

HELD AT GUNPOINT: APPLYING THE PHYSICAL RESTRAINT
SENTENCING ENHANCEMENT

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Abstract

Federal circuit courts of appeal often disagree about how to interpret the United States Sentencing Guidelines. One contentious guideline is the physical restraint sentencing enhancement. This enhancement increases the sentence of a defendant who physically restrained a victim during a crime. Circuit courts disagree about whether to apply this enhancement to a defendant who points a gun at a victim and tells that victim not to move. Four circuit courts interpret the physical restraint enhancement narrowly and only apply it when a defendant does something highly similar to tying or locking up a victim. Three circuits interpret the enhancement very broadly and uphold the enhancement’s imposition on defendants who do no more than point a gun and instruct a victim not to move. Three other circuits interpret the enhancement broadly but have not explicitly ruled on whether it applies to a defendant who brandishes a firearm and issues a threat. Two circuits take an approach between the other circuits. This Note argues that the text of the enhancement, the relevant commentary in the Guidelines, existing sentencing options, and the American judicial system’s preference for liberty require a narrow interpretation of the physical restraint enhancement. Courts should only apply the enhancement when a defendant restrains a victim by applying force that touches the victim or by confining the victim in a space that appears locked. Regardless of which interpretation is currently correct, the U.S. Sentencing Commission should clarify this issue.

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INTRODUCTION

For most criminal defendants in the federal system, the most significant phase of the criminal justice process is sentencing.¹ This Note explores the current circuit split regarding one aspect of sentencing: the physical restraint sentencing enhancement in the United States Sentencing Guidelines (Guidelines).² In 1984, Congress created the U.S.

1. Melissa Hamilton, *Sentencing Adjudication: Lessons from Child Pornography Policy Nullification*, 30 GA. ST. U. L. REV. 375, 384–85 (2014). Sentencing is more important than trials because of the vast number of defendants who plead guilty. *See* *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (“[C]riminal justice today is for the most part a system of pleas, not a system of trials.”).

2. While this Note was in the editing process, Julia Knitter published an excellent Comment on this same topic. *See* Julia Knitter, Comment, “*Don’t Move*”: *Redefining “Physical Restraint” in Light of a United States Circuit Court Divide*, 44 SEATTLE U. L. REV. 205 (2020). Knitter’s Comment and this Note cover much of the same case law and provide similar recommendations to the U.S. Sentencing Commission. *See id.* at 227. While Knitter’s work is well worth reading, this Note differs from Knitter’s Comment by providing a more nuanced and comprehensive exploration of the current circuit split, *see infra* Parts I–III, and by presenting additional reasons for adopting a narrow interpretation of “physical restraint,” *see infra* Part IV.

Sentencing Commission to make sentencing decisions more uniform in federal courts.³ The Sentencing Commission created the Guidelines to provide a specific sentencing range for every federal defendant.⁴ Courts calculate the sentencing range by finding the “base offense level” of the crime charged and modifying the offense level based on “specific offense characteristics” (SOCs) and other specified adjustments to find the total offense level.⁵ SOCs and other adjustments either increase a defendant’s offense level for aggravating factors or decrease the offense level for mitigating factors.⁶ Courts then combine the total offense level with the defendant’s criminal history to find a range of years on the Sentencing Table.⁷ Because of political pressures and structural problems, the sentencing ranges in the Guidelines have tended to increase.⁸ In particular, many of the SOCs “act as a one-way ratchet dramatically increasing a guideline range.”⁹

Federal courts used to be bound by the sentencing ranges calculated through the Guidelines.¹⁰ However, in the 2005 case *United States v. Booker*,¹¹ the United States Supreme Court made the Guidelines advisory.¹² Though sentencing within the Guidelines is no longer mandatory, every sentencing decision must start with a correct calculation of an offender’s sentencing range.¹³ After correctly

When referring to the *U.S. Sentencing Guidelines Manual* as a whole, this Note uses “Guidelines.” When referring to a specific part of the Guidelines, this Note uses “guideline,” “application note,” or “commentary” as appropriate.

3. *About*, U.S. SENT’G COMM’N, <https://www.ussc.gov/about-page> [<https://perma.cc/WFG2-J5WF>]; see *United States v. Booker*, 543 U.S. 220, 246 (2005). For more information about the history of federal sentencing generally and of the Guidelines specifically, see Mistretta v. United States, 488 U.S. 361, 363–70 (1989); Mark W. Bennett, *Addicted to Incarceration: A Federal Judge Reveals Shocking Truths About Federal Sentencing and Fleeting Hopes for Reform*, 87 UMKC L. REV. 3, 6–10, 17–20 (2018). See generally Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315 (2005) (explaining and critiquing the origins and structure of the Guidelines).

4. Bennett, *supra* note 3, at 8.

5. U.S. SENT’G GUIDELINES MANUAL § 1B1.1(a)(1)–(5) (U.S. SENT’G COMM’N 2018).

6. Compare *id.* § 3B1.1 (increasing offense levels for defendants who held leadership roles in criminal enterprises), with *id.* § 3B1.2 (decreasing offense levels for defendants who held minimal or minor roles).

7. *Id.* § 1B1.1(a)(6)–(8); see Bennett, *supra* note 3, at 8 (“This Sentencing Table is . . . a two dimensional grid with forty-three offense levels for criminal conduct down a vertical axis, and six categories of criminal history across a horizontal axis. . . . [T]he intersection of the two axes . . . creates 258 sentencing range boxes expressed in months, e.g. 262-327.” (footnote omitted)).

8. See Bowman, *supra* note 3, at 1319–20.

9. Bennett, *supra* note 3, at 20.

10. *Id.* at 8.

11. 543 U.S. 220 (2005).

12. *Id.* at 245 (invalidating the statutory provision that made the Guidelines mandatory).

13. *Gall v. United States*, 552 U.S. 38, 49 (2007).

calculating the offender's sentencing range, judges must exercise discretion to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes"¹⁴ of sentencing.¹⁵ Even with this discretion, judges tend to give significant weight to the Guidelines.¹⁶ In fiscal year 2019, seventy-five percent of sentences in all federal cases were within the framework of the Guidelines.¹⁷

The Supreme Court has left the job of clarifying the Guidelines to the Sentencing Commission.¹⁸ Consequently, circuit courts of appeals have great discretion in interpreting the Guidelines and the Sentencing Commission's incorporated commentary.¹⁹ Courts often disagree about when to apply various SOCs and adjustments.²⁰

14. These statutory purposes essentially are retribution, deterrence, incapacitation, and rehabilitation. *See* 18 U.S.C. § 3553(a)(2).

15. *Id.* § 3553(a). In exercising their discretion, judges must consider several statutory factors. *Id.*

16. Nancy Gertner, *Against These Guidelines*, 87 UMKC L. REV. 49, 53 (2018) (noting that the Guidelines "anchor" sentencing, even though they are advisory); Shon Hopwood, *Improving Federal Sentencing*, 87 UMKC L. REV. 79, 80 (2018) ("[F]ederal courts continue to give undue weight to the sentencing ranges provided by the Guidelines . . ."); *see* Peugh v. United States, 569 U.S. 530, 543–44 (2013); *see also* U.S. SENT'G COMM'N, THE INFLUENCE OF THE GUIDELINES ON FEDERAL SENTENCING 7 (2020), https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20201214_Guidelines-Influence-Report.pdf [<https://perma.cc/HV8G-H647>] ("[T]he guidelines continued to exert a strong influence on sentences imposed in firearms and illegal reentry offenses, a more moderate influence on sentences imposed in fraud and drug offenses, and a weakening influence in non-production child pornography offenses and career offender cases.").

17. U.S. SENT'G COMM'N, 2019 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 84 tbl.29, <https://www.uscc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/2019-Annual-Report-and-Sourcebook.pdf> [<https://perma.cc/AWA8-DBA5>].

18. *See* Braxton v. United States, 500 U.S. 344, 347–49 (1991); Elliot Edwards, Note, *Eliminating Circuit-Split Disparities in Federal Sentencing Under the Post-Booker Guidelines*, 92 IND. L.J. 817, 825 (2017).

19. Edwards, *supra* note 18, at 826.

20. *See* Kendall C. Burman, Comment, *Firearm Enhancements Under the Federal Sentencing Guidelines*, 71 U. CHI. L. REV. 1055, 1055 (2004) (exploring a circuit split on the firearm enhancement); Brian R. Christiansen, Comment, *The Clearly Improbable Intent of United States Sentencing Guideline Section 2D1.1(b)(1): Imposing Additional Prison Time Whenever a Weapon "Is Present Somewhere, Perhaps Anywhere,"* 34 HAMLINE L. REV. 331, 334, 336 (2011) (explaining that courts interpret the weapon enhancement somewhat differently); Rebekah R. Runyon, Note, *Am I Under Arrest? Why the U.S. Sentencing Guidelines Need a Strict Definition of What Constitutes an Intervening Arrest*, 67 FLA. L. REV. 1307, 1308 (2015) (examining a circuit split on the intervening arrest enhancement); David J. Sandefer, Comment, *To Move or Not to Move? That Is the Metaphysical Question*, 85 U. CHI. L. REV. 1973, 1974–75 (2018) (examining a circuit split on the robbery abduction enhancement).

One contentious SOC is the physical restraint enhancement. This two-level enhancement appears several times in the Guidelines.²¹ For example, the guideline for robbery says, “[I]f any person was physically restrained to facilitate commission of the offense or to facilitate escape, increase by 2 levels.”²² In an application note, the Sentencing Commission provides commentary: “‘*Physically restrained*’ means the forcible restraint of the victim such as by being tied, bound, or locked up.”²³ Because this list starts with “such as,” the list of examples is not exhaustive.²⁴ Courts uniformly apply this enhancement to defendants who do tie up, bind, or lock up victims—actions found in the list.²⁵

Circuit courts disagree about whether pointing a gun at a victim while telling the victim not to move qualifies as a physical restraint. Some courts find that such conduct does not trigger the physical restraint enhancement because there must be physical contact or some confinement.²⁶ In contrast, other courts hold that such conduct qualifies as a physical restraint.²⁷ One circuit court found that pointing a gun at someone qualifies as a physical restraint if the defendant has a sustained focus on restraining a particular victim.²⁸ Another circuit analyzes each case with a list of factors.²⁹ Finally, some courts are unsettled in their

21. U.S. SENT’G GUIDELINES MANUAL §§ 2B3.1(b)(4)(B), 2B3.2(b)(5)(B), 2E2.1(b)(3)(B), 3A1.3 (U.S. SENT’G COMM’N 2018). Courts treat these provisions the same way. *See, e.g.*, *United States v. Smith-Hodges*, 527 F. App’x 354, 356 (6th Cir. 2013).

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

23. *Id.* § 1B1.1 cmt. n.1(L); *see id.* § 2B3.1 cmt. background (“The guideline provides an enhancement for robberies where a victim . . . was physically restrained by being tied, bound, or locked up.”). This commentary is authoritative for interpreting the enhancement as long as the commentary does not violate the Constitution or a federal statute and is not “inconsistent with, or a plainly erroneous reading of,” the enhancement. *Stinson v. United States*, 508 U.S. 36, 38 (1993).

24. *E.g.*, *United States v. Hickman*, 151 F.3d 446, 461 (5th Cir. 1998), *reinstated in relevant part on reh’g en banc per curiam*, 179 F.3d 230 (5th Cir. 1999); *United States v. Rosario*, 7 F.3d 319, 320–21 (2d Cir. 1993) (per curiam).

25. *See, e.g.*, *United States v. Kirtley*, 986 F.2d 285, 286 (8th Cir. 1993) (per curiam); *see also United States v. Simmons*, 803 F. App’x 6, 10–11 (7th Cir. 2020) (noting that the physical restraint enhancement was appropriate for a defendant who “grabbed some victims’ heads; pushed others; forced some to open cash registers at gunpoint; punched some, shoved them to the floor, and held them there; and held one victim to prevent flight”). A defendant can also get the physical restraint enhancement in all circuits for forcing a victim into a small room or confined space, even if that room or space is not actually locked. *See, e.g.*, *United States v. Frank*, 223 F. App’x 412, 413 (5th Cir. 2007) (per curiam).

26. *See, e.g.*, *United States v. Anglin*, 169 F.3d 154, 164 (2d Cir. 1999); *Hickman*, 151 F.3d at 461.

27. *See, e.g.*, *United States v. Fisher*, 132 F.3d 1327, 1330 (10th Cir. 1997).

28. *See United States v. Parker*, 241 F.3d 1114, 1118–19 (9th Cir. 2001).

29. *See United States v. Bell*, 947 F.3d 49, 56 (3d Cir. 2020).

positions.³⁰ Recent rulings from the U.S. Courts of Appeals for the Third and Seventh Circuits highlight this issue's importance.³¹

Whether the physical restraint enhancement applies can significantly affect a sentence.³² Consider a defendant who robbed a bank, pointed a firearm at a teller, made a verbal threat (such as "Don't move, or I'll shoot!"), and escaped with \$25,000. Under the Guidelines, the defendant gets a base offense level of 20 for robbery.³³ Because the defendant robbed a financial institution, the Guidelines increase the offense level by 2.³⁴ The offense level increases 6 more levels because the defendant "otherwise used" a firearm by pointing a gun at the teller.³⁵ The defendant's taking of more than \$20,000 earns another 1-level increase.³⁶ Thus, the defendant's total offense level without the physical restraint enhancement is 29.

Assuming the defendant has two prior felony convictions (and was sentenced to over one year and one month in prison for each) and one misdemeanor conviction within the last ten years, the defendant will be in Criminal History Category IV.³⁷ With this offense level and criminal history, the defendant has a sentencing range of 121–151 months.³⁸ If the court adds the physical restraint enhancement, the offense level increases to 31. Consequently, the defendant's sentencing range increases to 151–188 months.³⁹ Applying the enhancement could result in the defendant's spending over three years longer in prison.

This Note examines and seeks to clarify how each circuit applies the physical restraint enhancement to cases involving firearms. This Note also argues that courts should interpret the enhancement narrowly, excluding cases in which the defendant did no more than point a gun at a victim and make a verbal threat. Finally, this Note urges the Sentencing Commission to clarify that the enhancement applies narrowly. Part I examines the case law of circuits that interpret the enhancement narrowly. Part II looks at circuits that interpret the enhancement broadly. Part III considers circuits with approaches in between. Part IV argues that

30. See *United States v. Smith-Hodges*, 527 F. App'x 354, 357 (6th Cir. 2013).

31. See *Bell*, 947 F.3d at 56 (adopting a list of factors with which to analyze the physical restraint enhancement); *United States v. Herman*, 930 F.3d 872, 877 (7th Cir. 2019) (adopting a narrow interpretation of the enhancement).

32. See U.S. SENT'G GUIDELINES MANUAL § 2B3.1 cmt. background (U.S. SENT'G COMM'N 2018) ("[B]ecause of the relatively high base offense level for robbery, an increase of 1 or 2 levels brings about a considerable increase in sentence length in absolute terms.").

33. *Id.* § 2B3.1(a).

34. *Id.* § 2B3.1(b)(1).

35. *Id.* § 2B3.1(b)(2)(B).

36. *Id.* § 2B3.1(b)(7)(B).

37. See *id.* §§ 4A1.1(a)–(b), 5A Sentencing Tbl.

38. *Id.* § 5A Sentencing Tbl.

39. *Id.*

courts should narrowly interpret the Guidelines and only apply the physical restraint enhancement when a defendant physically held, tied, or confined a victim or performed an act highly similar to those examples. Part IV also urges the Sentencing Commission to clarify the enhancement.

I. CIRCUITS WITH A NARROW INTERPRETATION

The U.S. Courts of Appeals for the Second, Fifth, Seventh, and District of Columbia Circuits interpret the physical restraint enhancement narrowly. They only permit the enhancement if a defendant physically held, tied up, or confined a victim in an enclosed space with a threat.⁴⁰ These four circuits hold that pointing a gun at a victim and ordering her not to move does not constitute a physical restraint.⁴¹

A. *Second Circuit*

Narrowly interpreting the physical restraint enhancement, the Second Circuit requires that conduct must satisfy three elements to qualify.⁴² First, the restraint must be *physical*, as opposed to psychological.⁴³ Second, the conduct must involve physical *restraint* instead of mere physical *force*.⁴⁴ Third, the conduct “must be more than” an action that is “typical of most robberies.”⁴⁵

The reasoning for these elements comes primarily from *United States v. Anglin*.⁴⁶ In *Anglin*, the defendant was convicted of armed bank robbery and of using and carrying a firearm to aid in the bank robbery.⁴⁷ During the robbery, the defendant pointed his gun at the bank tellers and told them to lie down on the floor.⁴⁸ One witness testified that the defendant held a machine gun close to the witness’s face for about fifteen seconds.⁴⁹ The trial court applied the physical restraint enhancement

40. *United States v. Herman*, 930 F.3d 872, 876–77 (7th Cir. 2019); *United States v. Drew*, 200 F.3d 871, 880 (D.C. Cir. 2000); *United States v. Anglin*, 169 F.3d 154, 164 (2d Cir. 1999); *United States v. Hickman*, 151 F.3d 446, 461 (5th Cir. 1998), *reinstated in relevant part on reh’g en banc per curiam*, 179 F.3d 230 (5th Cir. 1999).

41. *Herman*, 930 F.3d at 877; *Anglin*, 169 F.3d at 164; *Hickman*, 151 F.3d at 461; *see Drew*, 200 F.3d at 880.

42. *United States v. Taylor*, 961 F.3d 68, 78–79 (2d Cir. 2020).

43. *Id.* at 78.

44. *Id.* Force, such as hitting a victim, only qualifies for the physical restraint enhancement if the force restrained a victim so that “the victim could do nothing about his situation because of the physical restraint.” *Id.* at 79 (quoting *United States v. Rosario*, 7 F.3d 319, 321 (2d Cir. 1993) (per curiam)).

45. *Id.* (quoting *United States v. Paul*, 904 F.3d 200, 204 (2d Cir. 2018)).

46. 169 F.3d 154 (2d Cir. 1999).

47. *Id.* at 156.

48. *Id.* at 157.

49. *Id.*

because the defendant waved a gun and ordered people to lie down.⁵⁰ The Second Circuit vacated the defendant's sentence, finding that the trial court improperly applied the enhancement.⁵¹

The appellate court found that the defendant's conduct did not constitute a "physical restraint."⁵² The court analyzed the examples of physical restraint given in the Guidelines' commentary and concluded that those examples are "materially different" from pointing a gun and commanding a victim to get down.⁵³ The examples in the Guidelines involve the use of an object (such as a rope) or a confining space.⁵⁴ Relying on the plain meaning of the words *physical* and *restraint*, the court reasoned that one can restrain using physical, mental, or moral force.⁵⁵ Because the Guidelines specify "physical restraint," the Sentencing Commission must have "intended a more precise concept."⁵⁶ The court distinguished a prior case involving a defendant who stepped on a victim's throat.⁵⁷ Unlike stepping on a victim's throat, "displaying a gun and telling people to get down and not move, without more, is insufficient to trigger the 'physical restraint' enhancement."⁵⁸

The court also reasoned that allowing the enhancement in this case would lead to excessive use of the enhancement.⁵⁹ If pointing a gun and issuing a command equated to physical restraint, "virtually every robbery would be subject to the 2-level enhancement for physical restraint unless it took place in unoccupied premises."⁶⁰ Instead of physical restraint being a special circumstance, it would be applicable to most robbery cases.⁶¹

The Second Circuit extends the reasoning of *Anglin* beyond that case's precise facts. For example, in *United States v. Paul*,⁶² the Second Circuit applied the reasoning of *Anglin* to a case in which the defendant ordered a cashier at gunpoint to move to the cash register.⁶³ Though this order was more significant than an order to lie down, the order to move to the

50. *See id.* at 156–57.

51. *Id.* at 163.

52. *Id.* at 164.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 163 (citing *United States v. Rosario*, 7 F.3d 319, 320 (2d Cir. 1993) (per curiam)).

58. *Id.* at 164.

59. *Id.* at 165.

60. *Id.*

61. *Id.* The court said further, "We also note that robberies committed with a firearm already are subject to various other enhancements under U.S.S.G. § 2B3.1(b)(2)." *Id.* at 165 n.9.

62. 904 F.3d 200 (2d Cir. 2018).

63. *Id.* at 203–04.

cash register was typical of many robberies.⁶⁴ Consequently, the physical restraint enhancement was inappropriate, and the case was remanded for resentencing.⁶⁵

B. *Fifth Circuit*

The Fifth Circuit defines “physical restraint” more specifically and more narrowly than other circuits.⁶⁶ In *United States v. Hickman*,⁶⁷ the government charged multiple defendants after a series of robberies.⁶⁸ One of the defendants received the physical restraint enhancement because he pointed a gun at a victim.⁶⁹ The court concluded that applying the physical restraint enhancement to that action was inappropriate.⁷⁰ The court indicated that the enhancement is properly administered in situations “involving either the physical holding of the victim or the confining of the victim in some manner coupled with a threat of violence.”⁷¹ The “no alternative but compliance” standard adopted and applied by other circuit courts did not apply in this situation because the defendant did nothing beyond what an armed robber would normally do.⁷² The court believed that to rule otherwise would allow the physical restraint provision to be applied to every armed robbery.⁷³

64. *Id.* at 204 (“The main message of this Court’s decision in *Anglin* is that in the absence of physical restraint similar to being bound or moved into a locked or at least a confining space, the enhancement is not to be added where the direction to move is typical of most robberies.”).

65. *Id.*; see also *United States v. Hunter*, 795 F. App’x 75, 76 (2d Cir. 2020) (summary order) (finding that the application of the physical restraint enhancement was error where the defendant “followed store employees to the store’s break room, stole an employee’s cell phone, directed the employees to count to 100, threatened to hurt the employees if they called the police, and then left the store”); *United States v. Taylor*, 961 F.3d 68, 72, 81 (2d Cir. 2020) (vacating imposition of the physical restraint enhancement when factual findings showed that the defendant had pretended to have a gun and ordered robbery victims to enter back rooms but did not show that the defendant had locked those rooms or held anyone there for any length of time).

66. See *United States v. Hickman*, 151 F.3d 446, 461 (5th Cir. 1998), *reinstated in relevant part on reh’g en banc per curiam*, 179 F.3d 230 (5th Cir. 1999).

67. 151 F.3d 446 (5th Cir. 1998), *reinstated in relevant part on reh’g en banc per curiam*, 179 F.3d 230 (5th Cir. 1999).

68. *Id.* at 451–52.

69. *Id.* at 460–61.

70. *Id.* at 461.

71. *Id.*; see *United States v. Garcia*, 857 F.3d 708, 713 (5th Cir. 2017) (arguing that *physical* limits *restraint* to situations similar to when victims are tied, bound, or locked up); cf. *United States v. Frank*, 223 F. App’x 412, 413 (5th Cir. 2007) (*per curiam*) (finding that the physical restraint enhancement was applicable when the defendant used a gun to force victims into an office and ordered them to stay there).

72. *Hickman*, 151 F.3d at 461; see *infra* Section II.A.3 (discussing the Eleventh Circuit’s no alternative but compliance standard).

73. *Hickman*, 151 F.3d at 461–62; see *Garcia*, 857 F.3d at 710, 713 (finding that a defendant’s pointing a gun at a victim and ordering the victim to lie down were typical actions in an armed robbery and did not merit the physical restraint enhancement).

C. Seventh Circuit

The Seventh Circuit recently concluded that the physical restraint enhancement depends on a defendant's physical actions to limit a victim's mobility.⁷⁴ In *United States v. Herman*,⁷⁵ the Seventh Circuit held that, to receive the physical restraint enhancement, the defendant must have done more than point a gun and tell a victim not to move.⁷⁶ In *Herman*, the defendant briefly pointed a gun at the victims, directed them to stay where they were, and fled.⁷⁷ After the defendant left, the victims followed, prompting the defendant to fire his gun once.⁷⁸ Based on these facts, the trial judge applied the physical restraint enhancement.⁷⁹

The Seventh Circuit vacated the sentence.⁸⁰ The court stated that the enhancement does not include psychological coercion because the Guidelines specify "physical" restraint.⁸¹ Consequently, the enhancement focuses on the defendant's action of immobilizing the victim.⁸² The court noted that whether a victim freezes in fear when faced with a gun is irrelevant to physical restraint.⁸³ In fact, in *Herman*, the victims pursued the defendant, demonstrating that they were not restrained by the defendant's actions.⁸⁴ The court rejected the "no alternative to compliance" standard because it could include "purely psychological coercion."⁸⁵ Further, a trial judge does not need to implement the physical restraint enhancement to properly account for any psychological coercion that the defendant used.⁸⁶ The Seventh Circuit discussed its previous rulings in *United States v. Carter*⁸⁷ and *United States v. Taylor*⁸⁸ and

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

75. 930 F.3d 872 (7th Cir. 2019).

76. *Id.* at 877.

77. *Id.* at 873.

78. *Id.*

79. *Id.* at 874.

80. *Id.* at 877.

81. *Id.* at 875.

82. *Id.* at 876.

83. *Id.*

84. *Id.*

85. *Id.* (internal quotation mark omitted); see *infra* Section II.A.3 (discussing the Eleventh Circuit's no alternative but compliance standard).

86. *Herman*, 930 F.3d at 877.

87. 410 F.3d 942, 954 (7th Cir. 2005) (upholding application of the physical restraint enhancement when a bank robber sustained his focus on a teller, pointed a gun at her, and told her to move from the bank's vault to her teller drawer), *disapproved of by Herman*, 930 F.3d 872. The court emphasized the "sustained focus of the weapon on the victim coupled with the compelled movement." *Id.* This approach seems similar to the Ninth Circuit's sustained focus test. See *infra* Section III.A.

88. 620 F.3d 812, 813, 815 (7th Cir. 2010) (upholding application of the physical restraint enhancement when a bank robber pointed a gun at a teller and ordered her to move to her teller's station), *disapproved of by Herman*, 930 F.3d 872.

disagreed with their more expansive views of physical restraint.⁸⁹ Because the court declined to hear *Herman* en banc, a narrow interpretation of physical restraint remains the law in the Seventh Circuit.⁹⁰

A dissenting opinion in *Herman* strongly disagreed with the majority's reasoning.⁹¹ The dissent argued that being "physically restrained" means having limited or restricted control over one's own body.⁹² This understanding of the enhancement can include a situation where a defendant points a gun and tells the victim not to move.⁹³ Though a victim can choose to disobey an order from a defendant with a gun, a victim can also break out of zip ties or a locked room.⁹⁴ Clearly, the victim is still physically restrained despite a possibility of escape.⁹⁵

D. District of Columbia Circuit

The D.C. Circuit notes that a victim's fright is not relevant to whether a defendant physically restrained a victim.⁹⁶ In *United States v. Drew*,⁹⁷ the defendant pointed a shotgun at a victim and ordered the victim to walk to a different part of a house.⁹⁸ The trial judge applied the physical restraint enhancement to the defendant.⁹⁹ The circuit court vacated the sentence.¹⁰⁰ Analyzing the enhancement, the circuit court noted that "physical restraint requires the defendant either to restrain the victim through bodily contact or to confine the victim in some way."¹⁰¹ The victim in *Drew* may have "felt restrained," but she was not physically restrained.¹⁰² The court further argued that interpreting the physical restraint enhancement differently would allow a sentencing judge to add the enhancement "to almost any attempted murder."¹⁰³

The Second, Fifth, Seventh, and D.C. Circuits interpret the physical restraint enhancement narrowly and do not allow trial judges to impose the enhancement when the defendant merely pointed a gun and issued a threat. In these circuits, the armed robbery defendant in the introduction

89. *Herman*, 930 F.3d at 876–77.

90. *See id.* at 877.

91. *Id.* (Flaum, J., dissenting from denial of en banc consideration).

92. *Id.* at 878.

93. *Id.* at 878–79.

94. *Id.* at 879.

95. *Id.*

96. *See United States v. Drew*, 200 F.3d 871, 880 (D.C. Cir. 2000).

97. 200 F.3d 871 (D.C. Cir. 2000).

98. *Id.* at 875.

99. *Id.* at 876.

100. *Id.* at 880.

101. *Id.*

102. *Id.*

103. *Id.*

could not receive the enhancement. Similar conduct, such as ordering a victim at gunpoint to move into a different position or into an equally or less confining space, also would not warrant the enhancement.

II. CIRCUITS WITH A BROAD INTERPRETATION

The U.S. Courts of Appeals for the First, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits interpret the physical restraint enhancement broadly. The Fourth, Tenth, and Eleventh Circuits have expressly adopted the broadest interpretation that pointing a gun while telling a victim not to move is physical restraint.¹⁰⁴ The First, Sixth, and Eighth Circuits have not adopted such a clear rule but have indicated that they interpret the enhancement broadly.¹⁰⁵

A. *Circuits Holding that Pointing a Gun and Issuing a Command Suffices*

The Fourth, Tenth, and Eleventh Circuits expressly allow trial courts to impose the physical restraint enhancement even when a defendant did not physically touch or confine a victim. The Fourth and Tenth Circuits conclude that pointing a gun at a victim is a physical restraint.¹⁰⁶ The Eleventh Circuit reasons that the threat of shooting a gun forces the victim to comply.¹⁰⁷

1. Fourth Circuit

The Fourth Circuit holds a broad view of physical restraint.¹⁰⁸ In *United States v. Wilson*,¹⁰⁹ the defendants conducted two carjackings.¹¹⁰ In the first carjacking, the defendants approached a woman in her car, pointed a gun at her, and ordered her to leave the car.¹¹¹ The government did not charge the defendants for the first carjacking, but the appellate court said in dicta that the first carjacking did not involve physical restraint.¹¹² In the second carjacking, the defendants posed as hitchhikers

104. *United States v. Wilson*, 198 F.3d 467, 472 (4th Cir. 1999); *United States v. Fisher*, 132 F.3d 1327, 1329 (10th Cir. 1997); *United States v. Victor*, 719 F.3d 1288, 1290 (11th Cir. 2013).

105. *United States v. Ossai*, 485 F.3d 25, 32 (1st Cir. 2007); *United States v. Coleman*, 664 F.3d 1047, 1050 (6th Cir. 2012); *United States v. Kirtley*, 986 F.2d 285, 286 (8th Cir. 1993) (per curiam).

106. *Wilson*, 198 F.3d at 472; *Fisher*, 132 F.3d at 1330.

107. *Victor*, 719 F.3d at 1290.

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

109. 198 F.3d 467 (4th Cir. 1999).

110. *Id.* at 469.

111. *Id.*

112. *Id.* at 472. The court did not clearly explain what distinguishes this carjacking from the second. This dictum, in part, led at least one district judge to find that merely pointing a gun was not a physical restraint. *See United States v. Lilly*, 285 F. Supp. 2d 737, 741–42 (S.D.W. Va.

to rob a car.¹¹³ While riding as passengers, the defendants pulled a gun on the driver and told her to pull over, hand over her money, and get out of the car.¹¹⁴ The court concluded that by holding a gun to the victim's head and keeping her in the car long enough to hand over her money, the defendants physically restrained the victim.¹¹⁵ The court noted that restraint is not an element of carjacking.¹¹⁶

The Fourth Circuit refined and reasserted the rationales for its broad view of the enhancement in 2011.¹¹⁷ In *United States v. Dimache*,¹¹⁸ a defendant pointed a gun at victims during a bank robbery and told them to lie down and be quiet.¹¹⁹ At sentencing, the defendant received the physical restraint enhancement.¹²⁰ The Fourth Circuit affirmed the enhancement because “[t]he essential character of conduct that is subject’ to the [physical restraint] enhancement is the deprivation of a person’s ‘freedom of physical movement.’”¹²¹ The court implied that the defendant created an extra harm during the robbery because telling the victims to get down stopped them from leaving and from interfering with the robbery.¹²²

The *Dimache* court refused to limit the application of the enhancement to cases nearly identical to the examples in the commentary that defines

2003) (expressing concern that, if pointing a gun constitutes physical restraint, the enhancement could almost always be applied because nearly all robberies involve using a deadly weapon to threaten a victim into compliance). The *Wilson* court’s dictum likely is no longer persuasive because of a later decision. See *Dimache*, 665 F.3d at 604, 607 (affirming the application of the physical restraint enhancement when the defendant had pointed a gun at victims and ordered them to lie down). A more recent district court decision held that the mere act of pointing a gun counts as physical restraint. See *Mason v. United States*, No. 11-CR-198, No. 14-CV-116, 2014 WL 12693721, at *4 (E.D.N.C. Mar. 13, 2014).

113. *Wilson*, 198 F.3d at 469.

114. *Id.*

115. *Id.* at 472; see also *United States v. Baylor*, 296 F. App’x 360, 361–62 (4th Cir. 2008) (per curiam) (holding that applying the physical restraint enhancement was proper when the defendant held a gun to a victim’s head during a robbery).

116. *Wilson*, 198 F.3d at 472. The Fourth Circuit emphasizes that the physical restraint enhancement is inapplicable when physical restraint is an element of the offense or is specifically incorporated into the base offense level. *United States v. Stokley*, 881 F.2d 114, 116 (4th Cir. 1989). For example, in *United States v. Mikalajunas*, the court held that the physical restraint enhancement could not apply to a murder defendant who had caught and stabbed his victim. 936 F.2d 153, 156 (4th Cir. 1991). The court reasoned that restraint is an element of murder. *Id.* (“Every murder involves the ultimate restraint.”). But see *id.* at 158 (Niemeyer, J., dissenting) (noting how many different ways one can commit murder without restraining the victim before the moment of death).

117. See *Dimache*, 665 F.3d at 607–09.

118. 665 F.3d 603 (4th Cir. 2011).

119. *Id.* at 604.

120. *Id.* at 605.

121. *Id.* at 604, 606 (quoting *United States v. Taylor*, 620 F.3d 812, 814 (7th Cir. 2010)).

122. See *id.* at 608.

“physically restrained.”¹²³ The court argued that the “intended scope” of the physical restraint enhancement “is to punish a defendant who deprives a person of his physical movement.”¹²⁴ The court also declined to create a distinction between confining a victim in a large area and confining a victim in a small area because the size of the area is not relevant to a victim’s freedom of movement and because such a distinction would be difficult to apply.¹²⁵

2. Tenth Circuit

Like the Fourth Circuit, the Tenth Circuit holds that pointing a gun at a victim physically restrains the victim.¹²⁶ In *United States v. Fisher*,¹²⁷ a bank robber hit a victim on the head and held a gun to the victim’s head to prevent the victim from moving.¹²⁸ Addressing whether the trial judge correctly applied the physical restraint enhancement, the circuit court noted that physical restraint can include more than actual physical touching.¹²⁹ The court said, “*Keeping someone from doing something* is inherent within the concept of restraint”¹³⁰ The court held that applying the physical restraint enhancement to the defendant was proper because the victim was “specifically prevented at gunpoint from moving.”¹³¹

The Tenth Circuit clarified its broad interpretation of the enhancement in *United States v. Miera*.¹³² In *Miera*, two bank robbers told everyone in the bank to put their hands up and not to move, while one of the robbers

123. *Id.* at 609; see U.S. SENT’G GUIDELINES MANUAL § 1B1.1 cmt. n.1(L) (U.S. SENT’G COMM’N 2018).

124. *Dimache*, 665 F.3d at 609.

125. *Id.*; see also *United States v. McGowan*, 629 F. App’x 531, 533 (4th Cir. 2015) (per curiam) (finding that bank robbers had “essentially restrain[ed] everyone in the bank” by brandishing a gun and threatening to shoot); *United States v. Shiflett*, 56 F.3d 62, 1995 WL 318485, at *2–3 (4th Cir. 1995) (unpublished table decision) (per curiam) (stating that the physical restraint enhancement was proper when an armed defendant had placed victims into an unlocked bank vault).

126. *United States v. Fisher*, 132 F.3d 1327, 1330 (10th Cir. 1997).

127. 132 F.3d 1327 (10th Cir. 1997).

128. *Id.* at 1328.

129. *Id.* at 1329.

130. *Id.* at 1330.

131. *Id.*; see *United States v. Xayaso*, 45 F. App’x 843, 845–46 (10th Cir. 2002); see also *United States v. Checora*, 175 F.3d 782, 790–91 (10th Cir. 1999) (holding that forcible restraint is using “physical force or another form of compulsion” to hold a “victim back from some action, procedure, or course; prevent the victim from doing something; or otherwise keep the victim within bounds or under control”); cf. *United States v. Pagan*, No. CR 15–4078, 2016 WL 9021737, at *11 (D.N.M. Dec. 16, 2016) (choosing not to impose a physical restraint enhancement when the defendant had robbed a restaurant and discharged his firearm but had not ordered victims not to move and had not kept anyone from leaving).

132. 539 F.3d 1232 (10th Cir. 2008).

stood by the door with his gun.¹³³ In deciding whether the physical restraint enhancement was appropriate, the circuit court explained that targeting specific individuals is not necessary for the enhancement.¹³⁴ However, a defendant must do “*something more*” than brandishing or displaying a gun to merit the enhancement.¹³⁵ The court found that the defendants in *Miera* did do “*something more*” by waving a gun around, commanding everyone not to move, and standing in front of the door.¹³⁶ Therefore, the court concluded that the defendants had physically restrained the victims.¹³⁷

In *United States v. Joe*,¹³⁸ a later panel of the Tenth Circuit criticized how *Miera* and other cases had “wrenched ‘physically’ from its original place so that it now seems to describe the conduct or the inner thoughts of the *victim*.”¹³⁹ The court in *Joe* said that “it is quite a challenge to conceive of a restraint that would not be deemed ‘physical’ under this court’s case law.”¹⁴⁰ However, the court recognized that it was bound by the Tenth Circuit’s prior decisions.¹⁴¹ The Tenth Circuit has continued to apply its very broad interpretation of the physical restraint enhancement to cases involving firearms.¹⁴²

3. Eleventh Circuit

The Eleventh Circuit probably uses the broadest interpretation of physical restraint. The Eleventh Circuit allows trial judges to impose the physical restraint enhancement when a defendant leaves a victim with “no alternative but to comply” and with no effective way to leave.¹⁴³ Even a defendant who did not use a gun can qualify for the enhancement if the defendant pretended to have a gun to ensure a victim’s compliance.¹⁴⁴ In *United States v. Victor*,¹⁴⁵ the defendant acted as if he had a gun in his

133. *Id.* at 1233.

134. *Id.* at 1235.

135. *Id.* (internal quotation mark omitted) (quoting *United States v. Pearson*, 211 F.3d 524, 526–27 (10th Cir. 2000)).

136. *Id.*

137. *Id.* at 1235–36.

138. 696 F.3d 1066 (10th Cir. 2012).

139. *Id.* at 1072.

140. *Id.*

141. *Id.*

142. *See United States v. Wade*, 719 F. App’x 822, 827–28 (10th Cir. 2017); *United States v. Rogers*, 520 F. App’x 727, 730 (10th Cir. 2013); *see also United States v. Williams*, No. CR. 17-2556 JB, 2020 WL 4016108, at *28 (D.N.M. July 16, 2020) (“[T]he Tenth Circuit . . . interprets physical restraint expansively . . .”).

143. *United States v. Townsend*, 521 F. App’x 904, 909 (11th Cir. 2013) (per curiam); *United States v. Vallejo*, 297 F.3d 1154, 1167 (11th Cir. 2002).

144. *See United States v. Victor*, 719 F.3d 1288, 1290 (11th Cir. 2013).

145. 719 F.3d 1288 (11th Cir. 2013).

jacket pocket to prevent a victim from escaping.¹⁴⁶ The Eleventh Circuit held that this action was enough for the enhancement to apply.¹⁴⁷

In *Victor*, the court emphasized that the physical restraint enhancement applies “when the defendant’s conduct ‘ensured the victims’ compliance and effectively prevented them from leaving’ a location.”¹⁴⁸ Further, the court clarified that the Guidelines do not require that a defendant must move a victim to receive the enhancement.¹⁴⁹ Even though the defendant in *Victor* was not actually armed and did not order the victim into a confining space, the court held that the defendant had effectively prevented the victim from escaping.¹⁵⁰

The Fourth, Tenth, and Eleventh Circuits apply the physical restraint enhancement when a defendant does no more than pointing a gun at a victim and issuing a threat or command. In these circuits, the defendant in the introduction could receive the physical restraint enhancement. Of course, any further conduct, such as ordering a victim at gunpoint to move to another room, would even more assuredly receive the enhancement.

B. *Circuits Suggesting that Pointing a Gun and Issuing a Command Suffices*

The First, Sixth, and Eighth Circuits have not clearly settled whether pointing a gun at a victim while saying not to move is a physical restraint under the Guidelines.¹⁵¹ However, these circuits interpret the physical restraint enhancement broadly.¹⁵² If these three circuits heard a case that directly addressed the issue of whether pointing a gun and saying not to move is sufficient for the enhancement, they likely would align themselves with the Fourth, Tenth, and Eleventh Circuits.

146. *Id.* at 1289–90.

147. *Id.*

148. *Id.* at 1290 (quoting *United States v. Jones*, 32 F.3d 1512, 1518–19 (11th Cir. 1994) (per curiam)); see also *United States v. Phillips*, 820 F. App’x 966, 968 (11th Cir. 2020) (per curiam) (“Phillips physically restrained M.P. . . . by pressing a gun against her chest and ordering her to hand over her car keys. In that moment M.P. was restrained just as surely as if her hands had been tied—she could not leave for fear of being shot in the chest by Phillips.”).

149. *Victor*, 719 F.3d at 1290.

150. *Id.* at 1290; see also *United States v. Hill*, 732 F. App’x 759, 765 (11th Cir. 2018) (per curiam) (affirming application of the physical restraint enhancement when armed bank robbers ordered a victim to lie on the ground and told other victims to move away from their desks and to keep their hands up); *United States v. Westbrook*, 583 F. App’x 882, 885 (11th Cir. 2014) (per curiam) (affirming imposition of the enhancement when a defendant ordered victims “to lie on the floor at gunpoint”); *Jones*, 32 F.3d at 1519 (affirming imposition of the enhancement when armed robbers ordered victims to walk into a bank vault).

151. See, e.g., *United States v. Ossai*, 485 F.3d 25, 32 (1st Cir. 2007); *United States v. Coleman*, 664 F.3d 1047, 1050 (6th Cir. 2012); *United States v. Hutter*, 399 F. App’x 138, 139–40 (8th Cir. 2010) (per curiam).

152. See *Coleman*, 664 F.3d at 1050; *United States v. Wallace*, 461 F.3d 15, 34–35 (1st Cir. 2006); *United States v. Kirtley*, 986 F.2d 285, 286 (8th Cir. 1993) (per curiam).

1. First Circuit

The First Circuit uses a “case-specific and fact-intensive” inquiry to determine whether the physical restraint enhancement should apply.¹⁵³ In *United States v. Wallace*,¹⁵⁴ two defendants pointed guns directly at victims and ordered the victims not to move.¹⁵⁵ One of the defendants used his body to block a victim’s path of escape.¹⁵⁶ The court explained, “Given the intense, one-on-one nature of the armed robbery, 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 . . . the victims were ‘physically restrained’ for purposes of the guidelines enhancement.”¹⁵⁷

The First Circuit reached a similar result in *United States v. Ossai*.¹⁵⁸ In *Ossai*, the defendant placed a gun to a victim’s head and put a hand on the victim’s neck and shoulder to make the victim kneel.¹⁵⁹ The circuit court noted that it did not need to address whether the use of the gun alone counted as physical restraint because the defendant also placed his hand on the victim’s neck and stated, “I do not want to hurt you.”¹⁶⁰ Because of *Wallace* and *Ossai*, the First Circuit likely would apply the enhancement when a defendant points a gun and issues a command. However, because of its fact-intensive inquiry, the court probably would list every fact that could show restraint instead of adopting a per se rule that pointing a gun and ordering a victim not to move creates physical restraint.

2. Sixth Circuit

The Sixth Circuit interprets the physical restraint enhancement broadly.¹⁶¹ In *United States v. Coleman*,¹⁶² the defendant robbed a bank while carrying a BB pistol that looked like a handgun.¹⁶³ During the robbery, the defendant pointed the pistol at a victim and ordered the victim “to come out of his office and sit on the floor in the lobby.”¹⁶⁴ The trial court applied the physical restraint enhancement.¹⁶⁵ The Sixth

153. *Ossai*, 485 F.3d at 32.

154. 461 F.3d 15 (1st Cir. 2006).

155. *Id.* at 33.

156. *Id.*

157. *Id.* at 34–35.

158. 485 F.3d 25 (1st Cir. 2007).

159. *Id.* at 31–32.

160. *Id.* at 32 (arguing that forcing the victim to his knees made the victim “more vulnerable” to what the defendant wanted).

161. *United States v. Coleman*, 664 F.3d 1047, 1050 (6th Cir. 2012).

162. 664 F.3d 1047 (6th Cir. 2012).

163. *Id.* at 1048.

164. *Id.*

165. *Id.*

Circuit upheld the imposition of the enhancement because the defendant made the victim move to a different place and stay there.¹⁶⁶ The court distinguished this situation from other jurisdictions' cases because the defendant forced the victim to move "to a place where [the defendant] could better monitor [the victim's] activities."¹⁶⁷ The court declined to adopt a "physical component" limitation to the enhancement because a victim faced with a gun is just as, if not more, restrained by the gun than if the victim was being held by the collar.¹⁶⁸ The court also declined to adopt the Ninth Circuit's "sustained focus" requirement because the Sixth Circuit "aligns with those circuits that read the text more broadly."¹⁶⁹

The Sixth Circuit has decided not to address the "difficult and as-yet unsettled question of whether the physical-restraint enhancement is properly applied to a defendant who merely aims his gun at a stationary victim and orders the victim not to go anywhere."¹⁷⁰ In *United States v. Smith-Hodges*,¹⁷¹ the defendant pointed a gun at a victim and told the victim to lie on the ground.¹⁷² In upholding the physical restraint enhancement on appeal, the court found that the defendant's behavior in this case was similar to the defendant's behavior in *Coleman*.¹⁷³ The court reasoned, "In both cases, the victim was forced at gunpoint to move to a different, more vulnerable position and maintain it until the defendant could complete the robbery."¹⁷⁴ The court discussed how the defendant's real argument on appeal seemed to be "that the physical-restraint enhancement requires an element of bodily contact or spatial confinement—in other words, something *physical*."¹⁷⁵ The court declined to expressly rule on that argument but indicated that the court disagreed with the defendant's position.¹⁷⁶ Based on its broad interpretation of the enhancement, the Sixth Circuit seems likely to allow the enhancement to be imposed on a defendant who points a gun and issues a threat.

166. *Id.* at 1050–51.

167. *Id.* at 1050.

168. *Id.* (citing *United States v. Thompson*, 109 F.3d 639, 641 (9th Cir. 1997)).

169. *Id.* (citing *United States v. Parker*, 241 F.3d 1114, 1118 (9th Cir. 2001)).

170. *United States v. Smith-Hodges*, 527 F. App'x 354, 357 (6th Cir. 2013); see *United States v. Williamson*, 530 F. App'x 402, 406 n.3 (6th Cir. 2013) (refusing to consider "whether ordering robbery victims to the ground at gun point is alone sufficient to impose a physical restraint enhancement"); *United States v. Morgan*, No. 12–CR–067, 2013 WL 4213391, at *2 (E.D. Tenn. Aug. 15, 2013) (noting that the Sixth Circuit's case law is unclear).

171. 527 F. App'x 354 (6th Cir. 2013).

172. *Id.* at 355.

173. *Id.* at 356 (citing *Coleman*, 664 F.3d at 1048).

174. *Id.*

175. *Id.* at 357.

176. See *id.*

3. Eighth Circuit

The Eighth Circuit allows the application of the physical restraint enhancement when a defendant orders a victim to move at gunpoint, even when the defendant does not move the victim to a more confining area.¹⁷⁷ In *United States v. Hutter*,¹⁷⁸ the defendant showed the victim a gun¹⁷⁹ while the victim was outside a bank and ordered the victim to unlock the bank door and walk with the defendant to the teller windows.¹⁸⁰ The defendant received the physical restraint enhancement.¹⁸¹ The circuit court upheld the defendant's sentence, finding that this case involved forced movement instead of "the proverbial 'this is a hold-up' scenario" where the victim does not move.¹⁸²

The Eighth Circuit endorses the "no alternative but compliance" standard.¹⁸³ In *United States v. Kirtley*,¹⁸⁴ the circuit court upheld the enhancement for a defendant who had displayed a gun and told victims to tie themselves up.¹⁸⁵ It did not matter that the defendant did not personally tie up the victims because the defendant's threats and gun left the victims with no alternative but to comply.¹⁸⁶

The Eighth Circuit's law is unclear on the precise question of whether pointing a gun and telling a victim not to move qualifies for the enhancement. In firearms cases, the Eighth Circuit has emphasized defendants' conduct such as moving or touching victims. However, the court probably would allow the enhancement even without that additional conduct because the court has adopted the no alternative but compliance standard. If the Eighth Circuit interprets that standard in line with the Eleventh Circuit,¹⁸⁷ a defendant who pointed a gun and issued a threat would qualify for the physical restraint enhancement.

177. See *United States v. Hutter*, 399 F. App'x 138, 140 (8th Cir. 2010) (per curiam).

178. 399 F. App'x 138 (8th Cir. 2010) (per curiam).

179. It was a toy gun, but the victim did not know. *Id.* at 138.

180. *Id.*

181. *Id.* at 139.

182. *Id.* at 140; see also *United States v. Schau*, 1 F.3d 729, 730 (8th Cir. 1993) (per curiam) (affirming imposition of the physical restraint enhancement when the defendants ordered victims at gunpoint to move into a bank vault).

183. *United States v. Kirtley*, 986 F.2d 285, 286 (8th Cir. 1993) (per curiam); see *United States v. Lee*, 570 F.3d 979, 983 (8th Cir. 2009) (finding that the physical restraint enhancement was appropriate for a defendant whose accomplice struck a victim with a handgun, leaving the victim with no alternative but compliance).

184. 986 F.2d 285 (8th Cir. 1993) (per curiam).

185. *Id.* at 285.

186. *Id.* at 286. The Eighth Circuit did not need to adopt this standard under these facts because the court could have emphasized the physical nature of the material that the defendant gave to the victims to use to tie themselves up.

187. See *supra* Section II.A.3.

The First, Sixth, and Eighth Circuits interpret the physical restraint enhancement broadly. Though the law of these circuits is somewhat uncertain, the defendant in the introduction would likely receive the physical restraint enhancement in all three circuits because of the circuits' generally broad reading of the enhancement. All three circuits certainly would apply the enhancement if a defendant pointed a gun at a victim and told the victim to move somewhere else.

III. CIRCUITS WITH OTHER APPROACHES

The Third and Ninth Circuits take a middle approach to interpreting the physical restraint enhancement. The Ninth Circuit uses a "sustained focus" standard that examines whether the defendant focused on a particular victim for a length of time.¹⁸⁸ The Third Circuit recently adopted a list of factors to use in analyzing whether to apply the physical restraint enhancement.¹⁸⁹

A. *Ninth Circuit's Sustained Focus Standard*

The Ninth Circuit developed a unique rule that allows the physical restraint enhancement to be imposed when a defendant shows "sustained focus" on a victim.¹⁹⁰ The Ninth Circuit applies this sustained focus standard when a defendant has not clearly used forcible restraint such as physically pinning a victim down or locking a victim in a closet.¹⁹¹ In *United States v. Parker*,¹⁹² the Ninth Circuit allowed the physical restraint enhancement to be applied when a defendant's accomplice pulled a victim up from the floor by her hair, but the court refused to implement the enhancement in another robbery in which the defendant's accomplice pointed a gun at a victim while ordering her to lie down.¹⁹³ This second victim was not any more restrained than other victims who are told to get down by a robber's command to everyone in a room.¹⁹⁴ Because merely pointing a gun at someone and issuing a command to get down is typical of armed bank robberies, the court reversed the defendant's sentence.¹⁹⁵

To receive the physical restraint enhancement, a defendant must have a sustained focus that lasts "long enough for the robber to direct the victim

188. *United States v. Parker*, 241 F.3d 1114, 1118–19 (9th Cir. 2001).

189. *United States v. Bell*, 947 F.3d 49, 56 (3d Cir. 2020).

190. *Parker*, 241 F.3d at 1118–19.

191. *See United States v. Crawford*, 372 F.3d 1048, 1062 (9th Cir. 2004) (en banc).

192. 241 F.3d 1114 (9th Cir. 2001).

193. *Id.* at 1118–19.

194. *Id.* at 1118.

195. *Id.* at 1118–19; *see also United States v. Hughes*, 227 F. App'x 562, 565 (9th Cir. 2007) (reversing imposition of the physical restraint enhancement when a defendant pointed a gun at a victim and ordered the victim to get on the floor).

into a room or order the victim to walk somewhere.”¹⁹⁶ In other cases, the Ninth Circuit has found a sustained focus when a defendant ordered a victim at gunpoint into a back room,¹⁹⁷ forced a victim to get down and get up repeatedly,¹⁹⁸ ordered a victim to his knees and held a gun to his head during a robbery,¹⁹⁹ and forced a victim at gunpoint to walk around an office.²⁰⁰

The Ninth Circuit would not apply the enhancement when a defendant merely points a gun and issues a command, but the circuit would allow the enhancement when a defendant points a gun at a victim and especially focuses on that victim. The defendant in the introduction would likely not receive the physical restraint enhancement for merely pointing a gun at the bank teller for a few seconds. However, if the defendant held a gun at the victim’s head and ordered the victim to move somewhere, the defendant would receive the enhancement. This approach is more expansive than the approach taken by the Second, Fifth, Seventh, and D.C. Circuits but is less expansive than the approach of the Fourth, Tenth, and Eleventh Circuits.

B. *Third Circuit’s List of Factors*

The Third Circuit recently took a unique approach by using the criteria of other circuits’ decisions to create a list of factors to use in applying the physical restraint enhancement.²⁰¹ In *United States v. Bell*,²⁰² the defendant robbed a store and received the physical restraint enhancement for pointing a toy gun, bashing a victim with the toy gun, and pushing the victim to the floor.²⁰³ In de novo review of whether the enhancement applied, the Third Circuit created a list of factors.²⁰⁴ These factors are the following:

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

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

197. *United States v. Nelson*, 137 F.3d 1094, 1112 (9th Cir. 1998).

198. *United States v. Thompson*, 109 F.3d 639, 641 (9th Cir. 1997) (holding that the enhancement requires no actual touching).

199. *United States v. Miller*, 39 F. App’x 517, 518 (9th Cir. 2002); see *United States v. Crawford*, 196 F. App’x 572, 573 (9th Cir. 2006) (affirming application of the physical restraint enhancement when a defendant put “his gun to the guard’s back, and forc[ed] the guard at gunpoint to turn around, put his hands up, and face a wall”).

200. *United States v. Albritton*, 622 F.3d 1104, 1108 (9th Cir. 2010).

201. See *United States v. Bell*, 947 F.3d 49, 56 (3d Cir. 2020).

202. 947 F.3d 49 (3d Cir. 2020).

203. *Id.* at 52–53.

204. *Id.* at 54, 56.

5. Placement in a confined space.²⁰⁵

Unlike other circuits, the Third Circuit ruled that trial courts should “balance these factors” instead of viewing any one factor as “necessarily dispositive.”²⁰⁶

In addressing the first factor, the court agreed with the Second, Fifth, Seventh, and D.C. Circuits that the restraint must “involve some physical aspect.”²⁰⁷ Looking at the second factor, the court found that exerting control did not require actual touching.²⁰⁸ For the third factor, the court adopted the “no alternative but compliance” standard used by the Eighth and Eleventh Circuits.²⁰⁹ In formulating the fourth factor, the Third Circuit adopted the durational requirement mentioned by other circuits.²¹⁰ Under this durational requirement, a mere moment of restraint is not sufficient.²¹¹ The fifth factor, placement in a confined space, came from a previous Third Circuit case.²¹²

Applying these factors to the facts in *Bell*, the Third Circuit found that there was not physical restraint.²¹³ The court reasoned that being pushed to the floor did not leave the victim with no alternative but compliance.²¹⁴ Further, the struggle lasted only a few seconds, meaning that the defendant could not have focused on the victim for a significant period of time.²¹⁵ The court indicated that the physical restraint enhancement should not apply to every defendant who has a physical encounter with a victim.²¹⁶

205. *Id.* at 56.

206. *Id.*

207. *Id.* at 56–57.

208. *Id.* at 57.

209. *Id.* at 57–58 (quoting *United States v. Copenhagen*, 185 F.3d 178, 180 (3d Cir. 1999)).

210. *Id.* at 59 (first citing *United States v. Mikalajunas*, 936 F.2d 153, 156 (4th Cir. 1991); then citing *United States v. Khleang*, 3 F. App’x 672, 675 (10th Cir. 2001); and then citing *United States v. Parker*, 241 F.3d 1114, 1118 (9th Cir. 2001)). In *Khleang*, a panel of the Tenth Circuit concluded that a trial court should look at the totality of the circumstances, including duration, when deciding whether to apply the physical restraint enhancement. 3 F. App’x at 675. However, the court in *Khleang* cited no authority for that conclusion, and the case is not binding precedent. *Id.* at 673 n.*, 675. The Fourth Circuit in *Mikalajunas* did not clearly require more than a brief restraint to apply the enhancement in all cases. See 936 F.2d at 156. *Mikalajunas* was a murder case in which the Fourth Circuit did not allow the imposition of the enhancement because the defendant’s brief restraint of the victim merged with the defendant’s stabbing of the victim. *Id.* This situation is factually distinct from the issue in *Bell* and this Note.

211. *Bell*, 947 F.3d at 59.

212. *Id.* at 60 (citing *Copenhagen*, 185 F.3d at 183).

213. *Id.* at 61.

214. *Id.*

215. *Id.*

216. *Id.*

A dissent in *Bell* disagreed with the majority's use of de novo review.²¹⁷ Using the clear error standard instead, the dissent found that the application of the physical restraint enhancement was appropriate.²¹⁸ The dissent emphasized that the defendant had repeatedly used force by shoving the victim and hitting the victim with the toy gun.²¹⁹ The dissent found that the defendant tried to create no alternative but compliance with his actions.²²⁰ The dissent also argued that the defendant had focused on the victim long enough to apply the enhancement because the defendant restrained the victim long enough to escape with stolen money.²²¹

Because of how recent the *Bell* decision is, it is unclear how the Third Circuit's case law will develop. Prior to *Bell*, the Third Circuit held a middle position between the circuits that apply the physical restraint enhancement very broadly and those that apply it narrowly. The Third Circuit had focused on whether the victim had "no alternative to compliance."²²² The court also had indicated that it may not allow the enhancement when the defendant does no more than tell victims "to stand still, kneel or lie down."²²³ *Bell* may not change the use of the enhancement in the Third Circuit because the outcome in *Bell* may have been the same under the circuit's prior analysis of whether the victim had no alternative to compliance.²²⁴

After the decision in *Bell*, the Third Circuit likely would not apply the physical restraint enhancement to the defendant in the introduction, a robber who merely pointed a gun at a victim and issued a threat. This situation would exert control over the victim and would arguably leave the victim no alternative but compliance. However, this situation would not necessarily involve physical control, focus on the victim for a period of time, or placement of a victim in a confined space. Therefore, the weight of the factors seems to be against applying the enhancement.

If the defendant ordered the bank teller at gunpoint to move somewhere, the outcome might be different. This situation would exert control over the victim, would leave the victim no alternative but

217. *Id.* at 62 (Chagares, J., concurring in part and dissenting in part).

218. *Id.* at 62–63.

219. *Id.* at 66.

220. *Id.*

221. *Id.* at 67.

222. *United States v. Greenstein*, 322 F. App'x 259, 261, 266 (3d Cir. 2009) (quoting *United States v. Copenhagen*, 185 F.3d 178, 182 (3d Cir. 1999)) (affirming imposition of the physical restraint enhancement when a defendant ordered six victims to enter a walk-in freezer and to stay there); see *United States v. Chesney*, 308 F. App'x 639, 642 (3d Cir. 2009) (finding that it was not clear error for the trial court to impose the physical restraint enhancement when the defendant "held the store manager behind the cash register and told him to go to the back room at gunpoint").

223. *Copenhagen*, 185 F.3d at 182.

224. See *Bell*, 947 F.3d at 61. *But see id.* at 66 (Chagares, J., concurring in part and dissenting in part).

compliance, would involve the defendant's focus on the victim for a significant period of time, and may place the victim in a confined space. Under these facts, the Third Circuit would probably allow the enhancement to be applied. The hypothetical analyses in this paragraph and the preceding paragraph indicate that the Third Circuit may end up with similar outcomes compared to the Ninth Circuit's outcomes.²²⁵ The Third Circuit is more liberal in its approach than the Second, Fifth, Seventh, and D.C. Circuits, but is more restrictive than the Fourth, Tenth, and Eleventh Circuits.

IV. ARGUMENTS FOR A NARROW INTERPRETATION

Courts should interpret the physical restraint enhancement narrowly because of the text of the Guidelines, the commentary about the enhancement, other sentencing options, and the American system's preference for liberty. The principles of statutory interpretation apply to interpreting the Guidelines.²²⁶ The Supreme Court explains, "Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis."²²⁷ Applying these principles of interpretation shows that the physical restraint enhancement has a narrow meaning.

A. *Plain Meaning of the Enhancement's Text*

The plain text of the physical restraint enhancement supports a narrow interpretation. Courts should interpret the enhancement according to its plain meaning.²²⁸ According to the Supreme Court, "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."²²⁹ While an application note defines "physically restrained," the physical restraint SOCs and adjustments themselves do not define the term.²³⁰ According to the *American Heritage Dictionary of the English*

225. See *supra* Section III.A.

226. *United States v. Johnson*, 155 F.3d 682, 683 (3d Cir. 1998).

227. *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006).

228. See *Edwards*, *supra* note 18, at 841 (arguing for a strict textualist approach in interpreting the Guidelines because the Sentencing Commission can easily amend them).

229. *Perrin v. United States*, 444 U.S. 37, 42 (1979); see *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 476 (1994). To determine a term's ordinary meaning, courts may look to popular and legal dictionaries. See *Spencer v. Specialty Foundry Prods. Inc.*, 953 F.3d 735, 740 (11th Cir. 2020) ("In this case, 'both popular and legal' dictionaries support our interpretation" (quoting *Rainbow Gun Club, Inc. v. Denbury Onshore, L.L.C.*, 760 F.3d 405, 409 (5th Cir. 2014))).

230. See U.S. SENT'G GUIDELINES MANUAL §§ 2B3.1(b)(4)(B), 2B3.2(b)(5)(B), 2E2.1(b)(3)(B), 3A1.3 (U.S. SENT'G COMM'N 2018). For the definition in the commentary, see *supra* text accompanying note 23.

Language, the ordinary meaning of *physical* is the following: “Of or relating to the body” and “[o]f or relating to material things.”²³¹ *Restraint* means “[t]he condition of being restrained, especially the condition of losing one’s freedom.”²³² The definition of *physical* creates some ambiguity about the meaning of “physical restraint.” On one hand, the definition could extend only to when a physical object (such as a rope) restrains by interacting directly with a victim’s body.²³³ On the other hand, the definition could include when a physical object (such as a gun) persuades a victim to limit her own bodily movement.²³⁴

Looking at the phrase “physically restrained” as a whole resolves this potential ambiguity. In other contexts, the phrase “physical restraint” means something that actually impedes physical movement. For example, in literature on police use of force, the definition of “physical force” is broad and includes using weapons and issuing verbal threats.²³⁵ However, scholars in this field classify “restraints” as a unique category of physical force, involving the use of “handcuffs, leg cuffs, and more severe restraints, such as hobbles or body cuffs.”²³⁶ These restraints touch the one being restrained. Similarly, in courtrooms, physical restraints

231. *Physical*, AM. HERITAGE DICTIONARY OF THE ENG. LANGUAGE (5th ed. 2020), <https://ahdictionary.com/word/search.html?q=physical> [<https://perma.cc/EER4-Y4W6>]; see *Physical*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/physical> [<https://perma.cc/HRH6-LZV3>]; see also Oxford Univ. Press, *Definition of Physical*, LEXICO (2020), <https://www.lexico.com/en/definition/physical> [<https://perma.cc/G2SJ-C2DX>] (“Relating to the body as opposed to the mind.”); *Physical*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining *physical* as “[o]f, relating to, or involving material things; pertaining to real, tangible objects” and “[o]f, relating to, or involving someone’s body as opposed to mind”).

232. *Restraint*, AM. HERITAGE DICTIONARY OF THE ENG. LANGUAGE (5th ed. 2020), <https://ahdictionary.com/word/search.html?q=restraint> [<https://perma.cc/S6VC-MWR7>]; see also Oxford Univ. Press, *Definition of Restraint*, LEXICO (2020), <https://www.lexico.com/en/definition/restraint> [<https://perma.cc/UX5U-UK3C>] (defining *restraint* as “[a] measure or condition that keeps someone or something under control or within limits” and a “[d]eprivation or restriction of personal liberty or freedom of movement”); *Restraint*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining *restraint* as “[c]onfinement, abridgment, or limitation”).

233. See *United States v. Garcia*, 857 F.3d 708, 713 (5th Cir. 2017).

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

235. See Joel H. Garner & Christopher D. Maxwell, *Measuring the Amount of Force Used by and Against the Police in Six Jurisdictions*, in *USE OF FORCE BY POLICE* 25, 36 (Nat’l Inst. of Just. & Bureau of Just. Stat., Dep’t of Just. eds., 1999), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=809> [<https://perma.cc/4PU4-L7MP>] (“[P]hysical force includes any arrest in which any weapon or weaponless tactic was used.”); William Terrill, *Police Use of Force and Suspect Resistance: The Micro Process of the Police-Suspect Encounter*, 6 *POLICE Q.* 51, 54 (2003).

236. Garner & Maxwell, *supra* note 235, at 33; see Vivian B. Lord, *Police Responses in Officer-Involved Violent Deaths: Comparison of Suicide by Cop and Non-Suicide by Cop Incidents*, 17 *POLICE Q.* 79, 86 (2014) (separating commands, “low-lethal or physical restraints,” and lethal force into separate categories); Terrill, *supra* note 235, at 73 (using “physical restraint” to mean a category of force involving “pat downs, handcuffing, and firm grips”).

touch defendants.²³⁷ In medical contexts, physical restraint involves something “attached or adjacent to” the person being restrained.²³⁸ A similar definition applies in residential child care.²³⁹ Finally, in the study of laboratory animals, “[p]hysical restraint is the use of manual or mechanical means to limit some or all of an animal’s normal movement.”²⁴⁰ The ordinary, contemporary, common understanding of “physical restraint” is a physical obstacle, usually something that touches the one being restrained.

The Sentencing Commission must have meant something by *physically*,²⁴¹ or else the Sentencing Commission would have simply used *restrained* with no modifier. As the Seventh Circuit points out, a broad interpretation of the enhancement allows purely psychological restraint.²⁴² A gun pointed at one’s head is a psychological restraint.²⁴³ Fear of physical consequences keeps a victim from moving in that situation, not a restraint that literally limits movement.²⁴⁴ To give meaning to the word *physical*, courts should interpret the enhancement narrowly.

B. *Commentary in the Guidelines*

The listed examples in the commentary in the Guidelines also support not applying the enhancement to a threat at gunpoint. The Guidelines

237. See Joan M. Krauskopf, *Physical Restraint of the Defendant in the Courtroom*, 15 ST. LOUIS U. L.J. 351, 352, 355 (1971) (referring to handcuffs, chains, and shackles).

238. Julie A. Braun, *Legal Aspects of Physical Restraint Use in Nursing Homes*, HEALTH LAW., Jan. 1998, at 10 (“‘Physical restraints’ are defined as ‘any manual method or physical or mechanical device, material, or equipment attached or adjacent to the resident’s body that the individual cannot remove easily which restricts freedom of movement or normal access to one’s body.’”); A.D. Smith & Martin Humphreys, *Physical Restraint of Patients in a Psychiatric Hospital*, 37 MED. SCI. & L. 145, 145 (1997) (“Physical measures may include actual physical restraint, when a member of staff directly applies force to a patient, and situational restraint, when the patient is removed to a different environment.”).

239. See Laura Steckley, *Catharsis, Containment and Physical Restraint in Residential Child Care*, 48 BRIT. J. SOC. WORK 1645, 1645–46 (2018) (“[P]hysical restraint is defined as ‘an intervention in which staff hold a child to restrict his or her movement’” (quoting JENNIFER DAVIDSON ET AL., HOLDING SAFELY: A GUIDE FOR RESIDENTIAL CHILD CARE PRACTITIONERS AND MANAGERS ABOUT PHYSICALLY RESTRAINING CHILDREN AND YOUNG PEOPLE, at viii (2005))).

240. COMM. FOR THE UPDATE OF THE GUIDE FOR THE CARE AND USE OF LAB’Y ANIMALS, NAT’L RSCH. COUNCIL OF THE NAT’L ACADS., GUIDE FOR THE CARE AND USE OF LABORATORY ANIMALS 29 (8th ed. 2011), <https://grants.nih.gov/grants/olaw/Guide-for-the-Care-and-Use-of-Laboratory-Animals.pdf> [<https://perma.cc/Z2S7-DZ76>].

241. See *United States v. Anglin*, 169 F.3d 154, 164 (2d Cir. 1999) (explaining that one can restrain with physical, mental, or moral force).

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

243. See *id.*

244. Cf. *United States v. Joe*, 696 F.3d 1066, 1072 (10th Cir. 2012) (lamenting how the Tenth Circuit had “wrenched ‘physically’ from its original place so that it now seems to describe the conduct or the inner thoughts of the *victim*.”).

define “physically restrained” in section 1B1.1 application note 1(L) as “the forcible restraint of the victim such as by being tied, bound, or locked up.”²⁴⁵ This commentary is authoritative for interpreting the enhancement as long as the commentary does not violate the Constitution or a federal statute and is not “inconsistent with, or a plainly erroneous reading of,” the enhancement.²⁴⁶ Though the listed examples in the commentary do not comprise an exclusive list, the examples should guide interpretation of the enhancement.²⁴⁷

All the examples involve some physical means that allow an offender to keep a victim in a certain place even after the defendant leaves an area. A victim who is tied up or locked in a closet is restrained for a period of time until the victim or someone else can remove the restraint.²⁴⁸ In contrast, when a defendant tells a victim at gunpoint to freeze, that person is certainly not physically restrained after the defendant departs. The victim may stay in place out of fear, but the victim does not have to do anything, such as untying a rope or unlocking a door, to be free. Because of this fundamental difference between the examples in the commentary and threatening a person at gunpoint, courts should not include the threat at gunpoint as a physical restraint.²⁴⁹

The commentary creates some ambiguity by using “forcible restraint” in the definition of “physically restrained.” *Forcible* means “[e]ffected by force or threat of force against opposition or resistance.”²⁵⁰ By including the threat of force, this definition is much broader than the definition of *physical*. However, if “forcible restraint” is interpreted too broadly, it becomes impermissibly inconsistent with the plain text of the physical restraint enhancement.

For example, consider the “express threat of death” enhancement. After the publication of the 1993 Guidelines, circuit courts split over the meaning of a two-level enhancement for bank robbers who made express threats of death.²⁵¹ The commentary on the enhancement described a broad array of actions that would create significant fear in a reasonable

245. U.S. SENT’G GUIDELINES MANUAL § 1B1.1 cmt. n.1(L) (U.S. SENT’G COMM’N 2018) (emphasis omitted); *see id.* § 2B3.1 cmt. background (“The guideline provides an enhancement for robberies where a victim . . . was physically restrained by being tied, bound, or locked up.”).

246. *Stinson v. United States*, 508 U.S. 36, 38 (1993).

247. *See United States v. Anglin*, 169 F.3d 154, 157, 163–64 (2d Cir. 1999) (vacating imposition of the physical restraint enhancement because the defendant’s ordering victims at gunpoint to lie down was “materially different” conduct from the commentary’s examples).

248. *See id.* at 164.

249. *See id.*

250. *Forcible*, BLACK’S LAW DICTIONARY (11th ed. 2019); *see Forcible*, AM. HERITAGE DICTIONARY OF THE ENG. LANGUAGE (5th ed. 2020), <https://ahdictionary.com/word/search.html?q=forcible> [<https://perma.cc/ZWT4-X8RY>] (defining *forcible* as “[e]ffected against resistance through the use of force”).

251. *Edwards*, *supra* note 18, at 830.

person, but the actual language of the enhancement was “an express threat of death.”²⁵² Some circuits followed the commentary and applied the enhancement broadly.²⁵³ Disagreeing, the Sixth Circuit in *United States v. Alexander*²⁵⁴ ruled that the Sentencing Commission’s commentary on the meaning of “express threat of death” was invalid because it conflicted with the actual text of the enhancement.²⁵⁵ The court reasoned that allowing implied threats of death to qualify for the enhancement would remove all meaning from the word *express*.²⁵⁶ In 1997, the Sentencing Commission resolved the circuit split by amending the enhancement’s text to remove *express*.²⁵⁷

This same problem applies to a broad interpretation of *forcible*. The Eleventh Circuit’s interpretation of *forcible* is especially subject to this critique. In *Victor*, the defendant had no gun—no physical item—to restrain his victim.²⁵⁸ The defendant’s threat was purely psychological.²⁵⁹ He restrained the victims by making them believe that he had a gun.²⁶⁰ The defendant’s threat may have been forcible, but it was not physical. If “forcible restraint” includes psychological threats with no physical element, the commentary conflicts with the plain text of the enhancement and should be held invalid. However, allowing the commentary’s examples to guide the interpretation of “physical restraint” and “forcible restraint” eliminates the conflict. The commentary favors limiting the enhancement to something that binds or locks up a victim.

C. Existing Sentencing Options

Applying the physical restraint enhancement to defendants who threaten victims with firearms is unnecessary. Defendants who show or point a firearm already face large enhancements for brandishing or otherwise using a gun. Typically, when a defendant uses a firearm during a robbery, the defendant either will face a 5- to 7-level enhancement

252. *Id.* (quoting U.S. SENT’G GUIDELINES MANUAL § 2B3.1(b)(2)(F) & cmt. n.6 (U.S. SENT’G COMM’N 1993) (amended 1997)).

253. *See, e.g.*, *United States v. Hunn*, 24 F.3d 994, 995 (7th Cir. 1994) (affirming imposition of the express threat of death enhancement when the defendant kept his hand in his coat and stated that he had a gun).

254. 88 F.3d 427 (6th Cir. 1996), *superseded by rule*, U.S. SENT’G GUIDELINES MANUAL § 2B3.1(b)(2)(F) (U.S. SENT’G COMM’N 1997).

255. *Id.* at 431 (quoting U.S. SENT’G GUIDELINES MANUAL § 2B3.1(b)(2)(F) (U.S. SENT’G COMM’N 1993) (amended 1997)).

256. *Id.*

257. *Edwards*, *supra* note 18, at 832.

258. *United States v. Victor*, 719 F.3d 1288, 1290 (11th Cir. 2013).

259. *See id.* (“The fact that Victor was not actually armed with a gun at the time is immaterial—he intended to and did make the lobby employee *believe* he had one so that she was forced to comply.” (emphasis added)).

260. *Id.*

under the robbery guideline²⁶¹ or will face a mandatory minimum consecutive sentence of five, seven, or ten years under 18 U.S.C. § 924(c) for using or carrying a firearm during a crime of violence.²⁶² In circuits that interpret physical restraint broadly, a defendant will often receive a firearm enhancement or a separate firearm conviction in addition to a physical restraint enhancement.²⁶³

Courts impose the “otherwise used” firearm enhancement for conduct that is exactly the same as the conduct that qualifies for the physical restraint enhancement. In the Eleventh Circuit, defendants qualify for the “otherwise used” enhancement when they point firearms at specific victims and issue threats or orders “to create fear so as to facilitate compliance with a demand.”²⁶⁴ Other circuits agree.²⁶⁵ This standard sounds the same as the Eleventh Circuit’s standard for imposing the physical restraint enhancement.²⁶⁶

Though applying the physical restraint enhancement to these firearms cases may not qualify as impermissible double-counting,²⁶⁷ the

261. See U.S. SENT’G GUIDELINES MANUAL § 2B3.1(b)(2) (U.S. SENT’G COMM’N 2018) (imposing a 5-level enhancement for brandishing or possessing a firearm, a 6-level enhancement for otherwise using a firearm, and a 7-level enhancement for discharging a firearm).

262. See 18 U.S.C. § 924(c)(1)(A) (imposing a mandatory minimum sentence that depends on the defendant’s specific conduct), *invalidated in part by* United States v. Davis, 139 S. Ct. 2319 (2019). The mandatory minimum sentence is even longer in some circumstances. *Id.* § 924(c)(1)(B)–(C). The Supreme Court recently held the residual clause defining a crime of violence in § 924(c)(3)(B) to be unconstitutional. See *Davis*, 139 S. Ct. at 2323–24, 2336. However, § 924(c)(3)(A), the elements clause, is still constitutional and provides another way to define a crime of violence that can serve as a predicate offense for a prosecution under § 924(c). See *In re Pollard*, 931 F.3d 1318, 1320 (11th Cir. 2019) (per curiam) (noting that an armed robbery of a credit union is a crime of violence under the constitutional elements clause); *Steiner v. United States*, 940 F.3d 1282, 1285 (11th Cir. 2019) (per curiam) (holding that carjacking is a crime of violence under the constitutional elements clause), *cert. denied*, 141 S. Ct. 320 (2020).

263. See *United States v. Pearson*, 211 F.3d 524, 527 (10th Cir. 2000) (affirming imposition of the physical restraint enhancement and conviction under § 924(c) when the defendant held victims at gunpoint); *United States v. Rucker*, 178 F.3d 1369, 1371, 1373 (10th Cir. 1999) (affirming imposition of the physical restraint enhancement and the “otherwise used” firearm enhancement when the defendant held victims at gunpoint); *United States v. Wilson*, 198 F.3d 467, 468–69 (4th Cir. 1999); *United States v. Nelson*, 137 F.3d 1094, 1112 (9th Cir. 1998).

264. *United States v. Hano*, 922 F.3d 1272, 1296–97 (11th Cir. 2019) (quoting *United States v. Yelverton*, 197 F.3d 531, 534 (D.C. Cir. 1999)), *cert. denied*, 140 S. Ct. 488 (2019); see *United States v. Wooden*, 169 F.3d 674, 676 (11th Cir. 1999) (per curiam) (holding that the threat can be implied by positioning a gun one-half inch from the victim’s head).

265. See *United States v. Albritton*, 622 F.3d 1104, 1107 (9th Cir. 2010); *United States v. Dunigan*, 555 F.3d 501, 505 (5th Cir. 2009); *United States v. Bolden*, 479 F.3d 455, 463 (6th Cir. 2007); *United States v. Paine*, 407 F.3d 958, 964 (8th Cir. 2005).

266. See *supra* note 148 and accompanying text.

267. See *Pearson*, 211 F.3d at 527; *Rucker*, 178 F.3d at 1371, 1373. The Guidelines tend to allow using the same conduct to support multiple enhancements or to support an enhancement and an element of the underlying offense. See *United States v. Cook*, 850 F.3d 328, 334 (7th Cir.

application is unnecessary.²⁶⁸ Pointing a gun and ordering a victim not to move is serious, harmful conduct. Keeping a victim at gunpoint at the scene of a crime makes the victim more vulnerable and generates terror.²⁶⁹ However, the steep firearm enhancements and long mandatory minimum sentences of § 924(c) account for that danger.²⁷⁰ The Sentencing Commission may want to punish a defendant who points a gun at a victim and says “don’t move” more harshly than a defendant who points a gun at a victim and says “get out of here.”²⁷¹ If so, the Sentencing Commission should make that standard explicit. This Note instead urges the Sentencing Commission to explicitly exclude that kind of firearm use from the physical restraint enhancement. Applying a two-level enhancement for physical restraint on top of a firearm enhancement or conviction is redundant and unnecessary.²⁷²

D. Preference for Liberty

The preference for liberty found in the American system should guide courts in interpreting the physical restraint enhancement, and the Sentencing Commission in revising it. If a court concludes that the arguments for a broad interpretation of “physical restraint” are as strong as the arguments for a narrow interpretation, the rule of lenity requires erring on the side of defendants. A plurality of the Supreme Court explained, “The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them.”²⁷³ The rule

2017) (“[W]e presume that this [double] counting was permissible absent an indication to the contrary in the guidelines.”). The Guidelines sometimes explicitly require applying two enhancements for the same conduct. See U.S. SENT’G GUIDELINES MANUAL § 1B1.1 cmt. n.4(B) (U.S. SENT’G COMM’N 2018).

268. Cf. *United States v. Taylor*, 620 F.3d 812, 814–16 (7th Cir. 2010) (noting that it may be better for trial judges to choose not to apply the physical restraint enhancement when the underlying facts relate to the use of a firearm), *disapproved of on other grounds by* *United States v. Herman*, 930 F.3d 872 (7th Cir. 2019); *United States v. Crawford*, 372 F.3d 1048, 1081 (9th Cir. 2004) (en banc) (Kleinfeld, J., concurring) (“A more appropriate focus of inquiry would be upon whether restraint by a gun is covered by the ‘using’ and ‘brandishing’ adjustments . . .”).

269. See *United States v. Smith-Hodges*, 527 F. App’x 354, 356 (6th Cir. 2013).

270. Cf. *Crawford*, 372 F.3d at 1081 (Kleinfeld, J., concurring) (comparing the five- or six-level firearm enhancements with the “mere two level adjustment for physical restraint”).

271. See *Rucker*, 178 F.3d at 1373 (arguing in dicta that the latter defendant would not physically restrain the victim).

272. If a defendant’s firearm use or psychological coercion is particularly egregious, the trial judge can impose a sentence above the advisory Guidelines range. See 18 U.S.C. § 3553(a)(1); *Herman*, 930 F.3d at 877. It is unlikely that a defendant’s using a firearm and issuing a threat would be unusually egregious compared to similar defendants because such conduct is typical of armed robberies. See *United States v. Perry*, 743 F. App’x 617, 619 (6th Cir. 2018); *United States v. Anglin*, 169 F.3d 154, 165 (2d Cir. 1999).

273. *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion), *superseded by statute*, Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1618.

applies when a court has used every means of determining the meaning of a statute, but a “grievous ambiguity” remains.²⁷⁴ The rule may apply similarly to a grossly ambiguous guideline.²⁷⁵

The rule of lenity can serve as an alternative rationale for a sentencing opinion favorable to the defendant.²⁷⁶ For example, in *United States v. Leal-Felix*,²⁷⁷ the Ninth Circuit first used normal interpretative methods to find that the intervening arrest enhancement in the Guidelines does not include citations.²⁷⁸ After arguing for its interpretation, the court noted that, even if there were strong arguments against its interpretation, the rule of lenity would lead to “the same result.”²⁷⁹ Similarly, if “physical restraint” has two equally valid interpretations, the enhancement is ambiguous. If so, courts should err on the side of the defendant’s liberty.

Further, absent a specific Congressional directive, the Sentencing Commission should err on the side of liberty. The parsimony clause of 18 U.S.C. § 3553(a) guides the Sentencing Commission and requires courts to impose a “sentence sufficient, but not greater than necessary.”²⁸⁰ Professor Shon Hopwood argues, “The parsimony sentencing principle embodied in § 3553(a) is a recognition that courts should err on the side of a citizen’s liberty—similar to how the due process reasonable doubt standard or the rule of lenity places a thumb on the scale in favor of defendants.”²⁸¹ These principles indicate that the Guidelines should not be a “one-way ratchet” increasing sentences.²⁸² Because defendants who use firearms already face long prison sentences and because the government should favor liberty, the Sentencing Commission should clarify that the physical restraint enhancement does not apply to defendants who do no more than point a gun and issue a threat.

274. *Shaw v. United States*, 137 S. Ct. 462, 469 (2016) (quoting *Muscarello v. United States*, 524 U.S. 125, 138–39 (1998)). *But see* *United States v. R.L.C.*, 503 U.S. 291, 307 (1992) (Scalia, J., concurring) (“[I]t is not consistent with the rule of lenity to construe a textually ambiguous penal statute against a criminal defendant on the basis of legislative history.”).

275. *United States v. Boucha*, 236 F.3d 768, 775 (6th Cir. 2001); *see also* *United States v. Simpson*, 319 F.3d 81, 86 (2d Cir. 2002) (joining the Fourth, Eighth, and Ninth Circuits in holding that the rule of lenity applies to the Guidelines while noting that the Fifth and Seventh Circuits disagree). *But see* *United States v. Wright*, 607 F.3d 708, 716 (11th Cir. 2010) (Pryor, J., concurring) (arguing that the rule of lenity should not affect interpretation of the advisory Guidelines); Phillip M. Spector, *The Sentencing Rule of Lenity*, 33 U. TOL. L. REV. 511, 512 (2002) (arguing that the rule of lenity “makes little sense in the sentencing context”).

276. *United States v. Leal-Felix*, 665 F.3d 1037, 1044 (9th Cir. 2011) (en banc).

277. 665 F.3d 1037 (9th Cir. 2011) (en banc).

278. *Id.* at 1038–40.

279. *Id.* at 1044.

280. 18 U.S.C. § 3553(a).

281. Hopwood, *supra* note 16, at 94.

282. Bennett, *supra* note 3, at 20.

CONCLUSION

Courts should interpret the physical restraint enhancement narrowly. Circuit courts have reached several conclusions about how to interpret this enhancement. The First, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits should reevaluate their reading of the enhancement. Their current broad interpretation ignores the ordinary, contemporary, common meaning of “physically restrained” and relies too heavily on the commentary’s use of the word *forcible*. These circuits allow trial judges to impose the physical restraint enhancement on defendants who did not do anything similar to the examples in the application note, such as tying or locking up a victim. The Ninth and Third Circuits should also reconsider their approaches. Those circuits allow imposing the enhancement on a defendant who orders a victim to move somewhere at gunpoint. But forced movement is not part of the physical restraint enhancement’s text or application note. The text also does not include a “sustained focus” standard or a list of factors. If these eight circuits do not change, trial judges in those circuits should correctly calculate the Guidelines range with the physical restraint enhancement but consider varying downward based on the nature and circumstances of the offense.

Ultimately, the Sentencing Commission should clarify the enhancement. The Sentencing Commission should delete *forcible* from the application note that defines “physically restrained” because *forcible* creates disagreement and is much broader than *physical*. Because other enhancements and crimes account for the harms of using firearms, the Sentencing Commission should specify that the physical restraint enhancement is limited to conduct highly similar to the examples in the application note. The enhancement should apply only when a defendant restrains a victim by using physical means that touch the victim or by confining the victim in an apparently locked room or other restrictive area. The Sentencing Commission should emphasize that psychological coercion and the victim’s fear are irrelevant to whether the victim is *physically* restrained. Even if the Sentencing Commission disagrees with this Note’s conclusions, the Sentencing Commission should clarify the enhancement to resolve the current circuit split.