup>70</sup> *United States v. Ossai*, 485 F.3d 25, 32 (1st Cir. 2007).

<sup>71</sup> *Id.* at 26.

<sup>72</sup> *Id.* at 27.

<sup>73</sup> *Id.*

and charged with one count of robbery under the Hobbs Act, and because he had physically restrained the victim, his sentence was increased by two levels.<sup>74</sup>

Citing a previous decision, the court reiterated that the examples of physical restraint (tied, bound, or locked up) are merely illustrative.<sup>75</sup> By forcing the victim to his knees, the defendant diminished the victim's freedom of movement and ability to resist or escape.<sup>76</sup> The court reasoned that the physical restraint test is case-specific and fact-intensive, not every physical contact qualifies as restraint, and the absence of physical contact does not bar a finding of restraint.<sup>77</sup>

#### ii. Fourth Circuit

Similarly, the Fourth Circuit has held that the intended scope of physical restraint goes well beyond the examples that are listed in the application note under the Sentencing Guidelines.<sup>78</sup> "Whether a person is physically restrained during the commission of, or escape from, a robbery is not an easy question to answer, especially when a gun is present."<sup>79</sup> In *United States v. Dimache*, the defendant leaped over the counter, brandished a gun, and stated, "You know the drill."<sup>80</sup> He also pointed the gun at two tellers and told them to get on the floor and stay quiet.<sup>81</sup> The defendant was given the two-level enhancement because the tellers were physically restrained to facilitate commission of the offense.<sup>82</sup> The Fourth Circuit applies the two-level enhancement when the defendant points the gun at the victim, which restricts their movements and ensures that they comply.<sup>83</sup> The court reasons that the two-level enhancement acts to punish a defendant who deprives a person of physical movement and can be accomplished in

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 32.

<sup>76</sup> *Id.* The defendant rendered his victim more vulnerable to his will, which in turn diminished the victim's freedom to move. *Id.*

<sup>77</sup> *Id.*; see also *United States v. Wallace*, 461 F.3d 15, 33–35 (1st Cir. 2006) (affirming the physical restraint enhancement when the defendant was armed and blocked the victim's path).

<sup>78</sup> *United States v. Dimache*, 665 F.3d 603, 609 (4th Cir. 2011). What is essential when determining whether the two-level physical restraint enhancement is applicable is whether there was deprivation of a person's freedom of physical movement. *Id.* at 606.

<sup>79</sup> *Id.* The court here explains there has been a disagreement among courts of appeals regarding the physical restraint enhancement. *Id.* at 606–07. Citing other sister circuits as examples, the court explains that it applies the enhancement broadly, such as when a victim's movement is restricted, thereby ensuring the compliance of the victim. *Id.* at 607.

<sup>80</sup> *Id.* at 604.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 605. The size of the area that the victim is confined to is not controlling, because "the applicability of the USSG § 2B3.1(b)(4)(B) enhancement turns on whether the victim's freedom of movement was restrained, regardless of the size of the area." *Id.* at 609 (citations omitted).

<sup>83</sup> *Id.* at 607; see also *United States v. Stokley*, 881 F.2d 114, 116 (4th Cir. 1989) (explaining that by using the words "such as" in the definition of physical restraint, it is apparent that the listed actions are meant to be examples, not limitations).

many ways other than the examples listed in the definition of physical restraint.<sup>84</sup>

### iii. Sixth Circuit

The Sixth Circuit leans more towards the broad interpretation of physical restraint.<sup>85</sup> For example, in *United States v. Coleman*, the defendant brandished a BB pistol that the victims believed to be a real 9mm handgun and ordered an employee to come out of his office to sit on the floor.<sup>86</sup> The court held that imposing a restraint on the victim’s movement would suffice for the two-level physical restraint enhancement to apply.<sup>87</sup> Further, the court explains that its reading of the text of the physical restraint enhancement aligns more evenly with the circuits whose reading is broader.<sup>88</sup> Ultimately, the court used the plain language of the Sentencing Guidelines as well as case law from other circuits to determine that the enhancement applied to the conduct of the defendant in this case.<sup>89</sup>

In *Coleman*, it seems that the court made it clear that it follows the interpretation that physical restraint reaches beyond the examples in the definition.<sup>90</sup> Further, in the unpublished opinion, *United States v. Faulkner*, the Sixth Circuit expressly declined to limit the enhancement to when the defendant used a device like ropes or handcuffs in order to restrain their victim.<sup>91</sup>

### iv. Eighth Circuit

The Eighth Circuit is another circuit court that follows the interpretation that physical restraint reaches beyond the examples given in the definition.<sup>92</sup> For instance, the Eighth Circuit quickly dismissed a defendant’s argument that the victims were not physically restrained because they could have easily freed themselves.<sup>93</sup> In *United States v. Stevens*, the defendant and his accomplice ordered employees, at gunpoint, to put their hands in the air.<sup>94</sup>

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<sup>84</sup> *Dimache*, 665 F.3d at 609.

<sup>85</sup> See *infra* notes 86–91 and accompanying text.

<sup>86</sup> 664 F.3d 1047, 1048 (6th Cir. 2012).

<sup>87</sup> *Id.* at 1050–51.

<sup>88</sup> *Id.* at 1050.

<sup>89</sup> *Id.* at 1049. The Sixth Circuit cites to Black’s Law Dictionary’s definition of force, which is to compel by physical means, and then gives the example, “Barnes used a gun to force Jillian to use her ATM card.” *Id.* “‘Restraint’ is commonly defined as ‘(1) the act of holding back from some activity, or (2) by means of force, an act that checks free activity or otherwise controls.’” *Id.*

<sup>90</sup> See generally *id.*

<sup>91</sup> Nos. 98-5945/98-5946/98-5947, 1999 U.S. App. LEXIS 22434, at \*10–11 (6th Cir. Sep. 10, 1999).

<sup>92</sup> See *infra* notes 93–99 and accompanying text.

<sup>93</sup> *United States v. Stevens*, 580 F.3d 718, 720 (8th Cir. 2009). The defendant also attempted to argue that “‘if the use of the weapon is relied upon to establish use of physical restraint,’ then he will be punished twice,” which would be impermissible double counting. *Id.* at 722. However, the court quickly dismissed this argument by stating that “[t]he firearm was merely a tool used to effect the physical restraint accomplished by [the defendant and his accomplice].” *Id.*

<sup>94</sup> *Id.* at 719.

The defendant and his accomplice then moved the victims into a break room while still holding them at gunpoint, and the accomplice kept them there at gunpoint.<sup>95</sup> After the money was taken out of the teller drawers and vault, the defendant moved the victims into the vault and closed the door but did not lock it.<sup>96</sup> The court, citing a previous decision, explained that a defendant physically restrains a person if the defendant creates circumstances “allowing the persons no alternative but compliance.”<sup>97</sup> The court held that the circumstances of the case created no alternative for the victims except that of compliance.<sup>98</sup> Moreover, its interpretation of the physical restraint definition is not limited to tying or binding.<sup>99</sup>

#### v. Tenth Circuit

The Tenth Circuit has likely been the most explicit in its opinions regarding the physical restraint enhancement.<sup>100</sup> In *United States v. Miera*, the court affirmed the two-level enhancement for physical restraint.<sup>101</sup> In that case, the defendant and his accomplice entered a bank, told everyone to put their hands up, and pointed the gun around the room while telling people not to move.<sup>102</sup> The court, citing an older Tenth Circuit opinion, stated that the “enhancement for physical restraint is applicable when the defendant uses force, *including force by gun point*, to impede others from interfering with commission of the offense.”<sup>103</sup>

Previously, the Tenth Circuit held that physical restraint occurs when a victim is specifically prevented from moving and that “[k]eeping someone from doing something is inherent within the concept of restraint . . . .”<sup>104</sup> In *Miera*, the court pointed to the fact that brandishing alone does not “automatically create a situation where physical restraint of an individual occurs. Instead, something more must be done with the gun to physically restrain an individual.”<sup>105</sup>

Here, the defendant in *Miera* did something more than merely brandish the weapon.<sup>106</sup> Using an example, the court instructed readers to imagine a scenario where the defendant had “walked up to the teller’s station with a gun visible in his waistband and demanded money.”<sup>107</sup> This example

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 720 (quoting *United States v. Kirtley*, 986 F.2d 285, 286 (8th Cir. 1993)).

<sup>98</sup> *Id.* at 721.

<sup>99</sup> *Id.*

<sup>100</sup> See *infra* notes 101–08 and accompanying text.

<sup>101</sup> 539 F.3d 1232, 1233 (10th Cir. 2008).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 1234 (quoting *United States v. Pearson*, 211 F.3d 524, 525–26 (10th Cir. 2000)).

<sup>104</sup> *Id.* (quoting *United States v. Fisher*, 132 F.3d 1327, 1329–30 (10th Cir. 1997)).

<sup>105</sup> *Id.* (quoting *Pearson*, 211 F.3d at 526–27).

<sup>106</sup> *Id.* at 1235–36.

<sup>107</sup> *Id.* at 1236.

does not include the “something more” that the court finds is required for the enhancement under § 2B3.1(b)(4)(B) of the Sentencing Guidelines.<sup>108</sup>

vi. Eleventh Circuit

Compared to the Tenth Circuit, the Eleventh Circuit is not as explicit in its decisions regarding the physical restraint enhancement.<sup>109</sup> The Eleventh Circuit does, however, align with the broader interpretation of physical restraint, similar to the other circuits in this Subpart.<sup>110</sup> For example, in *United States v. Westbrook*, the defendant entered the restaurant with a co-defendant, brandished the gun, and ordered everyone on the floor.<sup>111</sup> The defendant also pointed the gun at several different people to steal electronic items from them.<sup>112</sup> The court explained that the physical restraint enhancement is not limited to the examples in the definition but instead also applies when the defendant’s conduct “ensured the victims’ compliance and effectively prevented them from leaving a location.”<sup>113</sup> Enhancement under § 2B3.1(b)(4)(B) does not require that the victim be moved at all.<sup>114</sup>

In another case, the Eleventh Circuit affirmed the two-level physical restraint when the defendant yelled that he had a gun and threatened to kill anyone who did not comply with his command, even though he did not have a gun.<sup>115</sup> Whether the defendant is actually armed with a gun is immaterial because he intended to make the victim believe that he had one so that she would comply with his orders.<sup>116</sup> Threatening a bank employee with what she believed to be a gun prevented her from escaping, and thus, the defendant did physically restrain her within the Sentencing Guidelines.<sup>117</sup> The Eleventh Circuit reaffirmed that there is no requirement that the victims be moved at all to receive the enhancement for physical restraint and noted the distinction between the abduction enhancement and the physical restraint enhancement: abduction requires movement to a different location while physical restraint does not.<sup>118</sup>

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<sup>108</sup> *Id.*

<sup>109</sup> *Compare id.* at 1234 (holding that the physical restraint enhancement is applicable when the defendant uses force by gunpoint), *with* *United States v. Westbrook*, 583 F. App’x 882, 885 (11<sup>th</sup> Cir. 2014) (holding that the physical restraint enhancement only applies when the defendant’s conduct ensured the victim’s compliance).

<sup>110</sup> *See infra* notes 111–18 and accompanying text.

<sup>111</sup> 583 F. App’x at 883.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 885 (quoting *United States v. Victor*, 719 F.3d 1288, 1290 (11<sup>th</sup> Cir. 2013)).

<sup>114</sup> *Id.* “[C]oncluding a § 2B3.1(b)(4)(B) enhancement applied to a bank robbery where, ‘[a]lthough no threats were made, the obvious presence of handguns ensured the victims’ compliance and effectively prevented them from leaving the room for a brief period while the robbers fled the scene.’” *Id.* (quoting *United States v. Jones*, 32 F.3d 1512, 1519 (11<sup>th</sup> Cir. 1994)).

<sup>115</sup> *Victor*, 719 F.3d at 1289–90.

<sup>116</sup> *Id.* at 1290.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 1290–91.

### B. A Stricter Interpretation of Physical Restraint

This Subpart addresses the six circuits that follow the opposite interpretation from the previous circuits discussed. The Second, Third, Fifth, Seventh, Ninth, and D.C. Circuits follow a stricter interpretation of physical restraint.<sup>119</sup> The Second and Third Circuits use factor tests to determine whether the physical restraint enhancement applies.<sup>120</sup> The circuits that follow a stricter interpretation look to whether the action is something that occurs in virtually every robbery, and if so, the enhancement for physical restraint should not apply.<sup>121</sup> These circuits believe there must be a truly physical aspect, and for that reason, psychological restraint does not count as physical restraint.<sup>122</sup> The following case examples explain each circuit's relevant holding on the issue of what exactly constitutes physical restraint.

#### i. Second Circuit

In *United States v. Taylor*, the Second Circuit clarified its interpretation of the physical restraint enhancement.<sup>123</sup> The court stated that the enhancement is “a provision drafted to deal with a special circumstance, must be interpreted narrowly lest it instead increase[s] the [Sentencing] Guidelines’ base level, in what one would expect to be the considerable majority of robbery cases, from 20 to 22.”<sup>124</sup> In *Taylor*, the defendant was convicted of robbery under the Hobbs Act after a string of cellphone store robberies occurred.<sup>125</sup> At one robbery, he acted as if he had a firearm, pushed a store employee into an inventory room, and told the victims “not to try anything stupid.”<sup>126</sup> In another robbery, he again acted like he had a firearm and shouted for the victims to get in the back of the store.<sup>127</sup>

The Second Circuit previously held that brandishing a gun and telling people not to move is insufficient to trigger the two-level enhancement because, while it causes victims to feel restrained, it does not physically immobilize them.<sup>128</sup> The Second Circuit established, through precedent, a three-factor test: “(1) whether the restraint was physical, (2) whether there was restraint rather than just use of force, and (3) whether the action in question was constitutive of the robbery or whether it was an additional

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<sup>119</sup> See discussion *infra* Parts III.B.i–iv.

<sup>120</sup> See discussion *infra* Parts III.B.i–ii.

<sup>121</sup> See discussion *infra* Parts III.B.i–vi.

<sup>122</sup> See discussion *infra* Parts III.B.i–vi.

<sup>123</sup> See 961 F.3d 68 (2nd Cir. 2020).

<sup>124</sup> *Id.* at 77–78 (quoting *United States v. Anglin*, 169 F.3d 154, 165 (2nd Cir. 1999)).

<sup>125</sup> *Id.* at 71–72.

<sup>126</sup> *Id.* at 72.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 78. The Second Circuit ruled against an interpretation that would subject each and every defendant to the enhancement, unless it occurred at an unoccupied premises or occurred by a robber who tells victims they *can* move or leave. *Id.*

physical restraint that facilitated the robbery.”<sup>129</sup> In adopting the test above, the Second Circuit joined the other circuits that have historically followed a stricter interpretation of the enhancement.<sup>130</sup> Without an added degree of physical restraint, the court will not impose the two-level enhancement for simply herding victims into an area.<sup>131</sup>

In *Taylor*, the court did not find that there was enough evidence to constitute the two-level enhancement for physical restraint because the defendant’s actions were the kind that is typical of most robberies.<sup>132</sup> Thus, because the victims were not physically immobilized, the two-level enhancement should not be applied.

## ii. Third Circuit

Similar to the Second Circuit, the Third Circuit also adopted a factor test to determine whether the physical restraint enhancement should be applied.<sup>133</sup> The court agreed that the examples listed in the definition are not exhaustive, but it held that the factor test should be used to evaluate whether the enhancement should be applied.<sup>134</sup> Those five factors are: “1. Use of physical force; 2. Exerting control over the victim; 3. Providing the victim with no alternative but compliance; 4. Focusing on the victim for some period of time; and 5. Placement in a confined space.”<sup>135</sup>

The court explained that the restraint must be more than psychological restraint because the plain meaning of the word “physical” in the definition of physical restraint connotes that the restraint must involve some physical aspect.<sup>136</sup> The defendant must restrict the victim’s freedom of movement, but no actual touching of the victim is required to be considered physical restraint.<sup>137</sup> The victim must have no alternative but compliance, and thus the factors should also include a duration requirement.<sup>138</sup> In order to apply the enhancement, the court should consider all of the factors, weighted evenly and balanced respectively.<sup>139</sup>

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<sup>129</sup> *Id.* at 79.

<sup>130</sup> *Id.* at 80.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 81.

<sup>133</sup> *United States v. Bell*, 947 F.3d 49, 56 (3rd Cir. 2020).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* The court concludes that, in order to impose the enhancement, the lower courts 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 with no alternative but compliance.” *Id.* at 60.

<sup>136</sup> *Id.* at 57.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 58–59. The Third Circuit agreed with the Fourth Circuit that all of the examples listed in the definition of physical restraint require more than a momentary restraint. *Id.* at 59. For this reason, the duration of the restraint should be considered as a factor when deciding whether to apply the enhancement. *Id.*

<sup>139</sup> *Id.* at 60.

In *Bell*, the defendant physically confronted the victim, threw the victim to the ground after grabbing his neck, and struck the victim with the plastic weapon.<sup>140</sup> Applying the five-factor test, the court found that the enhancement did not apply.<sup>141</sup> The court reasoned that the victim was left with other alternatives and specifically noted that he tried to stop the robbery twice.<sup>142</sup> Moreover, the restraint that occurred was quite limited in duration, so there was no focus on the victim as required to meet the factor test.<sup>143</sup> Based on the totality of the circumstances in this case, the Third Circuit concluded there was not a physical restraint to warrant the enhancement.<sup>144</sup>

### iii. Fifth Circuit

In 1998, the Fifth Circuit decided the case *United States v. Hickman*.<sup>145</sup> That case involved the prosecution of five separate defendants for a series of robberies, including five different restaurants and an AutoZone.<sup>146</sup> One of the defendants argued that he did not tie up, bind, or lock up the victims of the robberies, and therefore he should not have received the physical restraint enhancement.<sup>147</sup> While the court agreed that it is possible for a district court to find that a victim is physically restrained without being tied, bound, or locked up, it found that merely brandishing a weapon at a victim cannot support the enhancement.<sup>148</sup> Even though the defendant's actions permitted no alternative but compliance, he did nothing atypical to restrain the victims.<sup>149</sup> A threat not to move occurs in virtually every robbery, and ruling otherwise would allow the enhancement to apply to every defendant convicted of robbery.<sup>150</sup>

The Fifth Circuit has further held that the physical restraint enhancement is proper when defendants force their victims to move into confined spaces at gunpoint and then instruct them not to move.<sup>151</sup> In *United States v. Garcia*, the defendant held a handgun to a victim's head and demanded the victim get on the floor.<sup>152</sup> The court noted that "'restraint' is a condition capable of being brought about by a number of forces—physical, mental, moral—but in the phrase in question, 'physical' is

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<sup>140</sup> *Id.* at 52–53.

<sup>141</sup> *Id.* at 61.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* Based on a description of the events that occurred, it seemed that the interaction between the victim and Bell only took a few seconds from start to finish. *Id.*

<sup>144</sup> *Id.* In the concurring opinion, Judge Chagares noted that the case could have been decided looking at the plain text of the enhancement and the Third Circuit's precedent. *Id.* at 65 (Chagares, J., concurring).

<sup>145</sup> See generally 151 F.3d 446 (5th Cir. 1998).

<sup>146</sup> *Id.* at 450–51. The robberies of the restaurants included Church's Chicken, Hardees, Dairy Queen, Peking Restaurant, and Catfish King. *Id.* at 452.

<sup>147</sup> *Id.* at 461.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 461–62.

<sup>151</sup> *United States v. Garcia*, 857 F.3d 708, 712 (5th Cir. 2017).

<sup>152</sup> *Id.* at 710.

an adjective which modifies (and hence limits) the noun ‘restraint.’”<sup>153</sup> The court held that the enhancement did not apply because the defendants did not do anything that was not typical during any robbery.<sup>154</sup>

iv. Seventh Circuit

The Seventh Circuit determined that the physical restraint enhancement needed a limiting principle to “avoid an interpretation under which every armed bank robbery automatically supports the physical-restraint enhancement.”<sup>155</sup> In *United States v. Doubet*, the defendant wore a ski mask into a bank and, while armed, went up to the teller counter and announced a hold-up.<sup>156</sup> He herded three tellers into a restroom and then threatened to blow their heads off if they left, to which they complied for a total of five minutes before risking leaving.<sup>157</sup> According to the Seventh Circuit, simply herding victims into a defined area does not constitute physical restraint by itself; instead, something more is needed.<sup>158</sup> The “something more” in *Doubet* to warrant the enhancement was the use of the weapon to force the victims into the restroom while alerting them that an accomplice was watching, which “served as a figurative lock and key sufficient to constitute a physical restraint.”<sup>159</sup>

In *United States v. Herman*, the Seventh Circuit reiterated that “‘herding victims into a defined area’ would not necessarily constitute physical restraint.”<sup>160</sup> In that case, the defendant pointed a gun toward the victims, told the victims not to move, and then turned to go outside.<sup>161</sup> The victims, in this case, did not comply and pursued the defendant, and then shots were fired.<sup>162</sup> The court noted that the essential conduct required for physical restraint is deprivation of a person’s freedom of physical movement.<sup>163</sup> Further, the court noted that the cases that find physical restraint are cases that focus on the defendant’s action rather than the victim’s reaction.<sup>164</sup> The court held that more is required to invoke the enhancement

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<sup>153</sup> *Id.* at 713 (quoting *United States v. Anglin*, 169 F.3d 154, 164 (2d Cir. 1999)).

<sup>154</sup> *Id.*

<sup>155</sup> *United States v. Herman*, 930 F.3d 872, 875 (7th Cir. 2019) (interpreting prior holding in *United States v. Doubet*, 969 F.2d 341 (7th Cir. 1992)).

<sup>156</sup> 969 F.2d at 342.

<sup>157</sup> *Id.* at 342, 346.

<sup>158</sup> *Id.* at 346.

<sup>159</sup> *Id.* at 347.

<sup>160</sup> *Herman*, 930 F.3d at 875.

<sup>161</sup> *Id.* at 873.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 875. “If the Guideline had been meant to apply to all restraints, it would have said so; instead, it specifies *physical* restraints. That limitation rules out psychological coercion, even though such coercion has the potential to cause someone to freeze in place.” *Id.* at 875–76.

<sup>164</sup> *Id.* at 876.

than pointing a gun and ordering a person not to move; therefore, the physical restraint enhancement should not apply in this case.<sup>165</sup>

v. Ninth Circuit

Previously, the Ninth Circuit's decision in *United States v. Thompson* held that no actual touching is required to receive the physical restraint enhancement.<sup>166</sup> The court's analysis showed that when a dangerous weapon—such as a gun—is used to force someone to move, the person has been physically restrained just as if he had been “grabbed by the collar and pulled along.”<sup>167</sup> “A victim looking down the barrel of a gun has much less of an opportunity” to escape or end the restraint.<sup>168</sup>

More recently, the Ninth Circuit has followed the “sustained focus” standard to determine whether the enhancement should apply.<sup>169</sup> In *United States v. Parker*, the sustained focus standard prevented the defendant, a co-conspirator, from receiving the enhancement.<sup>170</sup> A “sustained focus” is the 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> According to the court, there was no doubt that the victim's mobility was restricted when she was made to lie down on the floor.<sup>172</sup> The court noted that it is “likely 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.”<sup>173</sup> Consequently, the victim in *Parker* was not physically restrained under the sustained focus standard.<sup>174</sup>

iv. D.C. Circuit

The D.C. Circuit has not had many opportunities to decide this issue.<sup>175</sup> However, in *United States v. Drew*, the D.C. Circuit found that the defendant did not physically restrain his wife when he ordered her to leave the bedroom and walk down the stairs at gunpoint.<sup>176</sup> Although the court found that the use of the words “such as” indicates illustrations rather than

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<sup>165</sup> *Id.* at 877.

<sup>166</sup> 109 F.3d 639, 641 (9th Cir. 1997). According to the court, the example “locked up” shows that this conclusion is correct. *Id.*

<sup>167</sup> *Id.* at 641.

<sup>168</sup> *Id.*

<sup>169</sup> *United States v. Parker*, 241 F.3d 1114, 1118–19 (9th Cir. 2001).

<sup>170</sup> *Id.* at 1119.

<sup>171</sup> *Id.* at 1118.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 1118–19.

<sup>174</sup> *Id.* at 1119.

<sup>175</sup> While *United States v. Drew* is not a bank robbery case, the D.C. Circuit defined physical restraint using the plain language of the statute, and thus it is included for reference. See, e.g., 200 F.3d 871 (D.C. Cir. 2000).

<sup>176</sup> *Id.* at 880.

limitation, it also found that the examples given indicate that the restraint occurs through bodily contact or actual confinement.<sup>177</sup> The court noted, based on the plain language, that the restraint must be physical to receive the two-level enhancement.<sup>178</sup>

#### IV. PROPOSED RESOLUTION

After a thorough dive into the case law that supports each circuit’s interpretation, it is clear that defining what exactly qualifies as physical restraint is most certainly difficult to decide. As illustrated above through case examples and illustrations, each circuit puts its own spin on what is considered physical restraint. As this Comment shows, the problem is that although there is a definition of physical restraint in the application instructions of the Sentencing Guidelines, it is clear that it can be quite ambiguous. However, looking at the definition of physical restraint given in the Sentencing Guidelines, the words “such as” seem to suggest that the examples listed in the definition are merely illustrative rather than exhaustive.<sup>179</sup> If the definition was meant to be viewed so narrowly and courts should only consider the examples listed in the definition, the Sentencing Commission should have been more explicit in its definition.

##### A. *The ‘Force’ of the Commission’s Commentary*

Under the Sentencing Guidelines, a defendant should receive a two-level sentence enhancement for physical restraint when he or she brandishes a firearm accompanied by any secondary action that prevents the victim from moving. Psychological restraint should be considered for the physical restraint enhancement because, in reality, the victim is restrained to the point where they cannot physically move. The courts should look to the actions of the defendant that made the victim unable to move or restricted the ability of the victim to move or escape. As the court held in *Miera*, “keeping someone from doing something is inherent within the concept of restraint . . . .”<sup>180</sup>

Forcible restraint should not be limited to a *physical* act of the defendant on the victim. The application instructions define physical restraint as “the forcible restraint of the victim such as by being tied, bound, or locked up.”<sup>181</sup> The plain meaning of physical restraint alone may lead a person to believe that physical restraint requires some physical act. However, the

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<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> See, e.g., *United States v. Stokley*, 881 F.2d 114, 116 (4th Cir. 1989) (“By use of the words ‘such as,’ it is apparent that ‘being tied, bound, or locked up’ are listed by way of example rather than limitation.”).

<sup>180</sup> *United States v. Miera*, 539 F.3d 1232, 1234 (10th Cir. 2008) (quoting *United States v. Fisher*, 132 F.3d 1327, 1329–30 (10th Cir. 1997)).

<sup>181</sup> U.S. SENT’G GUIDELINES MANUAL § 1B1.1, cmt L. (U.S. SENT’G COMM’N 2018).

dictionary meanings of force and restraint seem to prove otherwise.<sup>182</sup> Force is defined as “coercion or compulsion, esp[ecially] with the use or threat of violence.”<sup>183</sup> Restraint is defined as “(1) the act of holding back from some activity or (2) by means of force, an act that checks free activity or otherwise controls.”<sup>184</sup> Considering the two definitions side by side, forcible restraint can be accomplished by means other than literally tying a person up. Forcible restraint occurs when a defendant gives the victim no alternative but compliance.<sup>185</sup> This can be accomplished by a threat along with the presence of a firearm. By threat of force, in this case, using a gun, a defendant holds a victim back from any physical movement from their location. The presence of a firearm checks free activity and controls the victim for the entirety of the altercation. Thus, forcible restraint can be accomplished without physically touching a victim.

Further, it is important to consider the entire definition through the lens of the textual canon *ejusdem generis*. The Sentencing Guidelines do not provide an exhaustive list for what qualifies as physical restraint. *Ejusdem generis* is the Latin term for “of the same kind.”<sup>186</sup> When a law lists classes of things of the same sort, *ejusdem generis* is used to clarify the list.<sup>187</sup> In the definition of physical restraint, the list of “things” is tied, bound, or locked up.<sup>188</sup> This class of things results in a physical immobilization of a person to a fixed place by means of some secondary thing or item. This class cannot be defined so narrowly to only include being tied, bound, or locked up because, as many circuits have held, the words “such as” create a list of examples and is therefore not exhaustive.<sup>189</sup>

Ultimately, the definition of physical restraint listed in the commentary is not binding on the courts and instead is used to add clarity. The definition is not listed in the Sentencing Guidelines itself; rather, it is listed in the commentary and the application notes to the guidelines.<sup>190</sup> As the United States Supreme Court held in the 1993 case of *Stinson v. United States*, “[t]he functional purpose of commentary (of the kind at issue here) is to assist in the interpretation and application of those rules, which are within the Commission’s particular area of concern and expertise and which the Commission itself has the first responsibility to formulate and announce.”<sup>191</sup>

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<sup>182</sup> See *infra* notes 183–84 and accompanying text.

<sup>183</sup> Force, THE NEW OXFORD AMERICAN DICTIONARY (2001).

<sup>184</sup> United States v. Coleman, 664 F.3d 1047, 1049 (6th Cir. 2012) (citations omitted).

<sup>185</sup> See, e.g., United States v. Stevens, 580 F.3d 718, 720 (8th Cir. 2009).

<sup>186</sup> Legal Information Institute, *Ejusdem Generis*, CORNELL L. SCH., [https://www.law.cornell.edu/wex/ejusdem\\_generis#:~:text=Ejusdem%20generis%20is%20latin%20for,to%20clarify%20such%20a%20list](https://www.law.cornell.edu/wex/ejusdem_generis#:~:text=Ejusdem%20generis%20is%20latin%20for,to%20clarify%20such%20a%20list) (Feb. 2022).

<sup>187</sup> *Id.*

<sup>188</sup> U.S. SENT’G GUIDELINES MANUAL § 1B1.1, cmt L (U.S. SENT’G COMM’N 2018).

<sup>189</sup> See, e.g., United States v. Ossai, 485 F.3d 25, 32 (1st Cir. 2007); see also United States v. Bell, 947 F.3d 49, 55 (3rd Cir. 2020).

<sup>190</sup> U.S. SENT’G GUIDELINES MANUAL §§ 1B1.1, cmt L, 2B3.1 (U.S. SENT’G COMM’N 2018).

<sup>191</sup> 508 U.S. 36, 45 (1993).

The Court noted that the Sentencing Commission drafts the guidelines and the commentary interpreting them, so it is presumed that the interpretations included in the commentary represent the most accurate indication of how the Sentencing Guidelines should be applied.<sup>192</sup> In 2019, the Sixth Circuit noted that the commentary for the Sentencing Guidelines does not go through congressional approvals, but this does not present a problem because “commentary has no independent legal force—it serves only to *interpret* the Guidelines’ text, not to replace or modify it.”<sup>193</sup> The Sentencing Reform Act and its amendments have only made passing references to the commentary.<sup>194</sup> Thus, because the Sentencing Commission drafts the Sentencing Guidelines as well as the commentary, it has the power to modify the definition of the term physical restraint in the commentary and application instructions to make it clearer for courts to apply.

*B. How physical restraint can affect victims*

Not only do the inconsistencies surrounding physical restraint affect defendants, but it also can affect the victims of crime as well.<sup>195</sup> Being physically restrained can affect victims in many different ways. The mere presence of a firearm is likely threatening to a lot of people; they are unsure of them, have never been in contact with one, and firearms usually have a negative connotation. The presence of a gun will ensure a victim’s compliance, which in turn prevents them from physically moving because they do not want to be shot or killed. The Eleventh Circuit held that the obvious presence of a handgun ensures the victim’s compliance and therefore prevents them from leaving the room.<sup>196</sup> Moreover, as the Ninth Circuit previously explained in *Thompson*, a victim that is staring down the barrel of a gun is clearly physically restrained, as it gives them little to no opportunity to end the restraint.<sup>197</sup> The Fourth Circuit, as described above, explained that the two-level enhancement is used to punish a defendant who deprives a person of physical movement.<sup>198</sup> Therefore, the enhancement is meant to punish the defendant for his or her actions. While the reaction of the victim is absolutely relevant, it is not what matters the most when determining whether to apply the enhancement. Instead, it is the defendant’s actions that deprived the victim of movement.

Depriving a person of physical movement does not and should not require being tied up, bound, or locked up. If a person is unable to move from

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<sup>192</sup> *Id.*

<sup>193</sup> *United States v. Havis*, 927 F.3d 382, 386 (6th Cir. 2019).

<sup>194</sup> *United States v. Riccardi*, 989 F.3d 476, 484 (6th Cir. 2021).

<sup>195</sup> See Eugenio Weigend Vargas & Rukmani Bhatia, *No Shots Fired: Examining the Impact and Trauma Linked to the Threat of Gunfire Within the U.S.*, CTR. AM. PROGRESS (Oct. 20, 2020), <https://www.americanprogress.org/issues/guns-crime/reports/2020/10/20/491823/no-shots-fired/>.

<sup>196</sup> See *United States v. Jones*, 32 F.3d 1512, 1519 (11th Cir. 1994).

<sup>197</sup> See discussion *supra* Part III.B.v.

<sup>198</sup> *United States v. Dimache*, 665 F.3d 603, 606, 609 (4th Cir. 2011).

their location based on the likely probability that they will be seriously or fatally injured, this should be enough to invoke the enhancement. It is clear that physical restraint with a gun is different from the actual discharge of the gun and has different effects on the victims as well.<sup>199</sup> Even though there are no physical wounds from being held at gunpoint, victims often suffer from emotional distress and psychological trauma.<sup>200</sup> Perpetrators will brandish firearms “to intimidate and subdue victims, forcing them to comply out of fear of bodily harm.”<sup>201</sup> When a firearm is drawn, the conflict escalates substantially and becomes even more dangerous. Whether the intent is to shoot or intimidate, pulling a gun on someone is an act of gun violence, even though the trigger was not pulled.<sup>202</sup>

Based on the findings above regarding gun violence, it is clear that the actions of the defendants can affect victims for quite some time after the actual incident occurs. Perpetrators know exactly what they are doing when they pull a gun on someone and what they are trying to accomplish: the victim’s compliance. Pointing a gun at a victim functions like a “figurative lock and key sufficient to constitute a physical restraint.”<sup>203</sup> Pointing the gun directly at someone is “something more” than merely brandishing the weapon. A person would be much more likely to comply with someone’s orders when the gun is pointing directly at them rather than just visible from their waistband. As this Comment shows, it is clear that something more than mere brandishing is needed to invoke the enhancement. As specifically stated, “[s]ubsection (b)(4)(B) requires a result, physical restraint, but does not require any particular method to achieve that result. The examples of physical restraint set forth in the definition (being tied, bound, or locked up) are not the only means of physically restraining another.”<sup>204</sup> Depriving a person of their freedom of physical movement can be accomplished “by means other than creating a physical barrier to movement.”<sup>205</sup>

There are many different ways a victim can be physically restrained, which expand further than being tied, bound, or locked up. For example, a defendant could point the gun at the victim and threaten to either kill him or his family if he chooses to move. The victim will comply with the orders of the defendant and will be unable to move because of the fear of possibly dying. Currently, under some of the interpretations of the circuit courts, the

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<sup>199</sup> United States v. Miera, 539 F.3d 1232, 1235 (10th Cir. 2008).

<sup>200</sup> Vargas & Bhatia, *supra* note 196. Crime victims experience feelings such as “insecurity, anxiety, anger, violation, mistrust, vulnerability, and sadness or depression.” *Id.* Virtually all of these feelings are felt more frequently when a gun was used to threaten a victim. *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> United States v. Herman, 930 F.3d 872, 875 (7th Cir. 2019) (quoting United States v. Doubet, 969 F.2d 341, 347 (7th Cir. 1992)).

<sup>204</sup> THOMAS W. HUTCHISON ET AL., FED. SENT’G L. & PRAC. § 2B3.1 authors’ cmt. 6(b) (2022) (citations omitted).

<sup>205</sup> *Id.*

defendant would not receive the physical restraint enhancement for his conduct, meaning the sentence would be lesser.<sup>206</sup> It is true that something more must be done than merely brandishing the firearm in order to receive the two-level sentence enhancement. Merely brandishing a weapon will not be sufficient. For instance, if the defendant walked into a bank and showed the teller that he had a gun but did not do anything more to restrain the teller, he will only receive the five-level sentence enhancement for brandishing a weapon, but not the extra two-level enhancement for physical restraint. Brandishing or pointing the firearm with verbal commands, such as “don’t move,” “get down,” or any similar command or threat directed towards the victim should be sufficient to trigger the enhancement. When a victim is physically unable to move because of the presence of a firearm along with a secondary action, such as a death threat or being locked up, the defendant should be punished for his behavior, and the physical restraint enhancement should apply.

### *C. The proposed multi-factor test*

Because the different circuits each have vastly different ways of interpreting the physical restraint enhancement, the United States Supreme Court should decide this issue in order to create uniformity across the circuits for sentencing purposes. In the alternative, the Sentencing Commission could modify the definition of physical restraint under the Sentencing Guidelines. At this point in time, defendants that commit the exact same robbery could potentially be sentenced differently depending on the circuit they receive their sentence. When deciding this issue, the United States Supreme Court or the Sentencing Commission should develop a multi-factor test to determine whether a victim has been physically restrained. A multi-factor test would give the circuit courts an easier way to determine whether the enhancement applies.

While the Third Circuit’s five-factor test for physical restraint seems to be exactly what the courts need to help determine what qualifies as physical restraint, it is too strict of an interpretation for what the enhancement is attempting to accomplish. This Comment proposes the following factors to consider:

- (1) exerting control over the victim;
- (2) leaving the victim no alternative but compliance;
- (3) whether the victim was deprived of their freedom of physical movement;

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<sup>206</sup> See discussion *supra* Part III.

(4) whether the victim was actually immobilized for the commission of the robbery;

(5) the type of force used, whether actual touching or a threat of force.<sup>207</sup>

These factors should all be considered and balanced, and one should not be given more weight than another. When considering each circuit's opinion on physical restraint, these factors are explained or mentioned. These factors do not merely look at whether the person was psychologically restrained but would be considered along with the other factors surrounding the case. Each case is different, and determining whether to apply the enhancement will likely continue to be very fact-intensive. It is important to come to a consensus on what it means to be physically restrained across the circuits because federal sentencing for the exact same crime should be the same, regardless of which circuit a defendant is sentenced in.

*D. Distinguishing between four and two: abduction vs. physical restraint*

While this Comment specifically focuses on the physical restraint enhancement, it is important to distinguish it from another closely related enhancement: the four-level abduction enhancement. The courts often times have to decide between the two-level physical restraint enhancement and the four-level abduction enhancement when looking at sentencing.<sup>208</sup> The physical restraint enhancement does not require that the victim be moved at all, as reiterated by the Eleventh Circuit.<sup>209</sup> To receive the abduction enhancement, a defendant must force a victim to accompany him to a different location.<sup>210</sup> Like the physical restraint enhancement, there is a split of authority that has developed over the meaning of different locations in the definition of abduction.<sup>211</sup> This disagreement is whether the forced movement of victims to another area in the same building constitutes abduction.<sup>212</sup> Abduction requires movement to a different location, as differentiated from physical restraint, which does not require such movement.<sup>213</sup> It is clear that the Sentencing Commission's goal was to differentiate between abduction

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<sup>207</sup> These factors were compiled by the Author of this Comment by considering each circuit's interpretation of physical restraint that was examined in Part III of this Comment.

<sup>208</sup> See U.S. SENT'G GUIDELINES MANUAL § 2B3.1(b)(4) (U.S. SENT'G COMM'N 2018).

<sup>209</sup> *United States v. Westbrook*, 583 Fed.App'x 882, 885 (11th Cir. 2014) (citing *United States v. Victor*, 719 F.3d 1288, 1289 (11th Cir. 2013)).

<sup>210</sup> U.S. SENT'G GUIDELINES MANUAL § 1B1.1, cmt. n.1(a) (U.S. SENT'G COMM'N 2018). "For example, a bank robber's forcing a bank teller from the bank into a getaway car would constitute an abduction." *Id.*

<sup>211</sup> *United States v. Hill*, 963 F.3d 528, 532 (6th Cir. 2020) (quoting *United States v. Archuleta*, 865 F.3d 1280, 1285 (10th Cir. 2017)).

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 535.

and physical restraint.<sup>214</sup> If movement to another location were required for the physical restraint enhancement, the Sentencing Commission would not have created the abduction enhancement as well. If movement were required for physical restraint, there would be no distinction between the abduction enhancement and the physical restraint enhancement, and the line differentiating the two would be blurred. When there is no change in location, but a person’s movement is restrained by the action of the defendant, the physical restraint enhancement should apply.

## V. CONCLUSION

The issue of defining what exactly constitutes as physical restraint needs to be resolved by the United States Supreme Court. Once this issue is decided, there will finally be a consensus among the circuit courts. As of now, depending on which circuit a defendant is sentenced in, the outcome may be completely different for the same crime, and that should not be the case. Accordingly, the proposed resolution should punish the defendants for their actions that result in physical restraint when committing robbery, regardless of whether the victim is tied up or whether the victim is forced to stay in place by the barrel of a gun. In both circumstances, the victim is unable to move from their current location, and that is the reasoning behind the extra two-level enhancement. The defendant is accomplishing the same goal in either situation, and that goal is for the victim to comply with their orders. In both situations, the victim has no alternative but compliance. This Comment recognizes that mere brandishing is not sufficient to invoke the physical restraint enhancement but that there are other ways to physically restrain a victim to prevent them from moving aside from being tied, bound, or locked up. Furthermore, the victim does not need to be moved from their current location to be physically restrained because the movement to another location invokes the four-level sentence enhancement of abduction. Instead, this Comment proposes that the two-level sentence enhancement should be applied when the defendant not only brandishes the firearm but also commits any secondary act with the purpose of preventing the victim from moving. The pointing of a gun is an obvious example of an action that would prevent the victim from moving, but it could also be the defendant holding the gun and threatening the victim in some sort of way. The definition of physical restraint requires force or threat of force, and both of those examples accomplish that.

This Comment proposes a multi-factor test to determine whether a victim has been physically restrained: (1) exerting control over the victim; (2) leaving the victim no alternative but compliance; (3) whether the victim was deprived of their freedom of physical movement; (4) whether the victim

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<sup>214</sup> *See id.*

was actually immobilized for the commission of the robbery; and (5) the type of force used, whether actual touching or a threat of force. These factors would allow for the two-level physical restraint enhancement to be imposed when a victim is physically unable to move, by force or threat of force, in order to commit the robbery.

Until a decision is made by the United States Supreme Court or the definition of physical restraint is modified by the Sentencing Commission, this will continue to be a division across the circuit courts. Justice needs to be served not only for the victims suffering from the crimes but also for the multiple defendants who are receiving disparate sentences across the United States.