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THIS IS YOUR CAPTAIN SPEAKING, PLEASE REMAIN PHYSICALLY
RESTRAINED WHILE THE ROBBERY IS IN PROGRESS

*Conner J. Purcell**

ABSTRACT

This note analyzes the current circuit split over the application of the “Physical Restraint” sentence enhancement as applied to the crime of robbery. In the first camp, the circuit courts apply a broad or *constructive* meaning of physical restraint: allowing words or demands with the use of a firearm to trigger the enhancement. In many cases, the courts focus on the victim’s reaction to the perpetrator rather than the perpetrator’s actual conduct, suggesting psychological restraint rather than physical restraint. In the second camp, the circuit courts apply a plain meaning interpretation of physical restraint. These cases routinely find that the use of threats or demands in conjunction with a firearm during the course of a robbery is insufficient to trigger the physical restraint sentencing enhancements.

The note opens with a hypothetical to set the stage, discusses the history and mechanics of the Federal Sentencing Guidelines, and then examines the relevant cases of each circuit. Further, this note advances three primary arguments for a plain language interpretation of “physical restraint.” First, the word “physical” modifies the verb “restraint” thereby limiting imposition of the enhancement to types of restraint that are in fact physical. Second, the sentencing enhancements for threats of death and use of deadly or dangerous instrumentalities appear in the same section as the physical restraint

* J.D. Candidate 2022, Touro College Jacob D. Fuchsberg Law Center; The State University of New York at Albany, B.A. in Psychology, 2015. This Note is dedicated to my dear friends Kyle Webb and Michael LoRusso who passed on to the other side; gone but not soon forgotten. Additionally, I would like to thank my Note Editors Alina Ladyzhinskaya and Jennifer Covais, my faculty advisor the Honorable Mark Cohen, and of course, the woman who makes Law Review happen, Professor Rena Sepowitz. Her dedication and commitment to her students, staffers, and the Touro Law Center is something to be revered and something I will always cherish.

enhancement and would more adequately account for the type of behavior currently being scrutinized under the physical restraint enhancement in certain circuit courts. Thus, circuits of the first camp are applying the incorrect enhancement. Third, permitting reclassification of conduct through broad interpretation in order to trigger the physical restraint enhancement approaches the outer limits of the rule announced in *Blockburger v. United States*.¹ Additionally, the analysis section of the note proposes an amendment to the sentencing guidelines to account for the psychological restraint which circuits of the first camp have improperly classified as physical.

Ultimately, the note argues for national adoption of the Second Circuit's test in *United States v. Taylor*,² as the proper method for determining whether physical restraint has occurred to ensure appropriate application of the sentencing enhancement. Applying the *Taylor* Test to the opening hypothetical, it becomes clear that the offender's conduct would not trigger the sentencing enhancement.

The note concludes with an overview of the Sentencing Guidelines' original goal of bringing national uniformity to sentencing across the nation and discusses how the differences in interpretation have led to the opposite result. Finally, the note once again proposes the national adoption of *Taylor* in order to balance uniformity with proportionality and give effect to the notion that "words should mean something."³

¹284 U.S. 299, 304 (1932).

²961 F.3d 68, 78 (2d Cir. 2020).

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

I. INTRODUCTION

It is a Friday afternoon, and you head to the bank to cash your paycheck before heading home for what you hoped to be a relaxing weekend. While waiting in line for a teller, a bank robber bursts in through the door. The robber shouts “gimme the loot! gimme the loot!”⁴ while brandishing a firearm. Your heart is racing as the robber starts making demands and begins moving occupants around the bank in furtherance of her objective. While the bank teller fills a paper bag with unmarked bills, the robber turns to you. She points her firearm at you and demands that you stand on one leg and hop up and down. Although a strange request, you comply under the assumption that the robber is here for the money and not to harm you. You hop up and down on one leg for what feels like an eternity but what is less than two minutes in real time. The teller finishes filling the robber’s bag with money and hands it to the robber who departs hastily. The robber is in and out in under five minutes and you leave physically unharmed, untouched, and *unrestrained*.

Before reading any further, ask yourself: what does “physical restraint” mean? If someone pointed their finger at you and said sit down, would you? Would you feel “physically restrained” had this demand been made in an aggressive manner? What if instead of a finger, it was a knife or a firearm? You may be inclined to be more attentive to the demands of an aggressor who threatens the use of lethal force. However, would such a demand render one “physically restrained,” such that movement was not a possibility?

The Federal Sentencing Guidelines (“Guidelines”) do not present a clear answer to these questions, thus resulting in a federal circuit court split as to what “physical restraint” means.⁵ Under the current Guidelines, section 2B3.1(b)(2) enumerates fact-specific conduct of an offender which may subject her to enhancements or increases in her sentence.⁶ The application notes of section 1B1.1(L)

⁴ THE NOTORIOUS B.I.G., GIMME THE LOOT (Bad Boy & Arista Records 1994) (an ode to the greatest of all time).

⁵ See generally U.S. SENT’G GUIDELINES MANUAL, § 2B3.1. (U.S. SENT’G COMM’N 2021) [hereinafter *Guidelines*]; see also *Taylor*, 961 F.3d at 78 (outlining the current circuit split on the issue of whether the physical restraint enhancement provision requires actual physicality or if “psychological coercion of a gun is enough to constitute physical restraint.”).

⁶ U.S. SENT’G GUIDELINES MANUAL § 2B3.1(b)(2), (U.S. SENT’G COMM’N 2021).

define physical restraint as “the forcible restraint of the victim such as by being tied up, bound, or locked up.”⁷ Subsection (b)(4)(B) provides for an enhancement of two levels if the offender physically restrained any person to facilitate the commission of the offense or to facilitate an escape.⁸ The plain language of the Guidelines indicates that an offender is required to tether, bind, or lock away a victim in order to trigger the enhancement’s applicability. In other words, the prevention of movement by physical contact is necessary to trigger the enhancement. However, this is where the circuit courts diverge. The first camp, comprised of the First, Fourth, Ninth, Tenth and Eleventh Circuit courts, recognize a triggering of the enhancement provision when an offender makes threats using a deadly instrument such as a firearm.⁹ These circuits reason that a weapon accompanied by a threat engenders a constructive physical restraint on the victim.¹⁰ The second camp, comprised of the Second, Fifth, Seventh, D.C., and the reformed Ninth Circuit courts, generally rely on a definition of physical restraint consistent with a plain language reading of the Guidelines.¹¹

This Note supports the national adoption of the second camp’s position, more specifically the three-part test set forth by the Second Circuit in *United States v. Taylor*.¹² This test stays true to the notion that “[w]ords should mean something.”¹³ In support of this position,

⁷ *Id.* § 1B1.1.(L) cmt. background.

⁸ *Id.* § 2B3.1.(b)(4)(B).

⁹ See *infra* Section II(A) (this section contains cases from circuits that apply “constructive physical restraint” as the triggering the enhancement provision).

¹⁰ See *United States v. Dimache*, 665 F.3d 603, 606 (4th Cir. 2011).

¹¹ See *infra* Section II(B) (this section contains cases from circuits that apply true physical restraint as the triggering requirement of the enhancement provisions).

¹² 961 F.3d 68 (2d Cir 2020):

First, any restraint must be ‘physical.’ While ‘restraint’ is a condition capable of being brought about by a number of forces,’ the Sentencing Commission expressed ‘a more precise concept’ by including the word ‘physical’-‘an adjective which modifies (and hence limits) the noun ‘restraint.’ ‘The most pertinent definition of ‘physical’ is ‘of the body as opposed to the mind, as, physical exercise.’...Second, we have distinguished between qualifying physical ‘restraint’ and nonqualifying physical ‘force.’ ‘[M]ere physical contact with the victim does not inevitably amount to physical restraint.’ Notably, inflicting bodily injuries during a robbery is dealt with as a separate enhancement...Third, given that the restraint must facilitate rather than constitute the offense, it must be more than a ‘direction to move [that] is typical of most robberies.’

Id. at 78-79 (internal citations omitted).

¹³ *United States v. Herman*, 930 F.3d 872, 876 (7th Cir. 2019).

this Note will advance three primary arguments: First, use of the word “physical,” as opposed to “mental” or “emotional,” tends to show that physical modifies “restraint”¹⁴ and limits imposition of the enhancement to scenarios where the offender uses physical contact to restrict the victim’s freedom of movement in furtherance of the commission of the crime. Second, section 2B3.1 of the Guidelines contains alternate provisions which impose sentencing enhancements for both threats of death and the use of deadly or dangerous instrumentalities, thus the first camp is utilizing the wrong enhancements. Third, permitting reclassification and reassignment of the same conduct to trigger the physical restraint enhancement provision through a broad interpretation of physical restraint approaches the outer limits of a similar premise to the rule announced in *Blockburger*.¹⁵

To date, the Supreme Court has denied certiorari on this issue, leading not only to a split among the circuits generally, but also to different reasoning behind the circuits that do agree with each other. This split has undermined the original intent of the sentencing

¹⁴ *Taylor*, 961 F.3d at 78; *United States v. Garcia*, 857 F.3d 708, 713 (5th Cir. 2017) (both showing that a plain language reading of section 2B3.1. would indicate that the word “restraint” is modified by the adjective “physical” which imposes limitation as to only physical restraints within the context of the statute) (citing *U.S. v. Anglin*, 169 F.3d 154, 164 (2d Cir. 1999)).

¹⁵ *See Blockburger v. United States*, 284 U.S. 299, 304 (1932) (“The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.”). *Id.*

Applying this rule to the premise above, we see that essentially either the threat of death enhancement or “constructive” physical restraint enhancement could be triggered by proof of virtually the same facts. For example (1) a robbery occurred, (2) during the commission of that robbery the offender used a firearm thus triggering (b)(2)(A-E), (3) the offender pointed the firearm at the victim such that the (a) victim was instilled with a reasonable fear of death (thus triggering (b)(2)(F) and the (b) victim was physically restrained because the use of the firearm instilled a reasonable fear of death (thus triggering (b)(2)(F) and (b)(4)(B)). Under this example, if applied in Circuit Courts finding for constructive physical restraint, both the physical restraint enhancement and threat of death enhancement could be triggered by virtually identical conduct and without the proof of an additional fact.

Guidelines which is to assign consistent sentences to similar or like criminal acts and decrease sentencing disparities.¹⁶

This Note will be divided into six sections. Section II will provide a background on the enactment and subsequent changes to the Guidelines based on constitutional challenges.¹⁷ Section III will analyze the case law of the circuits which apply constructive physical restraint while Section IV will discuss the case law of circuits which apply a plain language meaning of physical restraint.¹⁸ Section V will advance a national adoption of the Second Circuit's three-part test.¹⁹ Finally, Section VI will conclude the Note, with some final remarks on overarching policy considerations.²⁰

II. FEDERAL SENTENCING GUIDELINES

A. Background

In 1984, Congress passed the Sentencing Reform Act,²¹ and created the United States Sentencing Commission.²² The Commission was tasked with developing sentencing Guidelines for judges to use when sentencing federal criminal offenders.²³ Until 2005, the federal Sentencing Guidelines, as developed by the Commission, were binding on federal courts by means of congressional statute.²⁴ However, in *United States v. Booker*,²⁵ the Supreme Court found the mandatory nature of the sentencing Guidelines to be unconstitutional.²⁶ In *Booker*, the district court conducted a separate post-trial sentencing

¹⁶ U.S. SENT'G GUIDELINES MANUAL, Ch. 1, Pt. A, Subpt. 1, § 3, The Basic Approach: Policy Statement (U.S. SENT'G COMM'N 2021).

¹⁷ *Infra* Section II.

¹⁸ *Infra* Sections III & IV.

¹⁹ *Infra* Section V.

²⁰ *Infra* Section IV.

²¹ *See* Sentencing Reform Act, 18 U.S.C. § 3551 (1984).

²² U.S. SENT'G GUIDELINES MANUAL, Ch. ONE, Pt. A, Subpt. 2. (U.S. SENT'G COMM'N 2021).

²³ *Id.*

²⁴ 18 U.S.C. § 3553(b)(1) (“[T]he court [*shall*] impose a sentence of the kind, and within the range, [referred to in the guidelines].” *emphasis added*).

²⁵ 543 U.S. 220 (2005).

²⁶ *See id.* at 265-67 (showing the Supreme Court excising subsection (b) of 18 U.S.C. § 3553, which as written, compelled the sentencing judge to impose a sentence within the range set by the Guidelines, thus making them mandatory).

hearing where additional facts were discovered by a preponderance of the evidence and were never presented to the jury.²⁷ These additional facts effectively mandated the sentencing judge to impose a sentence nearly ten years longer than would have been applicable if relying only on facts proved beyond a reasonable doubt to the jury.²⁸ The Court found this sentence violative of the Sixth Amendment principles: a fact, which increases an offender's sentence beyond the maximum sentencing range, must be proved beyond a reasonable doubt to a jury, with the exception of prior convictions.²⁹ The Court also took the opportunity to strike down the subsection that made the Guidelines mandatory, which effectively made the Guidelines advisory in nature.³⁰ A monumental case in its own right, *Booker* was the third installment of the Supreme Court's trilogy on the Sixth Amendment issue posed by mandatory sentencing schemes and judicial fact finding.³¹ In the *Booker* holding, the Court affirmed the principles set forth in *Apprendi*,³² and *Blakely*,³³ that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury

²⁷ *Id.* at 226.

²⁸ *Id.*

²⁹ *Id.* at 232.

³⁰ *Id.* at 259-61.

³¹ See *Apprendi v. New Jersey*, 530 U.S. 466 (2000); see also *Blakely v. Washington*, 542 U.S. 296 (2004).

³² *Booker*, 543 U.S. at 227-29 (citing *Apprendi*, 530 U.S. at 468-90 and showing the Supreme Court's holding that a New Jersey hate crime statute was unconstitutional. Under this statute an offender's sentence would be extended beyond the statutory maximum, if the judge found by a preponderance of the evidence, that the offender's intent "was to intimidate his victim based on the victim's particular characteristic." The Supreme Court found this to violate the Sixth Amendment principle, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.").

³³ *Booker*, 543 U.S. at 227-29 (citing *Blakely*, 542 U.S. at 300-05 and showing the Supreme Court's reversing a sentence whereby the sentencing judge exceeded the permissible sentencing range imposed by statute on the basis of facts not found by the jury. Here, the judge's additional ninety-month increase was justified by facts found in a separate evidentiary hearing rather than those found by a jury. Following the same principle from *Apprendi*, the Supreme Court determined the sentencing judge's upward departure from the statutory maximum was violative of the Sixth Amendment).

beyond a reasonable doubt.”³⁴ In a separate opinion authored in part by Justice Stevens, the Court addressed the sections of the statute which “were a necessary condition of the constitutional violation.”³⁵ Finding most of the statute valid, the Court excised only the subsections of the statute that were necessary to cure the constitutional violation, namely, 18 U.S.C. § 3553(b)(1) and 18 U.S.C. § 3742(e).³⁶ These excisions effectively made the Guidelines advisory rather than mandatory³⁷ and the standard of review on appeal would be “reasonableness.”³⁸

Although the Guidelines are now advisory, sentencing judges “must consult those Guidelines and take them into account when sentencing.”³⁹ As noted in *Booker*, the departure from mandatory to advisory has allowed the Guidelines to remain largely intact without violating constitutional rights, while still maintaining congressional objectives of certainty and fairness in sentencing and avoiding sentencing disparities.⁴⁰ Nevertheless, the Court never specifically articulated how sentencing judges should use the Guidelines in an advisory system, yet required them to “consult”⁴¹ and “consider”⁴² the Guidelines in their sentencing.⁴³ Justice Stevens, writing for the majority, opined that although judges were required to consider the Guidelines in sentencing, they “permit[ted] the court to tailor the sentence in light of other statutory concerns as well.”⁴⁴

³⁴ *Booker*, 543 U.S. at 244.

³⁵ *Id.* at 259.

³⁶ *Id.* at 259-62.

³⁷ *Id.* at 222.

³⁸ *Id.* at 260-63 (discussing the Supreme Court’s excision of 18 U.S.C. § 3742(e) which set a mandatory standard of review for appellate judges and instead imposing a reasonableness standard. The Court also excised § 3742(e) because it set the standard of review on appeal as dependent on cross reference to 18 U.S.C. § 3551(b), which the Court had also excised).

³⁹ *Id.* at 264.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 245.

⁴³ Gilles R. Bissonette, “Consulting” *The Federal Sentencing Guidelines After Booker*, 53 UCLA L. REV. 1497, 1517 (2006) (discussing the uncertainty of what mandatory consultation of an advisory sentencing system means).

⁴⁴ *Booker*, 543 U.S. at 245.

In 2007, the Supreme Court decided both *Rita v. United States*⁴⁵ and *Gall v. United States*.⁴⁶ These cases clarified that a sentencing court should begin the sentencing process “by . . . calculate[ion] of the applicable Guideline range,”⁴⁷ thus furthering the congressional objectives of national consistency among sentencing courts.⁴⁸ When calculating an offender’s sentence, courts will start with the base level assigned to each offense, where the numerical value assigned indicates the number of months for which an offender may be sentenced.⁴⁹ Next, the sentencing judge will add or subtract any adjustments and offense specific characteristics.⁵⁰ The numerical value, after adding or subtracting adjustments, will be cross-referenced with the offender’s criminal history.⁵¹ A pre-determined table will then be used to cross-reference the post adjustment offense level with the offender’s criminal history, resulting in a range of years which the judge will consider.⁵² Finally, the sentencing judge is required to give both the prosecution and defense the opportunity to argue for the sentence they each deem appropriate while considering all factors relevant to the sentence.⁵³ *Rita* and *Gall* make clear that in hearing counsels’ arguments for an appropriate sentence, the judge may not presume the guideline range is reasonable but must make his or her own assessment of the requested sentence based on the facts presented.⁵⁴ In considering both mitigating and aggravating factors in relation to the sentence, a judge may determine that a sentence either above or below the range is warranted and has discretion to impose such a sentence.⁵⁵ However, in exercising this discretion, courts must “adequately explain [the departure] to allow for meaningful appellate

⁴⁵ 551 U.S. 338 (2007).

⁴⁶ 552 U.S. 38 (2007).

⁴⁷ *Gall*, 552 U.S. at 49; *accord Rita*, 551 U.S. at 347-48.

⁴⁸ *Gall*, 552 U.S. at 49.

⁴⁹ U.S. SENT’G COMM’N, AN OVERVIEW OF THE FEDERAL SENTENCING GUIDELINES, available at

https://www.ussc.gov/sites/default/files/pdf/about/overview/Overview_Federal_Sentencing_Guidelines.pdf.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Gall*, 552 U.S. at 49-50.

⁵⁴ *Rita*, 551 U.S. at 350-51; *Gall*, 552 U.S. at 50.

⁵⁵ *Gall*, 552 U.S. at 50.

review and to promote the perception of fair sentencing.”⁵⁶ The statutory scheme of the Guidelines, outlined below, has many considerations which can operate to either increase or decrease the criminal defendant’s sentence.

B. The Statutory Scheme of the Guidelines

The chapters of the Guidelines are broken into different sections, each with a separate focus.⁵⁷ Chapter Two is titled “Offense Conduct” and focuses on the sentencing of specific crimes,⁵⁸ whereas Chapter Three titled “Adjustments,” and Chapter Four titled “Criminal History and Criminal Livelihood” focus on the defendant’s role in the crime(s) being charged and recidivism of the defendant, respectively.⁵⁹ An understanding of the general framework of the Guidelines is instructive of the enormous number of factors that play a role in the sentencing judge’s determination and thus is instructive of the sentencing judges’ discretion.⁶⁰

Chapter Two, titled “Offense Conduct,” is organized by types of crimes.⁶¹ For example, Part B is titled “Basic Economic Crimes,”⁶² and within part B, specific crimes that are inherently economic in nature, such as theft, burglary and robbery, are enumerated.⁶³ Each specifically enumerated crime is assigned a “base level offense” corresponding to a numerical value as a starting point.⁶⁴ This Note will now focus on the base offense level provisions involving the specific

⁵⁶ *Id.* (citing *Rita*, 551 U.S. at 351, noting the requirement a sentencing judge explain the departure from the appropriate Guidelines range based on an assessment of all relevant factors, in order to assist the appellate court in determining whether the sentence met the standard of review, abuse of discretion).

⁵⁷ U.S. SENT’G GUIDELINES MANUAL, (U.S. SENT’G COMM’N 2021).

⁵⁸ *Id.* at Ch. TWO.

⁵⁹ *Id.* at Ch. THREE & FOUR.

⁶⁰ *Id.* at Ch. TWO (showing adjustments to the sentence based on the general characteristics of the offense as related to the victim, the defendant’s role in the offense, the defendant’s interaction with law enforcement post apprehension, the number of counts charged and acceptance of responsibility); *see also id.* at Ch. FOUR (showing enhancements on the basis of recidivism).

⁶¹ *See generally id.* at Ch. TWO.

⁶² *Id.* at Ch. TWO, Pt. B.

⁶³ *Id.* at §§ 2b2.1, 2b2.2, 2b2.3.

⁶⁴ *Id.* All criminal offenses enumerated under Chapter 2 of the Guidelines provide a base level offense.

offense characteristic enhancement of “physical restraint” within the context of the robbery.⁶⁵

Sentencing under a conviction of robbery begins with a base level offense of twenty months.⁶⁶ Beneath the base level offense, the Guidelines enumerate “specific offense characteristics”⁶⁷ that range from the use of the weapon in varying degrees, to the seriousness of injury a victim may sustain and the amount of money actually stolen.⁶⁸ The federal circuits diverge on the interaction between sub-sections (b)(2)(B) and (b)(4)(B).⁶⁹ Under subsection (b)(2), a defendant convicted of robbery will receive a varying degree of enhancement to his sentence if a dangerous weapon was used.⁷⁰ Subsection (b)(2) adds different levels of enhancements depending on whether a dangerous weapon or firearm was used and to what extent it was used in the commission of the robbery.⁷¹ Looking forward several sub-sections to (b)(4)(B), another enhancement of two levels can be added “if any person was physically restrained to facilitate commission of the offense or to facilitate escape[.]”⁷² The effect of this divergence has created a split among the federal circuits where the first camp applies the physical restraint enhancement by constructive interpretation and the second camp applies the enhancement by a plain language interpretation of physical restraint.⁷³ The following section analyzes

⁶⁵ *Id.* at § 2B3.1.

⁶⁶ *Id.* at § 2B3.1.(a).

⁶⁷ *Id.* at § 2B3.1.(b).

⁶⁸ *Id.* at §§ 2B3.1.(b)(2) (3) (7) (This is not meant to be a complete list of enhancements under § 2B3.1. but rather show the wide range of conduct and behaviors considered for enhancements under the crime of robbery).

⁶⁹ *Id.* at §§ 2B3.1.(b)(2)(B) (b)(4)(B) (An enhancement in varying degrees for the use and extent of a dangerous weapon or firearm arises under §§ (b)(2)(B),(C),(D) and an enhancement of 2 levels “if any person was physically restrained to facilitate commission of the offense or to facilitate escape” arises under § (b)(4)(B)).

⁷⁰ *Id.* at § 2B3.1.(b)(2).

⁷¹ *Id.* at § (b)(2) (showing an enhancement of 7 levels if a firearm was used and discharged, while only an enhancement of 3 level if a dangerous weapon was brandished or possessed. This is instructive as to the large difference in potential sentencing relative to small differences in actual conduct. For example, a robber who commits the crime and fires a handgun into the air would start sentencing at 27 months whereas a robber who commits the crime of forcible stealing using only his or her hands but does so with anything qualifying as dangerous weapon would start sentencing at only 23 months).

⁷² *Id.* at § 2B3.1.(b)(4)(B).

⁷³ *Infra* Parts III and IV.

the constructive physical restraint application used by the Fourth, First, Tenth, Eleventh, and formerly the Ninth Circuit courts.

III. CIRCUIT COURTS THAT APPLY CONSTRUCTIVE PHYSICAL RESTRAINT

This section outlines a series of circuit court decisions showing a pattern of broad interpretation with respect to § 2B3.1.(b)(4)(b). As illustrated in the case law that follows, not only have the defendants not restrained their victims in a physical manner, but in many instances, the defendants at no point come into physical contact with the victims of the robberies.⁷⁴ The circuit courts in this camp therefore apply an interpretation of the Guidelines consistent with constructive physical restraint, in that any actual restraint tends to be induced by the victim's perception of coercion or fear of harm.

A. Fourth Circuit

In *United States v. Dimache*,⁷⁵ the defendant entered a bank and approached a teller under what appeared to be typical banking and transactional business.⁷⁶ After the bank teller's drawer was open, Dimache forcibly jumped over the counter "brandishing" a firearm.⁷⁷ Once behind the counter, Dimache pointed the firearm at two bank tellers and ordered them to get down on the floor.⁷⁸ "[Dimache] told them to be quiet, stating if they were not '[y]ou know what will happen.'" ⁷⁹ Dimache was eventually apprehended and pled guilty.⁸⁰ In the pre-sentencing phase of the trial, a probation officer applied three separate sentencing enhancements, one of which was the

⁷⁴ See generally *United States v. Dimache*, 665 F.3d 603 (4th Cir. 2011); *United States v. Miera*, 539 F.3d 1232 (10th Cir. 2008); *United States v. Wallace*, 461 F.3d 15 (1st Cir. 2006).

⁷⁵ 665 F.3d 603 (4th Cir. 2011).

⁷⁶ *Id.* at 604.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*, see U.S. SENT'G GUIDELINES MANUAL § 2B3.1 cmt. 6 application (U.S. SENT'G COMM'N 2021) (Dimache's words of "you know what will happen" coupled with a pointed pistol would be enough to satisfy the enhancement for death threats under subsection (b)(2)(F), yet it was not applied.).

⁸⁰ *Dimache*, 665 F.3d at 604.

enhancement for physical restraint.⁸¹ The probation department's reasoning behind the imposition of the physical restraint enhancement was that during the commission of the robbery, Dimache "used a firearm to threaten the victim tellers and force them to lie on the ground, thereby restraining their movements."⁸² On appeal, Dimache contended that physical restraint required more than pointing a gun and ordering the victims to the floor.⁸³ The Fourth Circuit rejected Dimache's argument on the ground that the definition of "physically restrained" is "the forcible restraint of the victim [*such as*] by being tied, bound or locked up."⁸⁴ Focusing on the words "such as," the Fourth Circuit concluded that the methods of physical restraint enumerated in the Guidelines application was not an exhaustive list of restraint possibilities.⁸⁵ After defining physical restraint in broader terms, the court then relied on the Seventh Circuit's precedent, quoting the essential characteristic of enhancement provision, "the deprivation of a person's 'freedom of physical movement.'"⁸⁶

B. Tenth Circuit

In *United States v. Miera*,⁸⁷ the co-defendants entered a bank and ordered the occupants to put their hands in the air and not to move.⁸⁸ Miera's brother and co-defendant stood at the entrance of the bank pointing a firearm around the room continuing to order the occupants not to move.⁸⁹ Miera approached the teller with his hand under his clothing, which led the teller to believe he was carrying a concealed firearm.⁹⁰ Miera then demanded money from the teller, to which the teller complied, giving Miera about seven-thousand dollars

⁸¹ *Id.* at 605.

⁸² *Id.*

⁸³ *Id.* at 606 (noting counsel for Dimache apparently applying a plain language meaning to the enhancement provision).

⁸⁴ *Id.* (quoting U.S.S.G. 1B1.1(L)) (emphasis added).

⁸⁵ *Id.* at 609.

⁸⁶ *Id.* (quoting *United States v. Taylor*, 620 F. 3d 812, 814 (7th Cir. 2010) (noting reliance on a circuit that no longer applies this method of restraint to trigger the physical restraint sentencing enhancement).

⁸⁷ 539 F.3d 1232 (10th Cir. 2008).

⁸⁸ *Id.* at 1233.

⁸⁹ *Id.*

⁹⁰ *Id.*

in cash.⁹¹ Miera and his co-defendant escaped but were later apprehended by investigators, wherein two “air-powered pellet pistols” were seized and identified as the weapons used in the robbery.⁹² After Miera pled guilty to “one count of armed bank robbery in violation of 18 U.S.C. §§ 2113(a) & (d),”⁹³ the pre-sentence report recommended his sentence be enhanced, in part, pursuant to section (b)(4)(B).⁹⁴ At sentencing, Miera contested the application of the physical restraint sentencing enhancement, but the district court found otherwise and sentenced Miera to a forty-six month imprisonment.⁹⁵ On appeal, the Tenth Circuit relied on its prior holding in *Fisher*.⁹⁶ Citing *Fisher*, the court reiterated that “[U.S.S.G. §2B3.1(b)(4)(B)] is applicable when the defendant uses force to impede others from interfering with commission of the offense.”⁹⁷ Further, the Tenth Circuit held that physical restraint occurs when a victim is prevented from moving for purposes of facilitating the crime and was not solely limited to circumstances where the defendant physically touches the victim.⁹⁸ Additionally, the court looked to its holding in *United States v. Pearson*⁹⁹ to declare that the enhancement is triggered “when the defendant uses force, including force by gun point, to impede others from interfering with the commission of the offense.”¹⁰⁰ The Tenth Circuit recognized that *Pearson* instructed that “something more” than a mere display of the firearm must be done to trigger the enhancement.¹⁰¹ The court concluded Miera and his co-defendant’s actions of pointing the gun around the room while demanding that no one move and simultaneously blocking the bank door constituted the “something more” required to trigger the enhancement provision.¹⁰²

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 1234.

⁹⁴ *Id.* (showing a recommendation for the physical restraint enhancement provision).

⁹⁵ *Id.*

⁹⁶ *Id.* at 1234; see *United States v. Fisher*, 132 F.3d 1327 (10th Cir. 1997).

⁹⁷ *Miera*, 539 F.3d at 1234 (quoting *Fisher* 132 F.3d at 1329).

⁹⁸ *Id.* (citing *Fisher* 132 F.3d at 1329-30).

⁹⁹ 211 F.3d 524 (10th Cir. 2000).

¹⁰⁰ *Miera*, 539 F.3d 1234 (quoting *Pearson*, 211 F.3d at 526).

¹⁰¹ *Id.*

¹⁰² *Id.* at 1234-36.

C. Eleventh Circuit

In *United States v. Philips*,¹⁰³ the defendant appealed his sentence of 240 months which arose from his guilty plea for two separate car-jackings and “brandishing” a firearm in furtherance of the car-jackings.¹⁰⁴ During the first carjacking giving rise to the sentence, the defendant and his father approached the victim in a parking complex.¹⁰⁵ Both the defendant and his father were armed and threatened the victim with their firearms before stealing the car.¹⁰⁶ Two days later, the defendant, his father, and two unindicted co-conspirators entered a parking lot and pulled up behind a car that was occupied by the three victims.¹⁰⁷ The defendant and the two unindicted co-conspirators approached the victims’ vehicle and the defendant pressed a firearm against the driver’s chest.¹⁰⁸ The defendant ordered the driver-victim to give him the keys to the vehicle, while one of the co-conspirators held a firearm to the chest of the passenger-victim.¹⁰⁹ The defendant and two co-conspirators fled the scene in the stolen vehicle while the defendant’s father fled in the vehicle all four had arrived in.¹¹⁰ During pre-sentencing, the court imposed the two level enhancement arising under U.S.S.G. § 2B3.1(b)(4)(B), finding that the defendants’ action of pressing a firearm against the victim’s chest qualified as physical restraint.¹¹¹ On appeal, the defendants’ sole contention was that the district court’s application of the sentencing enhancement was incorrect.¹¹² The circuit court revisited their prior interpretation of the physical restraint sentencing enhancement.¹¹³ The court emphasized that the previous clarification of the sentencing enhancement in question identified the words “such as” in the

¹⁰³ 820 F. App’x 966 (11th Cir. 2020).

¹⁰⁴ *Id.* at 967 (“brandishing a firearm” is a separate sentencing enhancement arising under 2B3.1.(b)(2)(C): “if a firearm was brandished or possessed, increase by 5 levels[.]”).

¹⁰⁵ *Philips*, 820 F. App’x at 966.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 968; *see* *United States v. Jones*, 32 F.3d 1512 (11th Cir. 1994).

definition for “physically restrained” as a modifier.¹¹⁴ Further, the court explained that this modification “indicates that the illustrations of physical restraint are listed by way of example rather than limitation.”¹¹⁵ This interpretation of the sentencing enhancement allows any conduct which “ensure[s] the victims’ compliance and prevent[s] them from leaving” to trigger the enhancement.¹¹⁶ In *United States v. Victor*,¹¹⁷ the court determined that the defendants’ actions of pointing an assault rifle magazine at a bank teller prevented her escape.¹¹⁸ Reading the two cases together, the *Philips* court determined the defendant had physically restrained the victim of the second carjacking by “pressing a gun against her chest and ordering her to hand over her car keys.”¹¹⁹

D. First Circuit

In *United States v. Wallace*,¹²⁰ the defendant’s brother entered a licensed firearms dealership posing as a customer interested in purchasing a special type of ammunition clip.¹²¹ Once the store assistant retrieved the keys to open the locked case, defendant Wallace entered the store “brandishing” a firearm.¹²² Wallace and his co-defendant, who was also now brandishing a firearm, pointed their weapons at the assistant and owner, ordered them not to move and open the locked firearms case.¹²³ The pair then fled the store with six stolen high caliber handguns.¹²⁴ After the store owner identified Wallace, the police conducted surveillance at his apartment ten days after the robbery had taken place.¹²⁵ Police arrested Wallace’s co-defendant “Nickoyan” pursuant to a search of the apartment wherein five of the six stolen firearms were found, as well as the firearm used by Wallace

¹¹⁴ *Id.* (quoting *Jones*, 32 F.3d at 1518).

¹¹⁵ *Id.* (quoting *Jones*, 32 F.3d at 1518).

¹¹⁶ *Id.* (quoting *Jones*, 32 F.3d at 1519).

¹¹⁷ 719 F.3d 1288 (11th Cir. 2013).

¹¹⁸ *Id.*

¹¹⁹ *Philips*, 820 F. App’x at 968.

¹²⁰ 461 F.3d 15 (1st Cir. 2006).

¹²¹ *Id.* at 20.

¹²² *Id.*; *supra* text accompanying note 104.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

in the commission of the robbery.¹²⁶ Wallace was not apprehended by the police until July of 2004 but his indictment was almost identical to his co-defendant's, with the addition of sentencing enhancements.¹²⁷

During the sentencing hearing, the government made recommendations for a sentence which fell within the middle of the appropriate range of the Guidelines.¹²⁸ Despite the apparent leniency advanced by the government, the district court rejected the recommendation and imposed a twenty-five-year sentence.¹²⁹ Wallace made numerous evidentiary and legal error challenges.¹³⁰ Noting the proximity of time between Wallace's sentencing and the Supreme Court's decision in *Booker*, the First Circuit recognized that Wallace's sentence did not reflect the application of subsequent case law.¹³¹ This circuit indicated that proper sentencing procedures under the Guidelines would entail determining the correct sentencing range as a starting point.¹³² Then, after evaluating factors set forth in the Guidelines, the sentencing court must determine if the sentence is appropriate regardless of whether it is above, within, or below the Guidelines range.¹³³ Here, the court pointed out that the district court erred by turning to factors as grounds for departure from Guidelines, which were not themselves listed in the Guidelines, without determining what sentence would be consistent with those factors.¹³⁴

On appeal, Wallace argued the pre-sentencing report's recommended enhancement provisions were in error.¹³⁵ Specifically with reference to section (b)(2)(B), Wallace contended that because neither he nor the co-defendant made physical contact with the store owner or assistant, nor did they force them into a separate and confined space, they never physically restrained them.¹³⁶ Looking to the

¹²⁶ *Id.*

¹²⁷ *Id.* at 21.

¹²⁸ *Id.* at 24.

¹²⁹ *Id.*

¹³⁰ *Id.* at 25-29.

¹³¹ *Id.* at 31; see *Booker*, 543 U.S. 220; see also *United States v. Jimenez-Beltre*, 440 F.3d 514 (1st Cir. 2006); *United States v. Scherrer*, 444 F.3d 91 (1st Cir. 2006).

¹³² *Wallace*, 461 F.3d at 32 (citing *United States v. Dixon*, 449 F.3d 194, 203-04 (1st Cir. 2004)).

¹³³ *Wallace*, 461 F.3d at 32.

¹³⁴ *Id.*

¹³⁵ *Id.* at 30.

¹³⁶ *Id.* at 33.

application notes of the Guidelines, the First Circuit defined physically restrained as the forcible restraint of the victim such as by being tied, bound, or locked up.¹³⁷ Using the reasoning later applied by the Fourth Circuit in *Dimache*, the First Circuit found that the examples listed by the Guidelines were not exhaustive, as stated in *DeLuca*.¹³⁸ In *United States v. DeLuca*, the court held that the physical restraint enhancement was appropriate where a victim's freedom of movement was restricted by the defendant's blocking of egress.¹³⁹ The First Circuit gave credence to other circuits' caution against an overly broad reading of "physical restraint."¹⁴⁰ Still, this circuit focused on the prevention of movement by use of a firearm rather than true restraint, thus taking a position consistent with what would later become sister circuits.¹⁴¹ Applying this standard, the court determined that blocking the store assistant's escape by method of a firearm constituted physical restraint.¹⁴²

E. Ninth Circuit

In *United States v. Thompson*,¹⁴³ the defendant and two accomplices entered a California bank while a third accomplice waited in the getaway vehicle outside.¹⁴⁴ Defendant Thompson and one accomplice were armed while the other accomplice who entered the bank was not.¹⁴⁵ While entering the bank, one of the armed defendants pushed his firearm into the back of a customer who was exiting, forcing the customer back inside the bank.¹⁴⁶ The customer was forced to the ground and held down by one of the defendants, who placed their foot

¹³⁷ *Id.* at 33 (quoting U.S. SENT'G GUIDELINES MANUAL § 1B1.1 cmt. n.1(L) (U.S. SENT'G COMM'N 2021)).

¹³⁸ *Wallace*, 461 F.3d at 33 (quoting *United States v. DeLuca*, 137 F.3d 24, 39 (1st Cir. 1998)).

¹³⁹ *Wallace*, 461 F.3d at 34 (citing *DeLuca*, 137 F.3d at 39).

¹⁴⁰ *Wallace*, 461 F.3d at 34; accord *United States v. Parker*, 241 F.3d 1114 (9th Cir. 2001); *United States v. Drew*, 200 F.3d 871 (D.C. Cir. 2000); *United States v. Anglin*, 169 F.3d 154 (2d Cir. 1999)).

¹⁴¹ *Wallace*, 461 F.3d at 34; accord *United States v. Wilson*, 198 F.3d 467 (4th Cir. 1999); *United States v. Fisher*, 132 F.3d 1327 (10th Cir. 1997).

¹⁴² *Wallace*, 461 F.3d at 34.

¹⁴³ 109 F.3d 639 (9th Cir. 1997).

¹⁴⁴ *Id.* at 640.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

on the customer's back.¹⁴⁷ The other defendant went to the bank's customer service manager and demanded the vault keys.¹⁴⁸ After obtaining the keys, the same defendant repeatedly forced the employee to the floor and back to her feet while simultaneously threatening to kill her.¹⁴⁹ At around the same time, the other armed defendant approached the branch manager at gun point, forced her to the vault area, and yelled profanities at her.¹⁵⁰ The branch manager later testified that she believed that the defendant would kill her.¹⁵¹ The court determined that the three separate acts of holding down the customer, the customer service manager, and the branch manager were committed by the two armed defendants, Thompson and Doe, however, which one committed which act never became clear at trial.¹⁵² The court concluded that defendant Thompson had committed at least one of the acts by recognizing the physical impossibility of one person holding two separate bank employees down simultaneously.¹⁵³

During sentencing, the district court adjusted Thompson's sentence upward because his acts were reasonably foreseeable and in furtherance of the conspiracy.¹⁵⁴ The Ninth Circuit determined that the two-level upward adjustment was justified due to the district court's finding that Thompson physically restrained either the customer or the branch manager.¹⁵⁵ The court compared Thompson's actions with the actions of the defendant in *U.S. v. Foppe*,¹⁵⁶ where the defendant controlled bank customers during a robbery by convincing them that a hairbrush was a firearm and dragging the customers around the bank in furtherance of the crime.¹⁵⁷ The Ninth Circuit concluded that Thompson's actions constituted a forcible and substantial restraint on the victim.¹⁵⁸ The court also addressed material differences between the actions of the defendant in *Foppe* and the defendant in *Thompson*.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ 993 F.2d 1444 (9th Cir. 1993).

¹⁵⁷ *Id.* at 1448.

¹⁵⁸ *Thompson*, 109 F.3d at 641.

In *Thompson*, the defendant: (1) used an actual firearm, rather than convincing victims a reasonably safe object was a firearm; and (2) never came into physical contact with his victim.¹⁵⁹ The court noted that the natural reaction a person has when being ordered to do something at gunpoint is to say that the person was forced.¹⁶⁰ Although the court recognized that a potential argument could be made that a threat of force rather than force itself was used, it ultimately relied on the example of “locked-up” in the application note to support its holding that Thompson did in fact physically restrain his victim.¹⁶¹ The Ninth Circuit agreed that, because locking a victim up could occur without ever touching the victim or the victim ever seeing the assailant, holding a victim at gunpoint constituted physical restraint.¹⁶² Further, the Ninth Circuit concluded that this was “the more natural and realistic interpretation of § 2B3.1(b)(4)(B).”¹⁶³ However, in later case law, the Ninth Circuit refined their standard to take a position more consistent with the second camp.¹⁶⁴

The above cases illustrate the theory of constructive physical restraint. Under this theory, the enhancement can be triggered without ever touching the victim(s) or even moving them from where they were standing in the premises at the time the robbery started. In the Fourth Circuit, the defendant was subject to the sentencing enhancement based on making demands.¹⁶⁵ Rather than force the victims to the floor by physical force, the defendant made demands while pointing a firearm at his victims.¹⁶⁶ This suggests that the victim’s reactions to words during the course of the robbery plays a key role in whether or not the enhancement is triggered. In the Tenth Circuit, the court allowed a definition of physical restraint which required no physicality to trigger the enhancement suggesting that physical restraint encompasses other types of restraint.¹⁶⁷ The Tenth Circuit agreed that “something more” than waving a firearm was required, but still held that verbal threats accompanied with a firearm can qualify as the

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 641-42.

¹⁶³ *Id.* at 642.

¹⁶⁴ *See* *United States v. Parker*, 241 F.3d 1114 (9th Cir. 2001).

¹⁶⁵ *See* *United States v. Dimache*, 665 F.3d 603, 604 (4th Cir. 2011).

¹⁶⁶ *Id.*

¹⁶⁷ *United States v. Miera*, 539 F.3d 1232, 1234 (10th Cir. 2008).

“something more” to sufficiently trigger the enhancement.¹⁶⁸ The Tenth Circuit suggested that even a robber’s positioning within the targeted business may play a role in triggering the enhancement.¹⁶⁹ In the First Circuit, the court appeared to recognize potential issues with an overly broad definition of “physical restraint” yet still qualified the brandishing of a firearm coupled with threats as sufficient to trigger the enhancement.¹⁷⁰ In the Ninth Circuit, the defendant appeared to engage in conduct that would sufficiently meet the physical restraint requirements of opposed circuits.¹⁷¹ However, the court’s analysis focused on a victims’ natural reaction to having a firearm pointed at them accompanied by demands.¹⁷² This suggests that a victim’s internal mental state is relevant to whether the victim was physically restrained. Most surprisingly, in the Eleventh Circuit, the defendant was subjected to the physical restraint sentencing enhancement for threats accompanied with the firearm despite the purpose of the threats being to remove the occupant from a vehicle, which was the target of the robbery.¹⁷³ This indicates that physical restraint can occur even when a robber is removing a victim from a location rather than locking him away. It also indicates that the purpose of threat, such as furthering a carjacking in *Philips* plays a role in whether threats can constitute physical restraint.¹⁷⁴

Following this logic, the sister circuits may potentially adopt a standard which allows for the sentencing enhancements application where the offender actually removes occupants from the bank or other business being robbed. In sum, the first camp’s reasoning places reliance on the victims’ subjective feelings and their natural reactions to having a firearm pointed at them during the course of the robbery. This suggests that mental or psychological restraint would be a more proper term for these circuits to adopt. However, no sentencing enhancement for psychological coercion or restraint exists at this time. A positive effect of the broader definition of physical restraint is that the sentencing enhancement can have a higher rate of deterrence. If

¹⁶⁸ *Id.* at 1234 (United States v. Pearson, 211 F.3d 524 (10th Cir. 2000)).

¹⁶⁹ *Miera*, 539 F.3d at 1233.

¹⁷⁰ United States v. Wallace, 461 F.3d 15, 34 (1st Cir. 2006).

¹⁷¹ United States v. Thompson, 109 F.3d 639, 640 (9th Cir. 1997).

¹⁷² *Id.* at 641.

¹⁷³ United States v. Philips, 820 F. App’x 966, 967 (11th Cir. 2020).

¹⁷⁴ *Id.*

offenders are aware that minor changes in behavior can significantly increase or decrease their time behind bars, they may be persuaded to use less violent tactics during the commission of a robbery or forego committing the crime entirely. On the other hand, this broad definition of physical restraint subjects' offenders in different geographical areas to greater disproportionalities during sentencing. A defendant who commits a robbery in the Carolinas, Colorado, Maine, or Georgia can face significantly more time for a robbery identical to one committed in New York.¹⁷⁵ The following section introduces the case law from the second camp and its application of the physical restraint sentencing enhancement.¹⁷⁶

IV. CIRCUITS THAT APPLY THE PLAIN LANGUAGE MEANING OF PHYSICAL RESTRAINT

The second camp of circuit courts has taken a narrower approach to applying the physical restraint sentencing enhancement. Under this stricter approach, pointing a firearm paired with threats is insufficient to trigger the enhancement. Rather, the “something more” referred to by the Tenth Circuit requires an element of physicality to sufficiently trigger the enhancement.¹⁷⁷ Despite a narrower approach to the definition of physical restraint, only one of the circuits below has adopted a test where the defendants conduct is measured to determine whether application of the enhancement is appropriate.¹⁷⁸

¹⁷⁵ Map of *Geographic Boundaries of United States Courts of Appeals and United States District Courts*, https://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf (showing North Carolina, South Carolina, Colorado, Maine, and Georgia within the jurisdiction of circuit courts that apply constructive physical restraint, and New York falling within the jurisdiction of a circuit court that applies a plain language interpretation to physical restraint).

¹⁷⁶ *Infra* Part IV.

¹⁷⁷ *United States v. Miera*, 539 F.3d 1232, 1234 (10th Cir. 2008).

¹⁷⁸ *United States v. Taylor*, 961 F.3d 68 (2d Cir. 2020).

A. Ninth Circuit

In *United States v. Parker*,¹⁷⁹ the defendant gang member was involved in a series of robberies of federally insured banks.¹⁸⁰ The physical restraint sentencing enhancement was applied to counts two and four of the defendant's indictment which were both for armed bank robberies.¹⁸¹ The defendant challenged application of the physical restraint enhancement provisions which were triggered by accomplice liability.¹⁸² Regarding Count two, accomplice, Evan Baylon pulled a bank teller off the floor by her hair.¹⁸³ Since Baylon's actions were reasonably foreseeable by defendant Parker and in furtherance of the jointly undertaken bank robbery, Parker was liable for the acts of his accomplices.¹⁸⁴ Count four involved a robbery during which a robber pointed a firearm at the bank teller and demanded she get down on the floor.¹⁸⁵ In differentiating between the two separate circumstances, the Ninth Circuit identified a *sustained focus* the defendant undergoes in cases where the enhancement is applied.¹⁸⁶ This sustained focus allows the offender to restrain the victim long enough to move or direct the victim to another part of the premises where the offense is taking place.¹⁸⁷ The Ninth Circuit commented on the congressional intent of the enhancement provision: "[i]t is therefore likely that Congress meant for something more than briefly pointing a gun at a victim and commanding her once to get down to constitute physical restraint, given that nearly all armed bank robberies will presumably involve such acts."¹⁸⁸ In applying the "sustained focus" standard, the Ninth Circuit held the enhancement was appropriate under Count two, but not appropriate under Count four.¹⁸⁹ Here, the Ninth Circuit appeared

¹⁷⁹ 241 F.3d 1114 (9th Cir. 2001).

¹⁸⁰ *Id.* at 1117.

¹⁸¹ *Id.*

¹⁸² *Id.* at 1118.

¹⁸³ *Id.*

¹⁸⁴ *Id.* ("U.S.S.G. §1B1.3(b) (2000) holds a defendant accountable at sentencing for all reasonably foreseeable acts and omissions of others in furtherance of a jointly undertaken criminal activity.") citing *United States v. Carter*, 219 F.3d 863, 868 (9th Cir. 2000).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 1118-19.

¹⁸⁹ *Id.* at 1119.

to take a middle ground as to qualifying acts which trigger the physical restraint sentencing enhancement.

B. Seventh Circuit

In *United States v. Herman*,¹⁹⁰ the defendant was invited to the home of Jacob Kirk (Kirk) and Kirk's mother, Samantha Daniels (Daniels).¹⁹¹ Upon entering, the defendant noticed that Daniels had a handgun partially protruding from her purse.¹⁹² The defendant was able to obtain control of Daniel's firearm, before pulling out his own handgun and commencing the robbery.¹⁹³ The defendant pointed one of the handguns at Kirk and Daniels and ordered them not to move before fleeing from the home.¹⁹⁴ When Kirk and Daniels pursued the defendant, he spun around and fired a round with the stolen handgun which narrowly missed Kirk's head.¹⁹⁵ At sentencing, the district court applied the Robbery base offense level of twenty, plus an additional ten levels for three separate enhancements but subtracted three levels due to the defendant having accepted responsibility.¹⁹⁶ The combination of the applicable adjustments, including an enhancement of two levels for physically restraining the victims, left the defendant with an offense level of twenty-seven.¹⁹⁷ On appeal, the defendant requested a remand for sentencing on the ground that the physical restraint enhancement was improper.¹⁹⁸

The court began its analysis by recognizing the circuit split and listing the individual circuits by its respective camp: the Fourth, Tenth, First and Eleventh Circuits' holding that pointing a gun and commanding a person not to move is enough to trigger the enhancement compared to the Ninth, D.C., Second and Fifth Circuits,

¹⁹⁰ 930 F.3d 872 (7th Cir. 2019).

¹⁹¹ *Id.* at 873.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 874. Here, defendant Herman received a 7-level enhancement for discharging a firearm during the course of the robbery, a 1-level enhancement for taking a firearm during the course of the robbery and a 2-level enhancement for physically restraining the victims. *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

which require more than pointing a gun and making demands to trigger the enhancement.¹⁹⁹ The court then reviewed its precedent from *United States v. Doubet*.²⁰⁰ In *Doubet*, an offender was subjected to the sentencing enhancement when he used a firearm to herd bank employees into a back room.²⁰¹ The *Doubet* court determined that the defendant's actions were consistent with "lock[ing them] up" and thus fell within the scope of the enhancement at the time the case was decided.²⁰² In *Herman*, the court spoke to the limiting principle it sought to establish in *Doubet*.²⁰³ Despite *Doubet* imposing the sentencing enhancement, the court mentioned that "herding victims into a defined area" would not trigger the enhancement in every circumstance, but that this limiting principle served to prevent the enhancement's application in nearly all armed robberies.²⁰⁴ The *Herman* court used its previous holding to advance a position that the sentencing enhancement was designed to punish physical restraint which rules out application where the victim's restraint comes from psychological coercion instilled by threat of harm.²⁰⁵ Further, the court admitted that its previous "middle position...may have covered too much conduct."²⁰⁶ Finally, *Herman* established that psychological coercion is insufficient to trigger the enhancement for physical restraint and found it inapplicable to the defendant.²⁰⁷

C. D.C. Circuit

In *United States v. Drew*,²⁰⁸ the defendant's estranged wife had a protective order against him at the time of the crime, precipitating invocation of the sentencing guideline in question.²⁰⁹ This protective order arose from previous acts of physical abuse and was conditioned

¹⁹⁹ *Id.* at 874-75.

²⁰⁰ 969 F.2d 341 (7th Cir. 1992).

²⁰¹ *Id.* at 346.

²⁰² *Id.*

²⁰³ *Herman*, 930 F.3d at 875; accord *Doubet*, 969 F.2d at 346.

²⁰⁴ *Doubet*, 969 F.2d at 346.

²⁰⁵ *Herman*, 930 F.3d at 875-76.

²⁰⁶ *Id.* at 876.

²⁰⁷ *Id.* at 877.

²⁰⁸ 200 F.3d 871 (D.C. Cir. 2000).

²⁰⁹ *Id.* at 874.

to run for one year.²¹⁰ Under the terms of the protective order, the defendant was to retrieve his belongings from the familial residence with a police escort and vacate.²¹¹ Further, defendant was ordered to stay at least 100 feet away from his wife and children, and could not communicate with her unless in the presence of counsel.²¹² In violation of this order, defendant contacted his wife expressing a need for help and voicing suicidal ideations.²¹³ After the defendant's wife suggested he seek medical assistance and voiced her intent to hang up, the defendant made claims that he would do something drastic.²¹⁴ Within minutes of the conversation, the defendant broke into the home by shattering a window.²¹⁵ This alerted his wife, who called 911 and hid in a bedroom closet.²¹⁶ The defendant made his way to the bedroom and upon finding his wife in the closet pointed a shotgun at her.²¹⁷ The 911 call picked up the exchange of words between defendant and his wife, indicating his intent to commit murder.²¹⁸ The defendant directed his wife into the upstairs hallway where they were met by their children.²¹⁹ The defendant pulled the trigger of his firearm; however, it did not discharge.²²⁰ Seeing this as an opportunity to intervene, the defendant's wife and children jumped on him and attempted to remove the shotgun from his possession.²²¹ The arresting officer arrived during the struggle, subdued the defendant, and placed him under arrest.²²²

After extensive plea deal negotiations, defendant pled guilty and was sentenced to eighty months followed by three years of

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.* at 875.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.* (When defendant's wife tried to put on her shoes, the defendant stated, "[y]ou don't need shoes where you are going." *Id.* at 875. Had this been said to the victim in the course of a robbery, this conduct would likely be sufficient to trigger the enhancement for threat of death.).

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

supervised release.²²³ In determining the defendant's base level offense, the court applied the cross-reference sections for the firearm charges which resulted in the base level offense for attempted first degree murder.²²⁴ Additionally, the district court added a two-level adjustment for physical restraint.²²⁵

Challenging his sentence, the defendant made two arguments relating to the Guidelines.²²⁶ First, he alleged an improper use of the cross-referencing sections of the Guidelines in an attempt to lower his base level offense of twenty-seven for first degree murder, to seventeen under the section of the Guidelines covering unlawful possession of firearms.²²⁷ The court responded that because the unlawfully possessed firearm was used in an attempt to commit another offense, that the section providing guidance for attempted offenses was applicable.²²⁸ Under this alternate section, the sentencing judge is instructed to apply the base level offense listed under the provision covering the substantive offense which was attempted.²²⁹ Thus, because the unlawful possession of a firearm was used in connection with an attempted first degree murder, the base level offense for first degree murder was applicable.²³⁰

Second, the defendant contested the validity of the physical restraint enhancement under these facts indicating that "he did not physically touch his wife and any physical restraint was part of the offense itself."²³¹ In response to this argument, the government argued for applicability of the enhancement by way of constructive physical restraint, in that ordering his estranged wife around the house by

²²³ *Id.* at 876.

²²⁴ *Id.* The effect of the cross-reference section in this context allowed the prosecution to set the base level offense at a term consistent with first degree murder. Under the cross-reference sections, a defendant charged with the underlying crime of unlawful possession of a weapon will be sentenced under the *substantive crime* in which he used the unlawfully possessed weapon. Here, although the defendant pled guilty to the unlawful weapons possession charges, he was charged with first degree murder in that he used the unlawfully possessed weapon with intent to commit first degree murder.

²²⁵ *Id.*

²²⁶ *Id.* at 877-80.

²²⁷ *Id.* at 878-79.

²²⁸ *Id.* at 878.

²²⁹ *Id.* at 877-79.

²³⁰ *Id.* at 879.

²³¹ *Id.* at 880.

gunpoint triggered the enhancement provision.²³² The court looked to the application notes under the applicable provision for first degree murder which referenced the commentary notes for physical restraint under the robbery provision.²³³ Although recognizing the words “such as” precluded the methods of restraint provided as examples from being a full and complete list, the court concluded imposition of this enhancement provision requires restraint through bodily contact or confinement of the victim.²³⁴ The court also noted the Ninth Circuit, as the only circuit at that time, to apply the constructive definition of physical restraint, and that all other circuits required at least “some type of confinement accompanying the forced movement at gunpoint.”²³⁵ Finally, the court reasoned that applying a constructive definition to the meaning of physical restraint within the Guidelines would effectively trigger the enhancement in “almost any attempted murder because presumably any victim would feel restrained if directed to move at gunpoint.”²³⁶

D. Fifth Circuit

In *United States v. Garcia*,²³⁷ the defendant and two co-defendants walked into a gun store, wearing ski masks and carrying firearms.²³⁸ While one defendant held his firearm to the employees’ head, the two other defendants guarded the store entrance with a

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.* (Although decided over a decade later, the Fourth Circuit came to a similar logical conclusion: the use of “such as” meant the means of physical restraint listed by example were not an exhaustive list. However, unlike the D.C. Circuit, the Fourth Circuit, used this linguistic logic to broaden its understanding and scope of physical restraint in the context of the sentencing provisions); *Drew*, 969 F.2d at 880; *cf.* *United States v. Dimache*, 665 F.3d 603, 609 (4th Cir. 2011).

²³⁵ *Id.*; *cf.* *United States v. Thompson*, 109 F.3d 639, 641 (9th Cir. 1997) (noting the Ninth Circuit’s holding that forcible movement at gunpoint constitutes physical restraint triggering the enhancement provision. Notably, the Ninth Circuit also determined the examples of physical restraint listed in the commentary were illustrative and therefore did not preclude physical restraint by other, apparently more constructive means.).

²³⁶ *Id.*

²³⁷ 857 F.3d 708 (5th Cir. 2017).

²³⁸ *Id.* at 710.

firearm and broke the glass weapons case to steal firearms.²³⁹ Upon breaking the glass case, another employee was alerted and rushed to the counter where he took cover and loaded his own pistol.²⁴⁰ The defendants and the armed employee exchanged gunfire during which the employee was shot in the ankle.²⁴¹ This exchange ended with the defendants fleeing from the store with a total of nine stolen firearms.²⁴²

The defendant was charged and later pled guilty to one count of robbery under the Hobbs Act,²⁴³ and one count of discharging a firearm in the commission of a violent crime.²⁴⁴ The probation department opted to impose the physical restraint enhancement despite objections by both the government and defense counsel.²⁴⁵ In support, the probation department attached an addendum to its report which distinguished the current case from the precedent.²⁴⁶ Agreeing with the presentencing report, the trial court sentenced the defendant to fifty-one months for the Hobbs Act robbery with the physical restraint enhancement and one-hundred-and-twenty months for the firearms charge.²⁴⁷

On appeal, the defendant challenged the application of the physical restraint enhancement which the government was now prepared to support.²⁴⁸ Similar to circuit courts that have taken divergent positions on the meaning of physical restraint, the Fifth Circuit focused on the words “such as” under the definition of physical

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.* See 18 U.S.C. § 1951(a). This criminal statute penalizes interference with commerce by use of threats or violence. *Id.* Here, defendant Garcia was interfering with the commerce of the commodity of firearms.

²⁴⁴ *Id.* See 18 U.S.C. § 924(c). Under this criminal statute, which is now held to be unconstitutional by many courts, a defendant who uses a firearm in connection with a violent crime faces additional sentencing depending on the extent of the use of the firearm in furtherance of a violent or drug trafficking crime. *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*; see *United States v. Hickman*, 151 F.3d 446, 461-62 (5th Cir. 1998) (showing Fifth Circuit precedent that physical restraint requires “either the physical holding of the victim or the confining of the victim in some manner coupled with a threat of violence.”).

²⁴⁸ *Id.*

restraint in the Guidelines commentary notes.²⁴⁹ Arriving at the same conclusion as circuit courts from both camps, the Fifth Circuit declared that “such as” precluded the methods of physical restraint listed in the commentary notes from being the only ways in which physical restraint can occur.²⁵⁰ The court then looked to various circuit courts for their interpretation of the physical restraint enhancement provisions.²⁵¹ Here, the court found the Tenth Circuit’s interpretation of physical restraint and applicable situations to be overly broad as compared to their own case law.²⁵² Specifically, the court held that “merely brandishing a weapon cannot support a [physical restraint enhancement] otherwise, [the] enhancement would be warranted every time an armed robber entered a bank.”²⁵³ The court explained that threats not to move are implicit in armed robberies and are not distinguishable from the typical armed robbery.²⁵⁴ In furtherance of the court’s desire to move away from a constructive physical restraint standard, the Fifth Circuit identified “restraint” as being a condition which can be modified by multiple adjectives such as physical, or mental or moral.²⁵⁵ In reliance on the Second Circuit’s holding in *Anglin*, the Fifth Circuit held that brandishing a firearm and ordering people not to move, without more, was insufficient to trigger the enhancement.²⁵⁶ As a final matter, the Fifth Circuit noted that it had little doubt the victims of Garcia’s robbery felt restrained; however, the court indicated the victims were not physically restrained such as someone who is “tied, bound, or locked up.”²⁵⁷

²⁴⁹ *Id.* at 712.

²⁵⁰ *Id.*

²⁵¹ *Id.* at 712-13; *see* *United States v. Stevens*, 580 F.3d 718 (8th Cir. 2009) (upholding an enhancement for physical restraint where the defendant moved bank employees into a vault at gun point “under circumstances clearly implying they should remain there or risk physical harm.”). *Id.* at 721; *see also* *United States v. Miera*, 539 F.3d 1232, 1233-36 (10th Cir. 2008) (upholding enhancement for physical restraint where the defendant blocked the bank door while brandishing a firearm, which “had the effect of physically restraining everyone in [the defendant’s] presence.”).

²⁵² *Garcia*, 853 F.3d at 713.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.* (citing *United States v. Anglin*, 169 F.3d 154, 164 (2d Cir. 1999)).

²⁵⁷ *Id.* (quoting U.S. SENT’G GUIDELINES MANUAL § 1B1.1 cmt. n.1(L) (U.S. SENT’G COMM’N 2021)).

E. Second Circuit

In *United States v. Taylor*,²⁵⁸ the defendants committed a series of cell phone robberies, where co-defendant Oneal acted as if he had a firearm by using certain hand motions.²⁵⁹ Over the course of three robberies and one attempted robbery, defendant Oneal used the leverage gained by pretending to have a firearm to force the employees of the targeted stores into different rooms.²⁶⁰ During sentencing, the district court made a discretionary downward adjustment and several adjustments based on Oneal's criminal history.²⁶¹ Oneal's final sentence was eighty-four months.²⁶² Here, the district court applied the physical restraint sentencing enhancement based on its reading of *Anglin* and the defendant's actions of pushing the victims into the backrooms of the targeted cell phone stores.²⁶³

On appeal, Oneal challenged the district court's application of the physical restraint enhancement provision.²⁶⁴ In its analysis, the Second Circuit noted its previous caution of interpreting "physically restrained" in a broad and expansive manner which would apply to most robbery cases.²⁶⁵ Drawing on its opinion in *Anglin*,²⁶⁶ *Rosario*²⁶⁷ and *Paul*²⁶⁸ and the plain language interpretation of the Guidelines, the court identified a three part test.²⁶⁹ First, the court noted that "restraint" is a noun modified by the adjective "physical," meaning brandishing a firearm and telling people to get down and not move was insufficient to trigger the enhancement provision.²⁷⁰ Although the

²⁵⁸ 961 F.3d 68 (2d Cir. 2020).

²⁵⁹ *Id.* at 71.

²⁶⁰ *Id.* at 71-72.

²⁶¹ *Id.* at 74.

²⁶² *Id.*

²⁶³ *Id.* ("[T]he district court found it applicable referring to our decision in *Anglin*, reasoning that, by 'pushing people into back rooms,' Oneal 'did far more' than the defendant in *Anglin*, who told the victims to get down on the floor and not move.") citing *United States v. Anglin*, 169 F.3d 154 (2d Cir. 1999).

²⁶⁴ *Taylor*, 961 F.3d at 77.

²⁶⁵ *Id.* at 77-78.

²⁶⁶ *Anglin*, 169 F.3d 154.

²⁶⁷ 7 F.3d 319 (2d Cir. 1993).

²⁶⁸ 904 F.3d 200 (2d Cir. 2018).

²⁶⁹ *Taylor*, 961 F.3d at 78.

²⁷⁰ *Id.* ("Accordingly, we have held that 'displaying a gun and telling people to get down and not move, without more, is insufficient to trigger the 'physical restraint'

court noted the precedent of other circuits and their application of the enhancement provision where the psychological coercion caused by the presence of a firearm was enough to trigger the enhancement, it chose not to follow these circuits.²⁷¹ Second, the court distinguished qualifying levels of physicality which would constitute the “restraint” necessary for proper application of the enhancement provision.²⁷² Specifically, the court held that to qualify as “restraint,” the physical force must facilitate the commission of the offense and that physical contact alone would not qualify.²⁷³ Further, the court noted that the physical restraint must “facilitate, [rather than] constitute the commission of the offense.”²⁷⁴ Finally, the Second Circuit held that the restraint must facilitate the crime, rather than be constitutive of the robbery.²⁷⁵

The overarching principle detailed in the cases above appears to be the avoidance of a definition of physical restraint which would make the sentencing enhancement applicable in nearly all armed robberies.²⁷⁶ The courts in the second camp have drawn a line that differentiates cases of psychological coercion from cases of physical restraint as a means of limiting the enhancement provision’s application. By limiting the interpretation of physical restraint to cases where the victim is truly physically restrained, the courts have engaged in a process of applying the black letter law of the sentencing Guidelines where appropriate. Most noteworthy is the Second Circuit’s reading and development of its three-part test. The court’s recognition that a broad definition of physical restraint would make the sentencing enhancement applicable in all robberies, excluding unoccupied premises, has advanced a position most consistent with the

enhancement,’ because, while brandishing a firearm may cause victims to *feel* restraint, it does not physically restrain or immobilize them.”). *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.* (citing *United States v. Rosario*, 7 F.3d 319, 321(2d Cir. 1993); *accord United States v. Herman*, 930 F.3d 872 (7th Cir. 2019) (holding that “the essential character of conduct that is subject to the physical-restraint Guideline is depriving a person of his physical movement.”). *Id.* at 875.

²⁷⁵ *Id.*

²⁷⁶ *See Taylor*, 961 F.3d 68; *Herman*, 930 F.3d 872; *United States v. Garcia*, 857 F.3d 708 (5th Cir. 2017); *United States v. Drew*, 200 F.3d 871 (D.C. Cir. 2000).

sentencing Guidelines' primary objectives: reducing sentencing disparities across the nation.²⁷⁷

V. RECOMMENDATIONS

“Words should mean something[.]”²⁷⁸ The exclusion of psychological coercion as a separately enumerated sentencing enhancement advances the position of the second camp. Had the sentencing commission considered such conduct sufficiently aggravating as to warrant enumeration of a specific enhancement provision it would be included in the original Guidelines. However, it is evident the sentencing commission did not intend psychological coercion to trigger an enhancement for physical acts. The significant portion of the statute, which illuminates the circuit courts' point of divergence, is the use of the phrase “such as.”²⁷⁹ Courts of both camps have identified that these two words alone signify the examples of physical restraint listed in the commentary notes, are mentioned by way of example, and do not constitute an exhaustive list.²⁸⁰ Under this interpretation, the circuit courts of the first camp have read “physical restraint” expansively and have applied it in situations where the defendant's conduct resembles psychological coercion. Conversely, courts of the second camp have concluded that although the list does not preclude a finding of other examples of physical restraint, the restraint required to trigger the enhancement provision must in fact be physical.

The first question in a court's statutory construction is to determine “whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; [and] the court...must give effect to the unambiguously expressed intent of Congress.”²⁸¹ Where congressional intent cannot

²⁷⁷ U.S. SENT'G GUIDELINES MANUAL, Ch. 1, Pt. A, Subpt. 1, § 3, The Basic Approach: Policy Statement (U.S. SENT'G COMM'N 2021).

²⁷⁸ *Herman*, 930 F.3d at 876.

²⁷⁹ U.S. SENT'G GUIDELINES MANUAL, § 2b3.1 cmt. background n.6 (U.S. SENT'G COMM'N 2021); *see* *United States v. Drew*, 200 F.3d 871, 880 (D.C. Cir. 2000); *see also* *United States v. Dimache*, 665 F.3d 603, 606 (4th Cir. 2011).

²⁸⁰ *Drew*, 200 F.3d at 880; *Dimache*, 665 F.3d at 606.

²⁸¹ *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 842-43 (1984); *see also* *Bostock v. Clayton County, Georgia* 140 S. Ct. 1731, 1738

be ascertained from a “plain language” reading, the courts engage in statutory construction through the use of the canons of construction.²⁸² The canons of construction can be separated generally into three separate approaches: (1) legislative intent; (2) textual meaning; or (3) pragmatic assessment of institutional, textual and contextual factors; the dynamic approach.²⁸³ Still, the canons of construction “are no more than rules of thumb in determining the meaning of the law”²⁸⁴ and generally “there is no hierarchy of the canons”²⁸⁵ so long as the court starts with a plain language reading. Although useful, the lack of hierarchy among the canons of construction potentially gives a presiding judge great deference in assigning conduct to statutory language. Despite the useful and often necessary effects of the canons of construction, this Note supports the position that § 2B3.1 (b)(4)(B) does not require interpretation past a plain language reading nor is the first camp’s interpretation as simplistic and inconsequential as the law school exercise of “No Cars in the Park.”²⁸⁶ The use of the word “physical” prior to “restraint” suggests that the restraint must in fact involve a physical element.²⁸⁷ Some courts have acknowledged that “[T]he victim’s reaction does not determine whether there is or is not

(2020) (“This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment.”).

²⁸² Ron Beal, *The Art of Statutory Construction: Texas Style*, 7 BAYLOR L. REV. 339, 342 (2012) (quoting Merriam-Webster’s Collegiate Dictionary 69 (11th ed. 2006)).

Art’ is defined as ‘skill acquired by experience, study, or observation.’ Nothing better describes the act of lawyers and judges attempting to discern the legislative intent of a statute. For it is through the subordination of the judiciary to the legislature that our laws are assured their democratic pedigree. Yet, many times the text may be unclear in the context of a particular fact pattern, and a statute’s meaning must be drawn from other sources. Thus, the court and lawyers must follow the legislative command by applying the statute’s language or referring to the legislative intent or purpose as discerned through the legislative history or canons of construction.

Id.

²⁸³ *Id.* at 342-43.

²⁸⁴ *Id.* at 343.

²⁸⁵ *Id.* at 344.

²⁸⁶ See generally H. L. A. Hart, *Positivism and Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958) (showing a classic Hart-Fuller debate of a statutory interpretation problem most law students will at some point encounter; the legal meaning of “No Vehicles in the Park”).

²⁸⁷ See *United States v. Herman*, 930 F.3d 872, 876 (7th Cir. 2019).

physical restraint.”²⁸⁸ Although restraint may have occurred, a victim’s physical response to the defendant’s verbal coercion falls outside the scope of physical restraint.

This circuit split could be resolved with an amendment to the Guidelines, to specifically include a “psychological coercion” enhancement. Since the case law is already well developed, the drafters of such an amendment would have the benefit of choosing language that is consistent with existing law. This amendment would enable prosecutors to adequately address new cases involving psychological coercion of the victims of robberies. The proposed amendment could be enumerated under a currently fictitious subsection “2B3.1(b)(4)(C)” which would immediately follow the physical restraint sentencing enhancement. The proposed language would read as follows: “(C) if any person was subjected to psychological coercion to facilitate commission of the offense, or to facilitate escape, increase by [x] levels.” Of course, the sentencing enhancements are incomplete without examples giving the judicial system a starting point from which to begin its interpretive analyses. The proposed commentary background notes would also include a brief description of examples which constitute psychological coercion sufficient to trigger the proposed enhancement. Such language could be as follows: “The guideline provides an enhancement for robberies when a victim was’ subjected to psychological coercion by use of dangerous instrumentalities.”²⁸⁹

This amendment would effectively resolve the circuit split and differentiate cases of physical restraint and psychological coercion. Over time, case law would make this differentiation clearer and define concrete examples of physical restraint as compared to psychological coercion. Several sentencing enhancements already exist which could adequately punish the behavior outlined in this Note.

Subsections §§ 2B3.1(b)(2)(D), (E) and (F) of the Guidelines adds a 4-level enhancement “if a dangerous weapon was otherwise used,”²⁹⁰ adds a 3-level enhancement “if a dangerous weapon was brandished or possessed,”²⁹¹ or adds a 2-level enhancement “if a threat

²⁸⁸ *Id.*

²⁸⁹ Quoting in part U.S. SENT’G GUIDELINES MANUAL, § 2B3.1 cmt. background (U.S. SENT’G COMM’N 2021).

²⁹⁰ *Id.* at § (b)(2)(D).

²⁹¹ *Id.* at § (b)(2)(E).

of death was made[.]”²⁹² Reading these enhancements together one could very reasonably argue that pointing a firearm and making demands would trigger § 2B3.1(b)(2)(D) or (E) in concert with § 2B3.1(b)(2)(F).²⁹³ For example, an offender walks into a bank with a firearm thus triggering subsection (D) or (E) or both. The offender then points the firearm at a bank teller and makes a statement such as “give me the money or else” thereby triggering subsection (F). Under the commentary notes, examples of threats of death are provided: “[g]ive me your money or else (where the defendant draws his hand across his throat in a slashing motion)[.]”²⁹⁴ However, the final sentence of the commentary notes states that “[t]he court should consider that the intent of this provision is to provide an increased offense level for cases in which the offender(s) engaged in conduct that would instill in a reasonable person, who is a victim of the offense, a fear of death.”²⁹⁵ Unlike the commentary and background notes for the physical restraint sentencing enhancement, the guidance provided by the sentencing commission suggests that application of this enhancement depends on the victim’s reaction to an offender’s conduct. It is fair to assume that reasonable people would be instilled with a fear of death from having a firearm pointed at them. This enhancement also directly lends itself to the psychological coercion currently being assigned to the physical restraint enhancement in circuits that have adopted constructive physical restraint.

Notably, the prime statutory limitation imposed on these enhancements is “that the cumulative adjustments from (2) and (3) shall not exceed 11 levels.”²⁹⁶ Subsection three of § 2B3.1 deals with enhancements related to injuries sustained by the victim during the course of the robbery.²⁹⁷ The largest enhancement arises under § 2B3.1(b)(3)(C) where an offender faces an enhancement of 6-levels for inflicting “Permanent or Life-Threatening Bodily Injury.”²⁹⁸ However, under the example above, the fictitious offender would very likely trigger a 6-level enhancement for using a firearm,²⁹⁹ and/or a 5-

²⁹² *Id.* at § (b)(2)(F).

²⁹³ *Id.* at §§ (b)(2)(D)(E)(F).

²⁹⁴ *Id.* at § 2B3.1 cmt. n.6.

²⁹⁵ *Id.*

²⁹⁶ *Id.* at § (b)(3).

²⁹⁷ *See* U.S. SENT’G GUIDELINES MANUAL § 2B3.1(b)(3).

²⁹⁸ *Id.* at § (b)(3)(C).

²⁹⁹ *Id.* at § (b)(2)(B).

level enhancement for brandishing or possessing a firearm.³⁰⁰ This combination allows for an offender's threatening use of a firearm as well as injuries caused during the commission of the robbery to be adequately punished. Reading the levels of enhancements together with the 11-level limitation potentially suggests the Commission intended to account for an offender's conduct within reason but wanted to avoid the use of the Guidelines as a prosecutorial hammer.³⁰¹

Under current law, a probation department and prosecutor may consider a range of behaviors to mix and match different enhancement provisions in robberies involving a firearm and reach the maximum or within 1-level of the maximum. However, the limitation imposed on subsections (2) and (3) does not apply to subsection (4), addressing the physical restraint enhancement. Thus, it appears that the physical restraint enhancement has been used in the first camp to circumvent this limitation and maximize sentences, even when a plain language reading of "physical restraint" would typically not include psychological coercion.

An expansive reading of "physical restraint" also implicates the long-standing rule discussed in *Blockburger v. United States*.³⁰² In *Blockburger*, the defendant was convicted of two counts of selling morphine hydrochloride to the same purchaser and one count of "having been made not in pursuance of a written order of the purchaser as required by [The Harrison Narcotic Act]" with respect to the sale in the second count.³⁰³ The defendant was sentenced to five years and a fine of \$2,000 dollars for each count.³⁰⁴ On appeal, the defendant unsuccessfully argued that the two sales constituted only one offense, and that the third count in relation to the count of the second sale was also one offense.³⁰⁵ The Supreme Court clearly expressed the following: "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine where there are two offenses or only one, is whether each provision requires proof of a fact which the other

³⁰⁰ *Id.* at § (b)(2)(C).

³⁰¹ *See generally* U.S. SENT'G GUIDELINES MANUAL § 2B3.1.

³⁰² 284 U.S. 299, 304 (1932).

³⁰³ *Id.* at 301.

³⁰⁴ *Id.*

³⁰⁵ *Id.*

does not.”³⁰⁶ Unfortunately for the defendant, each sale constituted a separate fact: the first sale had concluded before the second sale began; thus, they were individual sales. Applying this rule to the second and third counts which occurred during the same transaction, the prosecution proved that the defendant: (1) sold narcotics in violation of the statute; and (2) this sale violated a separate section of the same statute in that the forbidden drugs were not sold in the original stamped package.³⁰⁷ Here, the “additional fact” which constituted separate offenses was proof the drugs were not sold in their original packing and the sentence was thus lawful.³⁰⁸

Applying *Blockburger* to the Guidelines invites a potential violation under certain circumstances. Suppose an offender enters a bank with a firearm and points the firearm at the teller. The offender says, “give me the money or else” and the teller hands over the money. Under this set of facts, the offender could face sentencing enhancements for making a threat of death under § 2B3.1(b)(2)(F).³⁰⁹ Further, if this robbery occurred in a state residing in the First, Fourth, Tenth or Eleventh Circuits, it is very likely the offender would face an enhancement for physical restraint under § 2B3.1(b)(4)(B).³¹⁰ The facts proven would need to be as follows: (1) a robbery occurred; (2) a firearm was used [triggering a number of enhancement under § 2B3.1(b)(2)]; and (3) the offender pointed the firearm at the victim such that the (a) victim was instilled with a reasonable fear of death and the (b) victim was physically restrained because the use of the firearm instilled a reasonable fear of death. As illustrated above, the instillment of a reasonable fear of death would constitute the same fact and trigger two separate enhancement provisions. Although *Blockburger* applies to offenses themselves rather than sentencing enhancements, the logic is instructive to show how identical conduct under the current statutory scheme can be used to charge multiple enhancements based on very small differences in actual conduct.

³⁰⁶ *Id.* at 304.

³⁰⁷ *Id.* at 302-03.

³⁰⁸ *Id.* at 302-04.

³⁰⁹ U.S. SENT'G GUIDELINES MANUAL § 2B3.1(b)(2)(F) (U.S. SENT'G COMM'N 2021).

³¹⁰ *Id.* at § (b)(4)(B).

Of all the circuit courts, only one has developed a test for determining whether the physical restraint enhancement applies.³¹¹ The Second Circuit outlined a three-part test in its recent decision in *United States v. Taylor*.³¹² Under the first prong of the test, the restraint must be “physical.”³¹³ The Second Circuit’s focus under this prong is whether the restraint imposes physical immobility or rather causes the victim to *feel* restraint.³¹⁴ The second prong of the test focuses on “qualifying physical ‘restraint’ and nonqualifying physical ‘force.’”³¹⁵ Qualifying acts of physicality and nonqualifying acts are determined on the basis of which they occur. Articulating previous case law, this circuit emphasized that physical contact alone is insufficient to trigger the enhancement, while physical contact which facilitates the commission of the crime is sufficient.³¹⁶ To illustrate this point, the court discussed *Rosario*,³¹⁷ where the defendant struck a mail carrier such that the mail carrier fell to the ground.³¹⁸ The defendant then stepped on the mail carrier’s throat while stealing his personal items.³¹⁹ The Second Circuit noted that this defendant used multiple types of physical force, but only stepping on the mail carrier’s throat “facilitated the commission of the offense in that the victim could do nothing...because of the physical restraint.”³²⁰ The final prong of the *Taylor* test contemplates where and how the restraint occurs.³²¹ The court stated the restraint “must be more than a ‘direction to move [that] is typical of most robberies.’”³²² Clarifying this standard, the court explained in cases where the offender directs an employee at gun point, to behind the cash register, the conduct is insufficient to trigger the sentencing enhancement because moving an employee to the register or other cash storage *would be* typical of most

³¹¹ See *United States v. Taylor*, 961 F.3d 68, 78-79 (2d Cir. 2020).

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Id.* at 78 (*emphasis added*).

³¹⁵ *Id.* (quoting *United States v. Rosario*, 7 F.3d 319, 321 (2d Cir. 1993)).

³¹⁶ *Id.* (“[T]he essential character of conduct that is subject to the physical-restraint [G]uideline is depriving a person of his freedom of physical movement’ in order to complete the offense.”).

³¹⁷ *Rosario*, 7 F.3d 319.

³¹⁸ *Id.* at 320-21.

³¹⁹ *Id.*

³²⁰ *Taylor*, 961 F.3d at 79 (quoting *Rosario*, 7 F.3d at 321).

³²¹ *Id.*

³²² *Id.* (quoting *United States v. Paul*, 900 F.3d 200, 204 (2d Cir. 2018)).

robberies.³²³ Citing to *United States v. Paul*, the court articulated that “in the absence of physical restraint similar to being bound or moved into a locked or at least confining space, the enhancement is not to be added where the direction to move is typical of most robberies.”³²⁴

By means of this three-part test, the Second Circuit has narrowed the scope of physical restraint to give meaning to the words enacted by Congress. Specifically, even where a defendant moves a victim at gun point into another room, the enhancement will only apply if the victim is confined to that room.³²⁵ The decision in *Taylor* appears to reflect a long deliberation over application of the enhancement provision in that the Second Circuit had warned about a broad interpretation of physical restraint as early as 1999.³²⁶

In the introduction of this Note, I proposed a hypothetical. Applying *Taylor*, we see that the offender’s conduct would be insufficient to trigger the sentencing enhancement. In that example, the hypothetical offender pointed her firearm at a bank patron and told him to jump up and hop up and down on one leg. This conduct would not physically immobilize the patron despite a likely feeling of restraint, and thus fails prong one. Further, this demand is unlikely to facilitate the crime in any manner, failing prong two as well. Finally, this type of ordered movement, although atypical of most robberies, involves no binding or locking away of the victim and also fails prong three. The hypothetical also indicated that the offender “beg[an] moving occupants around the bank in furtherance of her objective.”³²⁷ This sentence invites the potential application of the physical restraint sentencing enhancement depending on how and where the offender moved the occupants. Suppose she dragged the victims into the bank vault, collected the money, and locked all the victims in the vault before escaping. Under this set of facts, the offender’s conduct was physical because it facilitated the commission of the crime and, although typical of most robberies, caused the victims to be locked away, a manner of restraint consistent with the Guidelines.

³²³ *Id.*

³²⁴ *Paul*, 900 F.3d at 204.

³²⁵ *Taylor*, 961 F.3d at 80.

³²⁶ *See United States v. Anglin*, 169 F.3d 154, 165 (2d Cir. 1999).

³²⁷ *See infra* Part I.

VI. CONCLUSION

The Sentencing Guidelines were designed in part to bring uniformity to sentencing of like crimes nationwide. However, interpretative differences among the circuit courts have led to the opposite result. The same crimes consisting of the same conduct are punished with significantly different amounts of time, purely based on the geographic location of the crime itself. A policy statement offered by the Sentencing Commission indicates their mission to balance uniformity in sentencing with the age-old criminal punishment theory of proportionality.³²⁸ Sentences should reflect the individual offender's conduct and history, but sentences among similarly situated offenders should be similar in length. A nationwide adoption of the *Taylor* test would effectively close the door on a circuit split and further the congressional intent and goals of the Guidelines. Finally, an adoption of this magnitude would lend credence to the notion that “words should mean something[.]”³²⁹

³²⁸ U.S. SENT'G GUIDELINES MANUAL, Ch. 1, Pt. A, Subpt. 1, § 3, The Basic Approach: Policy Statement (U.S. SENT'G COMM'N 2021).

³²⁹ *United States v. Herman*, 930 F.3d 872, 876 (7th Cir. 2019).