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RESOLVING DIVISION AMONG THE U.S. COURTS OF APPEALS: WHAT CONSTITUTES A PHYSICAL RESTRAINT?

Devin Thomas Slaugenhaupt*

INTRODUCTION

In May 2016, Joshua Herman visited Jacob Kirk's house in Indiana. What was intended to be a friendly visit turned into a robbery when Herman noticed that Kirk's mother was in possession of a Jimenez Arms handgun.[1] Kirk's mother allowed Herman to examine the handgun, at which point Herman pulled out a revolver of his own and told them, "stay seated. I don't want to blow you guys back, but I will if I have to."[2] Herman then fled with the stolen handgun, ultimately firing a shot at Kirk—and missing—when Kirk pursued Herman outside.[3] Herman pled guilty to violating 18 U.S.C. § 922(g), which makes it a crime for felons to be in possession of a firearm.[4] On appeal, the Seventh Circuit decided a two-point sentencing enhancement for physical restraint was inapplicable as "more than pointing a gun at someone and ordering that person not to move is necessary for the application of U.S.S.G. § 2B3.1(b)(4)(B)."[5]

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[1] United States v. Herman, 930 F.3d 872, 873–81 (7th Cir. 2019).

[2] *Id.*

[3] *Id.* at 873–74.

[4] *Id.* at 873.

[5] *Id.*

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A similar situation took place in May 2008, when Elianer Dimache robbed a bank in South Carolina.[6] Much like Herman, Dimache brandished a gun and told the bank tellers to get down on the ground and stay there or they would "know what will happen."[7] Dimache was later arrested and pled guilty to committing an armed bank robbery in violation of 18 U.S.C. § 2113(d).[8] However, unlike in *Herman*, the Fourth Circuit determined that a two-point sentencing enhancement for physically restraining a victim with a gun was applicable.[9] The Fourth Circuit based its reasoning on the idea that pointing a gun at victims and telling them not to move restricts their freedom of movement in a way that would be the effective equivalent of tying the individual up.[10] This means that Herman and Dimache were given different sentencing enhancements for committing the same type of crime—a result that Congress, the Supreme Court, and indeed the entire criminal justice system, seek to avoid.

This Note addresses the complicated and novel legal question illustrated by the above cases: should the brandishing of a gun during the commission of a robbery constitute a physical restraint for purposes of a sentencing enhancement?[11] A sentencing enhancement is a factor that increases the base offense level of a crime, ultimately leading to a longer sentence if a defendant is convicted.[12] Section 2B3.1(b)(4) of the U.S. Sentencing Guidelines Manual (Guidelines) provides a two-point sentencing enhancement if physical restraint is used on a victim during the commission of a robbery, but it never explicitly resolves the issue of whether brandishing a gun meets such criteria or not.[13] This is a complex issue that requires a resolution, as there are currently eleven United States Courts of Appeals split on whether to apply this sentencing enhancement in robberies where a gun is

[6] United States v. Dimache, 665 F.3d 603, 604–06, 609 (4th Cir. 2011).

[7] *Id.*

[8] *Id.*

[9] *Id.* at 609.

[10] *Id.*

[11] *See* U.S. SENTENCING GUIDELINES MANUAL § 2B3.1(b)(4) (U.S. SENTENCING COMM'N 2018).

[12] *See, e.g.*, *id.* at § 3B1.1 (providing for a sentencing enhancement if a defendant played an "aggravating role" in the offense); U.S. SENTENCING COMM'N, AGGRAVATING AND MITIGATING ROLE ADJUSTMENTS PRIMER §§ 3B1.1 & 3B1.2 1 (2013).

[13] *See* U.S. SENTENCING GUIDELINES MANUAL § 2B3.1(b)(4).

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brandished.[14] The number of courts of appeals split on this issue calls for clarification from the Supreme Court. As such, this Note argues that the next time the Court has the opportunity to grant certiorari in a case involving this issue, it should do so to prevent further confusion.[15]

The Supreme Court should hold that brandishing a gun is not a physical restraint, as counting it as such is prejudicial to defendants by allowing an additional, redundant sentencing enhancement on top of the enhancements that are available for using, possessing, or brandishing a firearm during the commission of a robbery.[16] If the Supreme Court holds that branding a gun *is* a physical restraint, it would disallow any limiting principle, meaning that this enhancement could potentially apply to almost every armed robbery, even if a victim was not truly restrained. Allowing this split among the United States Courts of Appeals to stand is inequitable and will lead to disparities in sentencing for the commission of the same crime, one of the main reasons the Guidelines were enacted in the first place.[17]

Part I of this Note examines the Guidelines and the development and application of sentencing enhancements generally. Part II provides an analysis of every case involved in the eleven-circuit split on the issue and evaluates the reasoning used by each court. Part III proposes a solution for the Supreme Court in resolving the circuit split.

I. UNITED STATES SENTENCING GUIDELINES AND SENTENCING ENHANCEMENTS

In a long-enduring effort to end major disparities in sentencing convicted criminals in the United States—and after almost a decade of debate, research, and discussion—Congress passed the Comprehensive Crime Control Act of 1984.[18] This comprehensive reform of the criminal justice system included the Sentencing

[14] *See* United States v. Herman, 930 F.3d 872 (7th Cir. 2019); *Dimache*, 665 F.3d 603 (4th Cir. 2011); United States v. Stevens, 580 F.3d 718, 719 (8th Cir. 2009); United States v. Miera, 539 F.3d 1232 (10th Cir. 2008); United States v. Wallace, 461 F.3d 15 (1st Cir. 2006); United States v. Parker, 241 F.3d 1114 (9th Cir. 2001); United States v. Drew, 200 F.3d 871 (D.C. Cir. 2000); United States v. Gonzalez, 183 F.3d 1315 (11th Cir. 1999); United States v. Anglin, 169 F.3d 154 (2d Cir. 1999); United States v. Hickman, 151 F.3d 446 (5th Cir. 1998).

[15] *See Herman*, 930 F.3d at 872.

[16] U.S. SENTENCING GUIDELINES MANUAL § 2B3.1(b)(2).

[17] U.S. SENTENCING COMM'N, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION 1 (2011) [hereinafter OVERVIEW].

[18] *Id.*

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Reform Act, a provision that established the United States Sentencing Commission and the U.S. Sentencing Guidelines.[19] The Guidelines provide guidance for the judiciary in sentencing defendants, assigning each crime a base sentencing time according to a specific offense characteristic.[20] While the sentencing guidelines were once mandatory, they are now advisory after the watershed case of *United States v. Booker*.[21] *Booker* created a three-step sentencing process for judges that is a holistic, rounded evaluation of multiple factors surrounding the crime committed and the defendant's relevant characteristics.[22]

A. The Enactment of the Federal Sentencing Guidelines

At the time of their enactment, the purpose of the sentencing guidelines was to: (1) structure and order the discretion in sentencing that was afforded to federal judges; (2) promote certainty and a degree of predictability in the administration of punishments for particular crimes; and (3) enact more serious penalties for specific groups of offenders, such as violent and repeat offenders.[23] The sentencing guidelines were originally mandatory for federal judges—there was no meaningful degree of discretion afforded to judges in making their sentencing decisions.[24] Congress concluded that the sentencing guidelines should be mandatory rather than advisory because this approach would successfully reduce sentence disparities for the same crime, while still retaining the degree of flexibility necessary to adjust for unanticipated factors that may arise in a given case.[25] However, the mandatory nature of the sentencing guidelines was eventually overturned by the Supreme Court in 2005, significantly altering the role of sentencing guidelines as well as the role of the

[19] *Id.*

[20] *Id.* at 2.

[21] 543 U.S. 220, 245–46 (2005).

[22] U.S. SENTENCING COMM'N, REPORT ON THE CONTINUING IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING 28–31 (2012) [hereinafter BOOKER REPORT].

[23] OVERVIEW, *supra* note 17, at 1.

[24] 18 U.S.C. § 3553(b)(1); *see* U.S. SENTENCING COMM'N, FEDERAL SENTENCING: THE BASICS (2015), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/201510_fed-sentencing-basics.pdf [hereinafter U.S. SENTENCING COMM'N].

[25] Mistretta v. United States, 488 U.S. 361, 367 (1989) (citing United States v. Addonizio, 442 U.S. 178, 189 (1979)).

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federal judges who apply the guidelines to make their respective sentencing decisions.[26]

B. United States v. Booker *and its Aftermath*

The Supreme Court decided in *Apprendi v. New Jersey*—a precursor to *United States v. Booker*—that a plaintiff must prove to a jury beyond a reasonable doubt any facts affecting the maximum length of a sentence; otherwise, the facts could be admitted to by the defendant in a guilty plea.[27] This holding was eventually expanded to encompass facts that trigger a mandatory minimum sentence and facts that will raise a statutory maximum fine.[28] *Apprendi* and its progeny set the stage for *Booker*, the case that fundamentally changed the role of the sentencing guidelines in the United States. *Booker* involved the consolidation of two cases involving distinct defendants—Freddie Booker and Ducan Fanfan—who were both convicted of charges involving the distribution of cocaine.[29]

In Booker's case, the sentencing judge decided to apply the sentencing guidelines to increase Booker's sentence by more than eight years based on a finding that he possessed a greater quantity of drugs than the jury had found at trial.[30] The result was the exact opposite in Fanfan's case, however.[31] The sentencing judge made findings that Fanfan had significantly more drugs than the jury had found at trial, as well as that Fanfan had been an organizer, leader, manager, or supervisor in the criminal conspiracy to distribute drugs.[32] These findings would have warranted a ten-year increase under the dictates of the sentencing guidelines; nonetheless, the judge *declined* to apply the sentencing guidelines in setting Fanfan's sentence.[33]

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[26] *See Booker*, 543 U.S. at 220.

[27] Apprendi v. New Jersey, 530 U.S. 466, 476 (2000); *see* U.S. SENTENCING COMM'N, *supra* note 24, at 11.

[28] Alleyne v. United States, 570 U.S. 99 (2013); S. Union Co. v. United States, 567 U.S. 343 (2012).

[29] *Booker*, 543 U.S. at 226–29.

[30] *Id.* at 227–28.

[31] *Id.* at 228–29.

[32] *Id.*

[33] *Id.*

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Accordingly, cases in two different circuits that involved the same crime received disparate applications of the sentencing guidelines.[34] To resolve this issue, the Supreme Court concluded that the mandatory nature of the sentencing guidelines must be overturned as it is incompatible with the Sixth Amendment's requirement that juries, and not judges, must find relevant facts for sentencing purposes.[35] The Court's decision repealed the mandatory provisions of 18 U.S.C.S. § 3553(b)—a subsection that had not allowed judges any discretion in sentencing, but compelled a strict application of the sentencing guidelines' range once it was calculated—now making the sentencing guidelines merely advisory guidelines for judges to use in holistically tailoring sentences to fit the defendant and the crime committed.[36] Because the guidelines are now advisory rather than mandatory, there is once again a disparity in how they are applied among the various circuits and the individual federal judges who apply them daily. When these applications run explicitly counter to one another, such as with the sentencing enhancement at issue in this Note, it is imperative that the Supreme Court clarify the proper position to take on the matter.

*C. Post-*Booker *3-Step Sentencing Process*

After *Booker*, the sentencing process evolved into three steps.[37] First, a judge must properly determine the guideline range by conducting relevant fact-finding by a preponderance of the evidence standard.[38] This process requires judges to respectfully consider the relevant guidelines.[39] The second step in the sentencing process is for a judge to consider any potentially relevant departure provisions from the sentencing guidelines that may apply.[40] Finally, the judge considers all of the 18 U.S.C.S. § 3553(a) factors—including the nature and circumstances of the offense, the kinds of sentences available, and the need for a sentence to fulfill a certain purpose, among other factors—to decide whether to sentence the defendant within

[34] *See* United States v. Booker, 375 F.3d 508 (7th Cir. 2004); United States v. Fanfan, No. 03-47-P-H, 2004 U.S. Dist. LEXIS 18593 (D. Me. June 28, 2004).

[35] *Booker*, 543 U.S. at 245–46.

[36] *Id.*

[37] U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(a)–(c) (U.S. SENTENCING COMM'N 2018); *see* BOOKER REPORT, *supra* note 22, at 28.

[38] U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(a); *see* BOOKER REPORT, *supra* note 22, at 28.

[39] Kimbrough v. United States, 552 U.S. 85, 101 (2007); *see* U.S. SENTENCING COMM'N, *supra* note 24, at 11.

[40] U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(b); *see* BOOKER REPORT, *supra* note 22, at 29; U.S. SENTENCING COMM'N, *supra* note 24, at 11.

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the applicable sentencing guidelines range, whether to sentence as a departure, or whether to sentence as a variance from the guidelines range.[41] This 3-step process is effective in guiding sentencing as it both enacts the will of Congress in passing the Sentencing Reform Act and allows judges some discretion, while still maintaining relative consistency in sentences for similar crimes due to the guidelines range.[42]

D. Sentencing Enhancements: Specific Offense Characteristics

Before venturing into the sentencing enhancement at hand, some additional background on sentencing adjustments more generally helps elucidate why the Supreme Court should hold that brandishing a gun is not a physical restraint for purposes of a sentencing enhancement, as counting it as such would be prejudicial to defendants by allowing two (or more) enhancements for the same action of brandishing a gun.[43] Sentencing adjustments can take multiple forms, but, for this Note, the relevant sentencing adjustment is an enhancement based on a specific offense characteristic.[44] Every crime has a specific base offense level that is the starting point for determining just how serious the crime is, and how harshly it will be punished.[45] Certain crimes, such as Second Degree Murder, have higher base levels than other less serious crimes.[46] The maximum offense level possible for a crime is 43, while the lowest base offense level possible for a crime is 1.[47]

For the crime at hand—robbery—the base offense level is 20.[48] If a defendant had a criminal history category of I—meaning they had a relatively clean record, as the criminal history category is determined by the number of convictions that one

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[41] U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(c); 18 U.S.C.S § 3553(a)(1)–(7) (LexisNexis 2020); *see* Gall v. United States, 552 U.S. 38, 50 n.6 (2007) ("The fact that § 3553(a) explicitly directs sentencing courts to consider the Guidelines supports the premise that district courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process."); *see also* BOOKER REPORT, *supra* note 22, at 31.

[42] U.S. SENTENCING COMM'N, *supra* note 24, at 11.

[43] *See* U.S. SENTENCING GUIDELINES MANUAL § 2B3.1(b)(2), (4).

[44] OVERVIEW, *supra* note 17, at 2.

[45] *Id.*

[46] U.S. SENTENCING GUIDELINES MANUAL § 2A1.2(a) (providing that Second Degree Murder has a base offense level of 38).

[47] *Id.*; U.S. SENTENCING GUIDELINES MANUAL ch.3, pt. A, sentencing tbl. (U.S. SENTENCING COMM'N 2016).

[48] U.S. SENTENCING GUIDELINES MANUAL § 2B3.1.

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has[49]—along with no enhancements at all, this would mean that an individual convicted of robbery would be facing 33–41 months of incarceration.[50] There are specific offense characteristics that are unique to each crime and that will increase this base offense level and lead to an extended period of incarceration.[51] The specific offense characteristic at issue in this Note is under § 2B3.1(b)(4)(B) of the Sentencing Guidelines, which provides, "if any person was physically restrained to facilitate commission of the offense or to facilitate escape, increase by 2 levels."[52] Specific offense characteristics are often highly contested because they can dramatically impact sentencing. As in this case, if the enhancement is granted and all else is equal, then an individual would be facing an offense level of 22 and now 41–51 months of incarceration, a significant increase for only a two-level enhancement.[53]

After the Supreme Court's *Booker* decision made the guidelines advisory rather than mandatory, circuit courts often differ as to how a particular specific offense characteristic should be applied.[54] In such a situation, it is important for the Supreme Court to grant certiorari in order to resolve the circuit split to promote consistency and predictability in sentencing for defendants who have committed similar crimes across the various United States Courts of Appeals.[55] Here, there is a "deep and abiding split" within the circuits that warrants resolution.[56]

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[49] U.S. SENTENCING COMM'N, CALCULATING CRIMINAL HISTORY: AN OUTLINE 1 (2011) (describing that criminal history categories are determined by points allocated to prior convictions: sentences exceeding one year and one month are worth three points, sentences exceeding sixty days are worth two points, and sentences less than sixty days are worth one point); U.S. SENTENCING GUIDELINES MANUAL, *supra* note 47 (providing that Criminal History Category 1 is for those defendants with 0 or 1 criminal history points).

[50] U.S. SENTENCING GUIDELINES MANUAL § 2B3.1; U.S. SENTENCING GUIDELINES MANUAL, *supra* note 47.

[51] *See* U.S. SENTENCING GUIDELINES MANUAL § 2B3.1.

[52] *See id.*

[53] *Id.* at § 2B3.1(b)(4)(B); U.S. SENTENCING GUIDELINES MANUAL, *supra* note 47.

[54] *See* United States v. Booker, 543 U.S. 220, 245–46 (2005).

[55] *See* SUP. CT. R. 10(a).

[56] Allapattah Servs., Inc. v. Exxon Corp., 362 F.3d 739, 746 (11th Cir. 2004) (Tjoflat, J., dissenting).

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II. DIVISION AMONG THE UNITED STATES COURTS OF APPEALS ON HOW TO APPLY THE FINAL ENHANCEMENT

Since January 7, 2020, eleven United States Courts of Appeals have been divided on whether to apply § 2B3.1(b)(4)(B)'s two-point sentencing enhancement when a firearm is brandished during the commission of a robbery.[57] The First, Fourth, Eighth, Tenth, and Eleventh Circuits hold that brandishing a gun during a robbery is enough to trigger the sentencing enhancement.[58] The Second, Third, Fifth, Seventh, Ninth, and D.C. Circuits hold the opposite, ruling that it is not sufficient for purposes of the sentencing enhancement that a gun was brandished, even if the victim is told not to move, as it is not a "physical restraint."[59]

A. Circuits Holding that Brandishing a Firearm Is a Physical Restraint

In order to understand why five United States Courts of Appeals hold that brandishing a firearm during the commission of a robbery is sufficient to constitute a physical restraint of a victim, it is important to evaluate each of the five cases, their facts, and their holdings. There is a common theme among these decisions' reasoning, namely that physical restraint should not be limited only to actions that are commonly recognized as physical restraint, but rather that it should encompass actions taken in the overall spirit of keeping a victim physically restrained.

1. *United States v. Dimache*

The facts of the most recent case from the Fourth Circuit, affirming the application of the § 2B3.1(b)(4)(B) enhancement, are recited, in part, above.[60] Analyzing Dimache's robbery of a bank where he brandished a gun and yelled for the bank tellers to get down because they "know what will happen" if they did not

[57] *See* U.S. SENTENCING GUIDELINES MANUAL § 2B3.1(b)(4)(B); *see also* United States v. Herman, 930 F.3d 872 (7th Cir. 2019) (providing the names and citations of the cases for the various circuits that are split on this issue, as well as clarifying the 7th Circuit's previous holdings on the matter).

[58] *See* United States v. Dimache, 665 F.3d 603 (4th Cir. 2011); United States v. Stevens, 580 F.3d 718, 719 (8th Cir. 2009); United States v. Miera, 539 F.3d 1232 (10th Cir. 2008); United States v. Wallace, 461 F.3d 15 (1st Cir. 2006); United States v. Gonzalez, 183 F.3d 1315 (11th Cir. 1999).

[59] *See Herman*, 930 F.3d 872; United States v. Parker, 241 F.3d 1114 (9th Cir. 2001); United States v. Drew, 200 F.3d 871 (D.C. Cir. 2000); United States v. Anglin, 169 F.3d 154 (2d Cir. 1999); United States v. Hickman, 151 F.3d 446 (5th Cir. 1998).

[60] See the Introduction of this Note for a recitation of the facts of *Dimache*.

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listen,[61] the district court found that Dimache's sentencing range, after applying the § 2B3.1(b)(4)(B) sentencing enhancements, was 78–97 months and ultimately sentenced him to 90 months.[62]

In holding that the brandishing of a gun during the commission of a robbery is sufficient to warrant the application of the two-point sentencing enhancement, the Fourth Circuit acknowledged that the comments to the sentencing guidelines define physical restraint as the "forcible restraint of the victim such as by being tied, bound, or locked up."[63] Despite this recognition, the court found that the brandishing of a gun during a robbery was sufficient to support a finding that a victim was physically restrained.[64] "The intended scope of the U.S.S.G § 2B3.1(b)(4)(B) enhancement is to punish a defendant who deprives a person of his physical movement, which can be accomplished by means other than those listed . . . ."[65] As a result, the court focused on the idea that the comment to the sentencing guidelines defining physical restraint as being "tied, bound, or locked up" is a guiding principle rather than an exhaustive list.[66]

The court also drew on the Seventh Circuit's *Taylor* opinion to find that pointing a gun at a victim has the same effect as using a physical restraint such as rope.[67]

> A pointed gun is used to move a person into an unlocked room and keep him there, or used to move a person from one part of the robbery scene to another, the person's freedom of movement is restrained as effectively as by shoving or dragging him into a room and locking the door.[68]

The Court also found the size of the area to which a victim is constrained by the brandishing of a gun to be immaterial, as the "applicability of the U.S.S.G.

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[61] *Dimache*, 665 F.3d at 604.

[62] *Id.* at 605–06.

[63] *Id.* at 606; U.S. SENTENCING GUIDELINES MANUAL § 1B1.1.

[64] *Dimache*, 665 F.3d at 609.

[65] *Id.*

[66] *Id.*

[67] *Id.* (citing United States v. Taylor, 620 F.3d 812, 815 (7th Cir. 2010)).

[68] *Id.*

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§ 2B3.1(b)(4)(B) enhancement turns on whether the victim's freedom of movement was restrained, regardless of the size of the area."[69]

2. *United States v. Stevens*

On March 10, 2008, Donald Lee Stevens—along with an accomplice, Natalie Abbott—robbed a bank at gunpoint.[70] Stevens, wearing a mask and rubber gloves, was armed with a loaded handgun when he entered the bank.[71] Stevens and his accomplice ordered the bank employees to raise their hands and then ushered them into the employee break room at gunpoint where they were ordered to lie face down on the floor with their arms out.[72] The robbers forced the employees to turn over their keys and cellphones, and Abbott stood guard over them with a firearm while Stevens filled a bag with money from the tellers' drawers and the bank vault.[73] Upon hearing two employees praying, Abbott told them to be quiet and threatened them with bodily harm if they did not listen to their commands.[74]

Stevens and Abbott eventually marched the employees inside of the bank's vault while they cut the phone lines.[75] Before he shut the employees in the vault, Stevens asked them if they would be able to breathe if the vault's door was closed.[76] One of the employees answered that they would still be able to breathe, and Stevens shut the door and he and his accomplice left immediately.[77] Stevens never locked the vault's door, but the employees remained inside of the vault regardless until help arrived fifteen minutes later after an employee called emergency dispatchers on a cellphone.[78]

Stevens and Abbott were both arrested for the bank robbery, and Stevens pleaded guilty to violating 18 U.S.C. §§ 2, 2113(a) and (d), as well as 18 U.S.C. §§ 2

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[69] *Id.* at 609.

[70] United States v. Stevens, 580 F.3d 718, 719 (8th Cir. 2009).

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*

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and 924(c)(1)(A).[79] Over Stevens' objections, during sentencing the judge applied the § 2B3.1(b)(4)(B) sentencing enhancement and found that Stevens physically restrained people during the bank robbery.[80] The application of this sentencing enhancement yielded an advisory guidelines range of 57–71 months of incarceration, while without this enhancement the advisory guidelines range would have been 46–57 months of incarceration.[81] Stevens was ultimately sentenced to 60 months of incarceration for armed robbery, as well as a consecutive sentence of 84 months—the statutory mandatory minimum—for the weapons count, and Stevens subsequently appealed these sentences.[82]

In upholding the application of the sentencing enhancement, the Eighth Circuit looked at previous circuit caselaw that defined "physical restraint" as a situation where "the defendant creates circumstances allowing the person no alternative but compliance."[83] In the court's opinion, this is the type of situation created by an individual brandishing a firearm and ordering someone to enter a bank vault.[84] The court also stated that the fact that a person may easily free themselves after being physically restrained does not preclude a finding that they were physically restrained.[85] The court found that Stevens' actions of cutting the phone lines and placing the employees in the vault evidenced his intent to keep them there and that the use of firearms and threats ensured their compliance.[86] In the court's view, a physical restraint is not limited to acts such as tying or binding.[87] The court did state that the interpretation of what constitutes a "physical restraint" is not without limit, however, as the court is looking for the brandishing of a weapon in conjunction with other factors in order to accomplish the physical restraint of an individual.[88] In this

[79] *Id.* Stevens pleaded guilty to committing armed bank robbery and using a firearm during the commission of a crime of violence.

[80] *Id.*

[81] *Id.* at 720.

[82] *Id. See* 18 U.S.C. § 924(c)(1)(A)(ii) (providing a mandatory minimum sentence of 84 months if a firearm is brandished during the offense).

[83] *Id.* (citing United States v. Kirtley, 986 F.2d 285, 286 (8th Cir. 1993)).

[84] *Id.*

[85] *Id.*

[86] *Id.* at 721.

[87] *Id.*

[88] *Id.* at 721–22.

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case, though, the brandishing of the firearm was "merely a tool" used to effect the physical restraint, and the use of this tool, in combination with the use of threats of violence or force to the employees, was sufficient for the Eighth Circuit to enforce the application of § 2B3.1(b)(4)(B) in sentencing Stevens.[89]

3. *United States v. Miera*

United States v. Miera is a Tenth Circuit case involving another bank robbery, wherein Jacob Miera entered a bank in West Valley, Utah, intending to rob the bank and its occupants.[90] Jacob's accomplice, his brother Timothy Miera, stood beside the bank's door and pointed a gun around the room, demanding that the people inside "don't move."[91] Jacob approached the bank teller with his hand under his clothing, implying that he possessed a weapon, and demanded currency in large denominations, which he ultimately received.[92] Jacob pled guilty to violating 18 U.S.C. § 2113(a) & (d) and was given multiple enhancements to his 20-point base offense level.[93] Specifically, he received a three-point enhancement under § 2B3.1(b)(2)(E) of the Guidelines for Timothy's brandishing a dangerous weapon during the robbery, as well as a two-point enhancement under § 2B3.1(b)(4)(B) because people were "physically restrained" during the commission of the offense.[94] Jacob appealed his sentence, even though it was below his guideline range, on the grounds that the § 2B3.1(b)(4)(B) physical restraint enhancement was inapplicable.[95] The Tenth Circuit disagreed and affirmed his sentence.[96]

In affirming the application of the § 2B3.1(b)(4)(B) physical restraint enhancement, the court cited a Tenth Circuit case that held that an "enhancement for physical restraint is applicable when the defendant uses force to impede others from interfering with commission of the offense."[97] The court held that in evaluating the concept of restraint, there should be a focus on whether someone was kept from

[89] *Id.*

[90] 539 F.3d 1232, 1233 (10th Cir. 2008).

[91] *Id.*

[92] *Id.*

[93] *Id.* at 1234.

[94] *Id.*

[95] *Id.*

[96] *Id.* at 1234, 1236.

[97] *Id.* at 1234 (citing United States v. Fisher, 132 F.3d 1327, 1329 (10th Cir. 1997)).

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doing something, as this is synonymous with the idea of physically restraining a person.[98] However, the court declined to hold that victims are physically restrained in every instance where a perpetrator possesses or brandishes a firearm.[99] Ultimately, the Tenth Circuit held that "something more" must be done with the firearm in order to hold that victims have been physically restrained.[100]

Based on all of the facts of the case, the Court found that "something more" was done with the firearm to support the finding that the victims were physically restrained by the defendants' brandishing firearms during the robbery.[101] Specifically, the court found that Timothy's aiming the gun around the entire room, taken in conjunction with his command "don't move," as well as his standing near the door of the bank, all acted in concert to appropriately result in the physical restraint of the victims within the bank.[102] As such, in the Tenth Circuit, a judge will need to determine that there was physical restraint via the brandishing of a firearm, then, a judge will need to evaluate the totality of the circumstances instead of relying on a bright-line rule to make their determination.

4. *United States v. Wallace*

United States v. Wallace, coming from the First Circuit, dealt with a September 25, 2000 robbery of a federally-licensed firearms dealership in Providence, Rhode Island committed by Timi Wallace and his brother, Nickoyan.[103] Nickoyan first walked into the firearms dealership posing as a customer and engaged with the store's owner and his assistant who was working with him at the time.[104] Nickoyan asked to see ammunition clips for a semi-automatic handgun, and when the assistant went behind the counter to obtain the keys for the display case containing the ammunition clips, Timi entered the store brandishing a TEC-9 semi-automatic handgun.[105] Timi ran at the owner of the store with the handgun and,

[98] *Id.* (citing United States v. Fisher, 132 F.3d 1327, 1329–30 (10th Cir. 1997)).

[99] *Id.* at 1235.

[100] *Id.* (citing United States v. Pearson, 211 F.3d 524, 525–26 (10th Cir. 2000)).

[101] *Id.* at 1235–36.

[102] *Id.*

[103] 461 F.3d 15, 20 (1st Cir. 2006).

[104] *Id.*

[105] *Id.*

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pointing it at him, shouted, "Don't move."[106] At this point, the assistant attempted to flee, but Nickoyan also drew a handgun and, similar to Timi's actions, pointed it at the assistant and told her not to move.[107] The two perpetrators left the store with 6 high-caliber handguns, and ten days later on October 5, 2000, police arrested Nickoyan, obtaining evidence against Timi in the apartment where his brother was located.[108] Timi successfully evaded arrest for four years but was eventually arrested in July 2004.[109]

Timi Wallace was charged with four counts for violating 18 U.S.C. §§ 1951, 922(u), and 924(c)(1)(A)(ii), and, unlike the defendants in *Dimache* or *Miera*, he did not plead guilty; instead, the case proceeded to trial.[110] After a four-day trial, the jury convicted Wallace of all four counts and found beyond a reasonable doubt that all seven sentencing enhancements included in the indictment should be applied to Wallace.[111] These sentencing enhancements included a two-point enhancement under § 2B3.1(b)(4)(B) for physically restraining the victims—via the brandishing of the weapon—during the commission of the robbery.[112] In his appeal before the First Circuit, Wallace argued that the two-point enhancement should not have been applied because neither he nor his brother physically touched the alleged victims or forced them into a confined, separate space in the store.[113] The First Circuit, however, disagreed with this contention.[114]

In upholding the application of the two-point sentencing enhancement under § 2B3.1(b)(4)(B), the court noted that the "examples listed in the guideline definition

[106] *Id.*

[107] *Id.*

[108] *Id.* at 20–21.

[109] *Id.* at 21.

[110] *Id.*

[111] *Id.* at 22. *Blakely v. Washington*, 542 U.S. 296 (2004), had just been decided before this case was settled, so the sentencing enhancements were still included in the indictment due to the uncertainty as to what to do, though it was acknowledged that sentencing enhancements did not need to be found by the jury. *Id.* at 21 n.2.

[112] *Id.* at 22; U.S. SENTENCING GUIDELINES MANUAL § 2B3.1(B)(4)(B) (U.S. SENTENCING COMM'N 2005).

[113] *Wallace*, 461 F.3d at 33; *see* U.S. SENTENCING GUIDELINES MANUAL § 3A1.3.

[114] *Wallace*, 461 F.3d at 32–35.

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of 'physically restrained' are merely illustrative, . . . not exhaustive."[115] The First Circuit acknowledged that other circuits have held differently on the issue and provided the underlying reasoning for these decisions; ultimately, though, the court found that the use of a firearm at close proximity to a victim would be sufficient to constitute a physical restraint:

> Given the intense, one-on-one nature of the armed robbery, the close proximity of the armed robbers to the victims, and the posturing of the defendant and co-conspirator when one of the victims tried to escape, there is no doubt that the victims were "physically restrained" for purposes of the guidelines enhancement.[116]

5. *United States v. Gonzalez*

The Eleventh Circuit decided *United States v. Gonzalez* in 1999, making this the only pre-*Booker* case holding that the brandishing of a firearm during the commission of a robbery can constitute a physical restraint.[117] Unfortunately, many of the facts leading up to *Gonzalez* are unknown, and there is very little detail as to the Eleventh Circuit's reasoning in making its decision.[118] In October 1995, a Drug Enforcement Administration (DEA) confidential informant, Nancy Camacho, agreed to help the DEA set up a drug sale and bust.[119] However, during the sale in question, the purchaser of the drugs became skittish and, despite knowing that the drugs were in a car, refused to enter the car and drive away with it.[120] As a result, the DEA staged a robbery of the car and drove away with it to prevent leaving large quantities of drugs easily accessible to the general public.[121] Consequently, the group that had purchased the drugs made a strong effort to recover them, first contacting Camacho

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[115] *Id.* at 33 (quoting United States v. DeLuca, 137 F.3d 24, 39 (1st Cir. 1998)). *See* U.S. SENTENCING GUIDELINES MANUAL § 2B3.1, cmt. background ("The guidelines provide an enhancement for robberies where a victim . . . was physically restrained by being tied, bound, or locked up.").

[116] *Wallace*, 461 F.3d at 34–35.

[117] 183 F.3d 1315 (11th Cir. 1999).

[118] There is no prior case history from the trial court, and the 11th Circuit provides very little factual background for the case.

[119] *Id.* at 1319.

[120] *Id.* at 1319–20.

[121] *Id.* at 1320.

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to discuss what happened before they invaded Camacho's house in December 1995.[122] The three men entered the house and threatened Camacho, her two juvenile sons, and her aunt.[123] At trial, the aunt testified that a man brandishing a firearm said, "Tell her [Camacho] to pay the money that she stole."[124] Additionally, the invaders pointed a gun to the youngest son's head and threatened his life in an attempt to force Camacho to disclose the location of the "stolen" drugs.[125]

Pursuant to § 3A1.3 of the Guidelines, the lower court applied a two-point sentencing enhancement for the physical restraint of the victims of the home invasion based on the perpetrators' use of the firearms and the threats made to the victims.[126] In holding that this sentencing enhancement was applicable, the Eleventh Circuit turned to § 1B1.1, comment (1)(i) to define "physical restraint" as the "forcible restraint of the victim such as by being tied, bound, or locked up."[127] The court specifically focused on the "such as" portion of this description of physical restraint, stating that the examples given are merely illustrations and are listed by way of example, not limitation.[128] Accordingly, the court found that by holding the victims at gunpoint, the defendants effectively physically restrained them, meaning that a two-point sentencing enhancement for physical restraint was in fact warranted.[129]

6. Basis of the Decisions

All five of these United States Courts of Appeals reached their respective decisions—holding that brandishing a firearm during the commission of a robbery is sufficient to physically restrain a victim—based on the same line of thinking.

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[122] *Id.*

[123] *Id.* at 1320, 1324.

[124] *Id.*

[125] *Id.* at 1327.

[126] *Id.*; U.S. SENTENCING GUIDELINES MANUAL § 3A1.3 (U.S. SENTENCING COMM'N 1998) ("If a victim was physically restrained in the course of the offense, increase by 2 levels."). *See* Russell G. Donaldson, *Construction of Provision of United States Sentencing Guidelines § 3A1.3 (U.S.S.G.) Authorizing Upward Adjustment of Sentence if Victims of Crime Were "Physically Restrained" by Accused*, 116 A.L.R. FED. 593, 33 n.11 (1993 & Supp. 2019) ("Application note 1 to § 2B3.1 declares that, among other phrases therein, the phrase 'physically restrained' is defined in § 1B1.1 of the guidelines, the subsection to which § 3A1.3 refers for its definition of 'physically restrained.' The phrase thus has the same meaning in § 2B3.1(b)(4)(B) as it has in § 3A1.3.").

[127] *Gonzalez*, 183 F.3d at 1327 (emphasis added).

[128] *Id.*

[129] *Id.*

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Specifically, they based their decisions on the idea that a person can be "physically restrained" by forces that are not strictly physical, but that could be considered psychological in nature. These courts focused on the fact that the brandishing of firearms keeps a victim from moving, effectively restraining them physically.[130] Further, all of these decisions interpreted § 1B1.1's definition of "physical restraint" as exemplary rather than limiting; the text lists non-exhaustive examples of physical restraint rather than a definitive list in the spirit of *inclusio unius*.[131] It is also important to note that there was not a single dissent or concurrence raised among any of these five Circuits' decisions.[132] In these Circuits, then, it would appear as if the courts are settled on the issue of whether brandishing a firearm during the commission of a robbery is sufficient to warrant a two-point sentencing enhancement for physical restraint of a victim under § 2B3.1(b)(4)(B).

B. Circuits Holding that Brandishing a Firearm Is Not a Physical Restraint

To understand why six United States Courts of Appeals have held that brandishing a firearm is not a physical restraint for the purposes of a sentencing enhancement—in contrast with the five circuits holding the reverse—it is vital to understand on what basis these decisions were made. In reaching their respective decisions, these six courts focused on the distinction between a mental and physical restraint, as well as the fact that the guidelines themselves explicitly state "physical restraint" as opposed to all restraints.

1. *United States v. Bell*

Decided on January 7, 2020, *Bell* is the most recent decision involving the § 2B3.1(b)(4)(B) physical restraint enhancement.[133] This case stems from a robbery of a Metro PCS store in Philadelphia, Pennsylvania on September 15, 2015.[134] Marquise Bell and his accomplice, Samuel Robinson, entered the store with stockings over their faces to conceal their identities, and Bell carried a weapon that

[130] David Sandefer, Comment, *To Move or Not to Move? That Is the Metaphysical Question*, 85 U. CHI. L. REV. 1973, 1997 (2018).

[131] U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 cmt. n.1(L) (U.S. SENTENCING COMM'N 2018); *Expressio Unius Est Exclusio Alterius*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[132] *See* 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); *Gonzalez*, 183 F.3d 1315.

[133] United States v. Bell, 947 F.3d 49 (3d Cir. 2020).

[134] *Id.* at 52.

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resembled a firearm.[135] Bell grabbed an employee by the neck and pointed the weapon at him before throwing him to the ground.[136] The employee grabbed Bell's arm while he was removing money from the cash register, at which point Bell struck the employee with the weapon.[137] The blow broke part of the weapon, causing the employee to realize that it was a plastic firearm, and the employee then stood up and attempted to stop the robbery.[138] A struggle ensued, in which Bell pushed the employee away and he and Robinson fled with roughly $1,000 in cash.[139]

Bell was found approximately a year later and arrested by law enforcement officers in Philadelphia.[140] Bell was indicted and pled guilty to violating 18 U.S.C. § 922(g) for being a felon in possession of ammunition, as well as 18 U.S.C. § 1951(a) for Hobbs Act robbery.[141] At Bell's sentencing hearing, the District Court imposed a two-level enhancement under § 2B3.1(b)(4)(B) over the objections of Bell's counsel.[142] The applicable guidelines sentencing range was 77–96 months, and the court imposed a sentence of 86 months of incarceration.[143] A timely appeal by Bell followed the court's decision.[144]

The Third Circuit, in evaluating whether the application of § 2B3.1(b)(4)(B) was appropriate in the immediate case, noted that based on the text of the Guidelines alone it was clear that Bell did not physically restrain the store employee.[145] However, the court also made clear that the examples listed in the Guidelines are not an exhaustive list, but rather demonstrative of what it means to be physically restrained.[146] The court also noted that there was no Third Circuit precedential

[135] *Id.*

[136] *Id.* at 52–53.

[137] *Id.* at 53.

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.* at 55.

[146] *Id.* (citing United States v. Copenhaver, 185 F.3d 178, 180 (3d Cir. 1999) ("Cases have generally held that 'physical restraint' is not limited to the examples listed in the guidelines.")).

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opinion defining physical restraint.[147] After evaluating other courts' decisions, the Third Circuit decided that "in order to impose the enhancement for physical restraint, a district court should determine if the defendant's actions involved the use of physical force that limited the victim's freedom of movement, with a sustained focus on the victim for some period of time which provided the victim with no alternative but compliance."[148] All of these factors should be balanced against one another equally, with no factor being dispositive, and the restraint must be imposed in order to facilitate the commission of the robbery or escape.[149]

In rejecting the application of § 2B3.1(b)(4)(B) to Bell's case, the court held that Bell did not physically restrain the victim as he only satisfied a few of the factors outlined above.[150] The court stated that the force was physical as Bell grabbed the victim and forced him to the ground, but the victim had other alternatives than to comply, as demonstrated by his fighting back not once but twice.[151] The physical restraint was also very limited in time, and so the court stated that there was no sustained focus on the victim.[152] Based on the totality of the circumstances, the court held that Bell did not physically restrain his victim.[153] Furthermore, the court admonished that if the enhancement was applied here, then there would be no effective limiting factor that would prevent this enhancement from being applied in "any crime that involves a chance encounter with a victim with any physical dimension."[154] Accordingly, the Third Circuit overturned the application of § 2B3.1(b)(4)(B).[155]

2. *United States v. Herman*

The facts of this case are outlined in greater detail above, but, essentially, Herman stole firearms from an acquaintance and his mother, and he aimed a firearm at them and told them, "stay seated. I don't want to blow you guys back, but I will if

[147] *Id.*

[148] *Id.* at 60.

[149] *Id.*

[150] *Id.* at 61.

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Id.*

[155] *Id.*

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I have to."[156] Herman even fired a shot at the pair as he fled, telling them "I told you not to" when they chased after him.[157] Herman ultimately pled guilty to violating 18 U.S.C. § 922(g).[158]

In calculating Herman's guidelines range, the district court found that a § 2B3.1(b)(4)(B) physical restraint enhancement was applicable, and, due to his criminal history and other relevant enhancements, this meant that Herman faced 120–150 months as his guidelines range.[159] Had the court not applied the § 2B3.1(b)(4)(B) sentencing enhancement, Herman's applicable guidelines range would have been a much-lower 100–120 months.[160] On appeal, though, the Seventh Circuit sought to separate psychological coercion from physical restraint.[161]

The Seventh Circuit's decision holding that the brandishing of a firearm during the commission of a robbery does not constitute a physical restraint focused in large part on the difference between a defendant's action and a victim's reaction.[162] The court stated that if a defendant waives a firearm about and yells at a victim to stay still, the action is threatening—and in fact perhaps a restraint of sorts—but not a physical restraint.[163] "Whatever restraint occurred came about from the way the victim decided to respond to the order."[164] This understanding of the Guidelines is much more restrictive than that of the five circuits holding that brandishing a firearm is indeed enough to warrant an enhancement under § 2B3.1(b)(4)(B). It clearly delineates between psychological restraints and physical restraints, with the court stating: "If the Guideline had been meant to apply to all restraints, it would have said so; instead, it specifies physical restraints. That limitation rules out psychological coercion, even though such coercion has the potential to cause someone to freeze in place."[165] The court remanded Herman's case for resentencing consistent with the

[156] United States v. Herman, 930 F.3d 872, 873 (7th Cir. 2019). See the Introduction of this Note for a recitation of the facts of *Herman*.

[157] *Id.* at 873–74.

[158] *Id.* at 873.

[159] *Id.* at 874.

[160] *Id.*

[161] *Id.* at 875.

[162] *Id.* at 876.

[163] *Id.*

[164] *Id.*

[165] *Id.* at 875–76.

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opinion, eliminating the application of § 2B3.1(b)(4)(B) in calculating his applicable guidelines range.[166]

Herman was not a unanimously decided case, however, as a dissent was written and signed onto by three circuit judges.[167] The dissenters disagreed with the majority's opinion, and they found the decision to be contrary to the language of the guidelines.[168] They also found the decision to have gone against twenty-five years of circuit precedent as the Seventh Circuit's holding was in direct conflict with the five circuits that have held the opposite.[169] The dissent wrote, "'physically restrained' describes a state of being where an individual's control over his body or bodily means has been limited, restricted, or confined by another" while "'forcible restraint' describes a violent or coercive action that has the effect of restraining or stopping an individual's ability to act."[170] The dissent used this line of reasoning to state that pointing a firearm at someone and telling them not to move is, in reality, a physical restraint that deprives an individual of control over their body.[171] "Just as a person can flee from a pointed gun, a person can break ties or binding or escape from a locked up room. This does not mean she is not physically restrained."[172] The dissent also noted that the majority should have given more weight to prior, adverse Seventh Circuit precedent, as well as the fact that there are five circuits in direct opposition to the court's ruling in this case.[173]

3. *United States v. Parker*

Between November 30, 1996, and March 15, 1997, Christopher Parker and the gang of which he was a member committed a series of robberies in the Sacramento, California region.[174] Parker personally participated in all of the robberies that were involved in the case, and he was charged with nine counts in connection with these

[166] *Id.* at 877.

[167] *See id.* at 877 (Bauer, J., dissenting).

[168] *Id.*

[169] *Id.*

[170] *Id.* at 878.

[171] *Id.* at 878–79.

[172] *Id.* at 879.

[173] *Id.* at 880 (citing United States v. Taylor, 620 F.3d 812 (7th Cir. 2010); United States v. Black, 636 F.3d 893 (7th Cir. 2011)).

[174] United States v. Parker, 241 F.3d 1114, 1117 (9th Cir. 2001).

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robberies.[175] Parker's case went to trial, and he was ultimately convicted of violating 18 U.S.C. § 2113(a) and (d), as well as 18 U.S.C. § 924(c).[176] Parker was sentenced to 888 months in custody, and his total sentence was based, in part, on the finding that a two-point sentencing enhancement applied for physically restraining victims during the course of the robberies.[177]

Parker's case is unique in that the district court applied the physical restraint enhancement to multiple counts.[178] The sentencing enhancement was applied to Count Two because, during a December 20, 1996 robbery, one of Parker's fellow gang members grabbed a bank teller by the hair and pulled her up from the floor.[179] The district court, as well as the Ninth Circuit, attributed this act to Parker because "reasonably foreseeable acts and omissions of others in furtherance of a jointly undertaken criminal activity" are attributable to all who partake in the crime.[180] Accordingly, this particular enhancement was appropriately applied in calculating Parker's sentence.[181]

Count Four concerned the February 13, 1997 robbery of a bank committed by Parker's gang.[182] During the robbery, one of the gang members aimed a firearm at a bank teller and told her to get down on the floor, an action the district court considered to be a physical restraint via the use of the firearm.[183] The Ninth Circuit disagreed, writing that a more "sustained focus" on a victim is necessary in order to consider such an action as a physical restraint.[184] The court held that it is "likely that Congress meant for something more than briefly pointing a gun at a victim and commanding her once to get down to constitute physical restraint, given that nearly

[175] *Id.*

[176] *Id.* at 1116–17. 18 U.S.C. § 2113(a) and (d) cover conspiracy and bank robbery charges, and 18 U.S.C. § 924(c) covers a charge of brandishing a firearm during a crime.

[177] *Id.* at 1117.

[178] *Id.*

[179] *Id.*

[180] *Id.* (citing United States v. Thompson, 109 F.3d 639, 641 (9th Cir. 1997); United States v. Carter, 219 F.3d 863, 868 (9th Cir. 2000)).

[181] *Id.* at 1118–19.

[182] *Id.*

[183] *Id.*

[184] *Id.* at 1118–19.

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all armed bank robberies will presumably involve such acts."[185] In its decision, the court noted that while the comments to § 2B3.1(b)(4)(B), defining physical restraint as "being tied, bound, or locked up," were illustrative and not exclusive, there were not enough facts in this case to hold that the brandishing of the firearm, combined with the command to get on the floor, constituted a physical restraint of the victim.[186] In deciding that the conduct in this case did not rise to the level of a physical restraint, the Ninth Circuit's "sustained focus" analysis seems to leave the door open to allowing the brandishing of a firearm to constitute a physical restraint in the right circumstances—barring a Supreme Court decision that holds otherwise.[187]

4. *United States v. Drew*

In October of 1997, Wilbert Drew's estranged wife went to the District of Columbia Superior Court and successfully obtained a civil protection order (CPO) against her husband, to whom she had been married for 11 years.[188] He had been physically abusive towards her, and the CPO required him to evacuate their family premises, stay at least 100 feet away from Mrs. Drew and their three children, as well as to not threaten, harass, abuse, or otherwise contact—aside from through counsel—his wife or their children.[189] A family counseling session was scheduled for November 19, 1997.[190] However, on November 2, 1997, Drew called his wife at 2:30 a.m., stating that he was distraught and could not wait until the 19th to see her because he was suicidal and felt alone.[191] His wife suggested he call a doctor and said she was going to hang up, at which point Drew threatened to do something "drastic" if she did.[192]

Minutes later, Drew shattered a window and broke through the bedroom door and then the door of the closet where his estranged wife was hiding on the phone

[185] *Id.*

[186] *Id.*; *see* U.S. SENTENCING GUIDELINES MANUAL § 2B3.1 cmt. background (U.S. SENTENCING COMM'N 2000) ("The guidelines provides an enhancement for robberies where a victim . . . was physically restrained by being tied, bound, or locked up.").

[187] *Parker*, 241 F.3d at 1119.

[188] United States v. Drew, 200 F.3d 871, 874 (D.C. Cir. 2000).

[189] *Id.*

[190] *Id.* at 874–75.

[191] *Id.* at 875.

[192] *Id.*

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with an emergency dispatcher.[193] Drew pointed a shotgun in her face and told her, "Bitch, get up. Get out of this closet."[194] She pleaded with him not to kill her and attempted to buy time by saying she needed to put on shoes, to which he replied, "You don't need shoes where you are going."[195] He forced her to walk through the hallway at gunpoint, and when they encountered two of their teenage sons he stated, "Bitch, walk."[196] After walking her to the staircase at gunpoint, he spoke again of how he could not take it anymore and was very distraught.[197] He eventually pulled the trigger, but when the gun did not discharge, Mrs. Drew and their two sons tackled and subdued Drew.[198]

Drew ultimately pled guilty to possessing a firearm while subject to a court order in violation of 18 U.S.C. § 922(g)(8).[199] Drew's total offense level was 27, with a guidelines range of 70–87 months, from which the district court imposed an 80-month sentence.[200] This sentence included a two-level enhancement for physical restraint of a victim under § 3A1.3 of the Guidelines, which Drew challenged in the D.C. Circuit.[201] In reviewing the application of the sentencing enhancement, the D.C. Circuit noted that the definition of "physical restraint" in § 1B1.1 was illustrative rather than imposing a limitation on what may count as a physical restraint due to the use of "such as" in the language.[202] Despite making this finding, though, the court concluded that the victim was not physically restrained in this case: "the phrase 'being tied, bound, or locked up' indicates that physical restraint requires the defendant either to restrain the victim through bodily contact or to confine the victim in some way."[203] The court noted that there is a difference between a victim feeling restrained via a psychological restraint, and actually being physically restrained, such

[193] *Id.*

[194] *Id.*

[195] *Id.*

[196] *Id.*

[197] *Id.*

[198] *Id.*

[199] *Id.*; *see also* 18 U.S.C. § 922(g) (defining the manners in which a person can violate this section).

[200] *Drew*, 200 F.3d at 876.

[201] *Id.*; U.S. SENTENCING GUIDELINES MANUAL § 3A1.3 (U.S. SENTENCING COMM'N 1998) ("If a victim was physically restrained in the course of the offense, increase by 2 levels.").

[202] *Drew*, 200 F.3d at 880 (emphasis added).

[203] *Id.* (citing United States v. Harris, 959 F.2d 246, 265 (D.C. Cir. 1992)).

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as when they are locked in a room or handcuffed.[204] The court remanded the case to the district court to resentence Drew without the two-point enhancement,[205] holding: "[t]he required restraint must, as the language plainly recites, be physical."[206]

5. *United States v. Anglin*

On the morning of April 16, 1996, Michael Anglin and an accomplice robbed an on-site branch bank at a college in New York.[207] Shortly before the bank was scheduled to open that morning, the branch supervisor knocked on the door to have the bank tellers let them inside.[208] Once the door was unlocked, Anglin and the accomplice came up behind the supervisor and yanked the door open.[209] They shoved a firearm through the door and forced their way inside as the bank supervisor fled, shouting that the bank was being robbed.[210] One of the intruders—it was unclear whether it was Anglin or the accomplice—aimed a firearm at the bank tellers, ordering them to get on the ground and not to look at them.[211]

While the accomplice was ultimately able to escape without being identified or caught, Anglin was found and charged with multiple crimes on the theory that he was the shooter, and his trial commenced on November 3, 1977.[212] Anglin was ultimately found guilty of violating 18 U.S.C. §§ 2, 371, 2113(a), 2113(d), and 924(c).[213] In sentencing Anglin, the judge applied the § 2B3.1(b)(4)(B) sentencing enhancement and found that Anglin physically restrained people during the bank robbery.[214] Anglin appealed this application of § 2B3.1(b)(4)(B), and the Second

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[204] *Id.* at 880.

[205] *Id.* (showing that there was a concurrence by the Chief Judge of the D.C. Circuit, but it was not in regard to the sentencing enhancement issue).

[206] *Id.* at 880.

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

[208] *Id.* at 157.

[209] *Id.*

[210] *Id.*

[211] *Id.*

[212] *Id.* at 156–57.

[213] *Id.* at 156. The four counts for which Anglin was found guilty were as follows: conspiring to commit bank robbery, committing bank robbery, committing robbery with the use of a firearm, and using and carrying a firearm in connection with the bank robbery charged in the previous counts. *Id.*

[214] *Id.* at 156–57.

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Circuit concluded that the lower court had misapplied this enhancement, vacating his sentence and remanding it back to the district court for resentencing in line with the opinion.[215]

In analyzing whether the district court incorrectly applied the sentencing enhancement to Anglin, the Second Circuit said that the issue "turns primarily on the legal interpretation of a guideline term" as applied to the facts of the case.[216] The court also agreed with a point of law that has been espoused by many other circuits, namely that the use of the modifier "such as" in the definition of "physical restraint" in § 1B1.1, comment (1)(i), indicates that the conduct listed in the definition is exemplary rather than limiting.[217] However, the Second Circuit ultimately held that displaying a gun and "telling people to get down and not move," without more, is not sufficient to trigger the application of a physical restraint enhancement.[218] Physical restraint, in the Second Circuit's view, would tend to entail the use of either an artifact to physically restrain someone, or else a room or space from which a victim cannot easily escape; in other words, a physical restraint is something that deprives a person of their liberty or freedom of movement.[219] The court distinguished between a physical restraint and a mental restraint, noting that the difference is that a physical restraint will apply equally to all individuals, whereas a mental restraint would have a different impact on the timid or the bold person.[220] There is a distinct difference between *feeling* physically restrained and actually *being* physically restrained.[221] To be considered a physical restraint, then, an action must have an equal effect on all individuals—something that the brandishing of a firearm at a person cannot ensure.[222]

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[215] *Id.* at 157, 165.

[216] *Id.* at 163 (citing United States v. Stroud, 893 F.2d 504, 507 (2d Cir. 1990)).

[217] *Id.* at 163 (citing United States v. Rosario, 7 F.3d 319, 320–21 (2d Cir. 1993) (per curiam)). *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 cmt. n.1(i) (U.S. SENTENCING COMM'N 1998).

[218] *Anglin*, 169 F.3d at 164.

[219] *Id.*

[220] *Id.* at 164.

[221] *Id.*

[222] *See id.*

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6. *United States v. Hickman*

In 1994, a group of individuals robbed various restaurants and stores throughout East Texas.[223] The first robbery was on March 15, 1994, when two of the individuals, armed with a handgun and a shotgun, entered a Subway sandwich shop just before closing time and demanded money from the employee.[224] This group committed six more armed robberies between March 15th and June 21, 1994.[225] Markus Chopane, one of the defendants in this case, received a sentencing enhancement for physically restraining victims by brandishing a firearm during the course of a robbery.[226] In reaching its decision, the Fifth Circuit began by examining the definition of "physically restrained" pursuant to the comments to the sentencing guidelines.[227] The court wrote, "physical restraint has been upheld in various circumstances involving either the physical holding of the victim or the confining of the victim in some manner coupled with a threat of violence."[228] However, the court ruled that brandishing a firearm alone did not warrant the application of the sentencing enhancement, because ruling otherwise would provide "no limiting principle on the application of this enhancement; every armed robbery would be enhanced by the physical restraint provision."[229]

7. Basis of the Decisions

In reaching their respective decisions, that brandishing a firearm during the course of a robbery is not sufficient to warrant a physical restraint enhancement, all six of these United States Courts of Appeals focused on the *physical* nature of the restraint described by the sentencing guidelines.[230] The *Herman* court concluded that

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[223] United States v. Hickman, 151 F.3d 446, 450–51 (5th Cir. 1998).

[224] *Id.* at 451.

[225] *Id.* at 451–52.

[226] *Id.* at 460–61.

[227] *Id.*; U.S. SENTENCING GUIDELINES MANUAL §§ 1B1.1 cmt. n.1(i), 2B3.1(b)(4)(B) (U.S. SENTENCING COMM'N 1997).

[228] *Hickman*, 151 F.3d at 461.

[229] *Id.* at 461–62. *See also* United States v. Garcia, F.3d 708, 709, 713–14 (5th Cir. 2017) (stating that pointing a gun at a victim's head and ordering them to the ground does not constitute a physical restraint, upholding the reasoning set forth in the *Hickman* case).

[230] United States v. Bell, 947 F.3d 49, 56–61 (3d Cir. 2020); United States v. Herman, 930 F.3d 872, 875–76 (7th Cir. 2019); United States v. Parker, 241 F.3d 1114, 1118–19 (9th Cir. 2001); United States v.

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physical restraints do not encompass mental restraints, because if the guidelines intended for this, they would say "all" restraints instead of "physical" restraints.[231] The court in *Drew* had a similar focus, differentiating between *feeling* restrained and actually being physically restrained.[232] Importantly, in *Drew*, the court reached its conclusion by applying the plain language of the guidelines in a textualist approach.[233] The court in *Anglin* drew on the distinction between a physical and mental restraint by concluding that a physical restraint applies equally to all people (objective), while a mental restraint will not have the same effect on all individuals (subjective).[234] This is precisely why the brandishing of a firearm during a robbery is not a physical restraint.[235] *Parker* was decided mostly along the same lines, but there the Ninth Circuit used a "sustained focus" inquiry that would seemingly leave the possibility open for the brandishing of a gun to count as a physical enhancement under the right circumstances.[236] The "sustained focus" inquiry states that merely pointing a gun at a person and ordering them to move to a location is not itself a physical restraint.[237] More sustained, personal focus would be required for the defendant's actions to amount to a physical restraint.[238] The court in *Bell* used a totality of the circumstances analysis, including factors (such as the sustained focus inquiry from *Parker*) to determine if brandishing a firearm constitutes a physical restraint.[239] This method is an effective way to ensure that this sentencing enhancement is not enacted for every encounter between an armed perpetrator and a victim.[240] Finally, the court in *Hickman* also drew on the distinction between physical and mental restraints in reaching its decision, while explicitly acknowledging an issue with allowing the application of a physical restraint enhancement to a robbery

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Drew, 200 F.3d 871, 880 (D.C. Cir. 2000); United States v. Anglin, 169 F.3d 154, 164–65 (2d Cir. 1999); United States v. Hickman, 151 F.3d 446, 461–62 (5th Cir. 1998).

[231] *Herman*, 930 F.3d at 875–76.

[232] *Drew*, 200 F.3d at 880.

[233] *Id.*

[234] *Anglin*, 169 F.3d at 164–65.

[235] *See id.*

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

[237] *Id.*

[238] *Id.*

[239] *Bell*, 947 F.3d at 56–61.

[240] *Id.* at 61.

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where a firearm is brandished: there would be no limiting principle to halt the application of this enhancement in every single case where there is a robbery.[241]

III. PROPOSED SOLUTION

Whether brandishing a firearm during the commission of a robbery constitutes a physical restraint is a complex issue that is hotly contested within the various jurisdictions of the United States. It has been brought before eleven of the nation's thirteen federal courts of appeals, and currently sits at a six-five split. A circuit split occurs when two or more of the courts of appeals have conflicting rulings on the same issue, and the Supreme Court considers this when deciding whether to grant *certiorari* for a given case.[242] Because eleven circuits are split on this issue—an issue that leads to a longer period of incarceration for defendants—there is an urgent need for the Supreme Court to resolve this issue as quickly as possible. The Supreme Court should grant *certiorari* in a case involving the application of § 2B3.1(b)(4)(B) at the next opportunity possible to prevent further confusion and create a binding precedent for the uniform application of sentencing guidelines.

A. Proposed Holding

If the Supreme Court grants *certiorari* in a case involving this issue, as it should, this Note proposes the Court conclude that brandishing a firearm during the commission of a robbery is not sufficient to trigger the application of a physical restraint sentencing enhancement. The Court should strictly interpret the language of the sentencing guidelines, following a textualist approach, to conclude that "physical restraint" is limited to restraints that are physical in nature, not mental in nature.[243] The Supreme Court should follow the example set by the Second, Fifth, Seventh, Ninth, and D.C. Circuits in holding this way. The focus of the inquiry should be on the text of the guidelines, which very clearly "physical restraint."[244]

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[241] United States v. Hickman, 151 F.3d 446, 461–62 (5th Cir. 1998).

[242] *See* SUP. CT. R. 10(a); Tom Cummins & Adam Aft, *Appellate Review*, 2 J. LAW 59, 60 (2012).

[243] *See* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999) (defining textualism and how it is applied in judicial interpretations in cases).

[244] U.S. SENTENCING GUIDELINES MANUAL § 2B3.1(b)(2) (U.S. SENTENCING COMM'N 2018).

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B. Textualism and the Court

Textualism, according to the late Justice Scalia, has one major principle: "The text is the law, and it is the text that must be observed."[245] Jurists who follow a textualist approach believe that the interpretation of a law should begin, and end, with the text as Congress wrote it, and there should be no further foray into the legislative history or intent of Congress.[246] Judge Easterbrook, of the Seventh Circuit, has stated that a textualist approach "should look at the statutory structure and hear the words as they would sound in the mind of a skilled, objectively reasonable user of words."[247] Importantly, since Justice Scalia's nomination to the Supreme Court, textualism has increased in strength and importance for the Court in making its decisions.[248] Textualism has become the starting point of judicial interpretation of statutes, and Justice Kagan even stated in 2015 that "we're all textualists now."[249] Additionally, no matter which interpretative philosophy a Justice subscribes to, statutory interpretation always begins with the primary language of the text.[250]

Textualism is not a theory of statutory interpretation that is "inherently conservative by design," nor does it necessarily produce conservative-leaning results when applied.[251] Indeed, textualism—when applied properly—will sometimes produce more traditionally conservative results and sometimes more traditionally

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[245] Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 22 (Amy Gutmann ed., 1997).

[246] Paul Killebrew, *Where are all the Left-Wing Textualists?*, 82 N.Y.U. L. REV. 1895, 1896–97 (2007).

[247] Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988).

[248] *See* Jesse D.H. Snyder, *How Textualism Has Changed the Conversation in the Supreme Court*, 48 U. BALT. L. REV. 413, 413 (2019).

[249] *Id.* at 413–14.

[250] WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 819 (3d ed. 2001) (explaining how all statutory interpretation must begin with the text of a statute even if a justice or judge is not necessarily a textualist). *See* ROBERT A. KATZMANN, JUDGING STATUTES 4, 28–31 (2014) (stating that even for purposivist judges the text is a starting point for statutory interpretation before delving into legislative history or the intent of the drafters).

[251] Margaret H. Lemos, *The Politics of Statutory Interpretation Reading Law: The Interpretation of Legal Texts. By Antonin Scalia and Bryan A. Garner. St. Paul: West. 2012. Pp. 567. $49.95*, 89 NOTRE DAME L. REV. 849, 853 (2013) (reviewing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012)).

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liberal results.[252] However, as Justice Kagan stated, textualism has become the norm in statutory interpretation at the Supreme Court, with even traditionally more liberal Justices, such as Justice Ginsburg, applying textualism to resolve cases.[253] Textualism is not limited to conservative jurists. Judges are individuals who may display patterns and preferences for certain methodologies, but there is nothing binding conservatives and liberals to particular statutory interpretation ideologies.[254]

All of this being said, the Roberts Court, which currently has a conservative majority, has shown a correlation between conservative Justices and textualism, meaning that the Court as a whole has become much more textualist-centered.[255] Additionally, the Senate recently confirmed Justice Barrett to the Supreme Court, solidifying a 6-3 conservative majority on the Court.[256] In addition to being a conservative Justice appointed under a Republican president, Justice Barrett's appointment to the Supreme Court carries extra significance in that she was a law clerk for Justice Scalia, who solidified textualism within the Court.[257] Many consider Justice Barrett to be the intellectual heir to Justice Scalia, with Justice Barrett herself claiming that "his judicial philosophy is mine, too."[258] She believes that a "judge approaches the text as it is written," and her confirmation to the Court solidifies the

[252] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 16 (2012) (claiming that textualism is an apolitical approach that does not produce political results).

[253] *See* Mount Lemmon Fire Dist. v. Guido, 139 S. Ct. 22, 24–26 (2018) (writing for an 8-0 majority, Justice Ginsburg resolved a circuit split by looking solely to the plain language of the statutory text); *see also* Snyder, *supra* note 248, at 414.

[254] Scott A. Moss, *Judges' Varied Views on Textualism: The Roberts-Alito Schism and the Similar District Judge Divergence That Undercuts the Widely Assumed Textualism-Ideology Correlation*, 88 U. COLO. L. REV. 1, 31 (2017).

[255] Anita S. Krishnakumar, *Textualism and Statutory Precedents*, 104 VA. L. REV. 157, 183 (2018). *See* Elizabeth Slattery, *The Roberts Court is Not 'Increasingly Conservative'*, THE HERITAGE FOUNDATION (Oct. 9, 2014), https://www.heritage.org/courts/commentary/the-roberts-court-not-increasingly-conservative.

[256] *Amy Coney Barrett Will be Asked to Rule on Election Disputes and Much More*, THE ECONOMIST (Oct. 26, 2020), https://www.economist.com/united-states/2020/10/26/amy-coney-barrett-will-be-asked-to-rule-on-election-disputes-and-much-more.

[257] Michael D. Shear & Elizabeth Dias, *Barrett Clerked for Scalia. Conservatives Hope She'll Follow His Path*, N.Y. TIMES (Sept. 26, 2020), https://www.nytimes.com/2020/09/26/us/politics/amy-coney-barrett-conservatives.html.

[258] Tessa Berenson, *Not Just Another Conservative Vote: How Amy Coney Barrett Could Influence the Supreme Court*, TIME (Oct. 9, 2020), https://time.com/5898043/amy-coney-barrett-supreme-court/.

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textualist-majority approach of the Roberts Court.[259] The addition of Justice Barrett means that the Court will be even more likely to apply a textualist approach to future cases before it, including to potentially resolving this circuit split.

C. Statutory Interpretation of § 2B3.1 of the Sentencing Guidelines

The textualist approach to resolving this circuit split would begin with looking at the plain language of the Sentencing Guidelines and giving the text its objectively reasonable meaning.[260] In this case, that would mean examining the language used in § 2B3.1(b)(4). This section states that a two-level sentencing enhancement will be applied if, during the commission of a robbery, "any person was *physically* restrained to facilitate commission of the offense or to facilitate escape."[261] Here, an ordinary, objectively reasonable individual would most likely understand "physical" to mean something that involved touch—a tangible restraint. The Merriam-Webster dictionary further bolsters this interpretation, as it defines "physically" as "in a physical manner" or "in respect to the body."[262] Thus, by looking only at the text and nothing else, it becomes clear that pointing a gun at an individual during a robbery is in fact *not* a physical restraint, as there has been no physical contact with respect to the body. It is most likely a mental or emotional restraint, and under this approach, it is not a physical restraint.

Even if the language is not exceedingly plain on its face—which in this case it appears to be—courts may apply textualism in the form of various canons of statutory interpretation. Some canons of statutory interpretation that the Court may consider if they do not resolve the circuit split through the plain meaning of the text of the Sentencing Guidelines are *in pari materia*, *expressio unius est exclusio alterius*, and *noscitur a sociis*. The canon of *in pari materia* states that statutes or sections that are on the same subject matter may be construed together so that any inconsistencies in one may be resolved by looking at the other.[263] The application

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[259] Brian Naylor, *Barrett, an Originalist, Says Meaning of Constitution 'Doesn't Change Over Time'*, NPR (Oct. 13, 2020), https://www.npr.org/sections/live-amy-coney-barrett-supreme-court-confirmation/2020/10/13/923215778/barrett-an-originalist-says-meaning-of-constitution-doesn-t-change-over-time.

[260] *See* Killebrew, *supra* note 246; Easterbrook, *supra* note 247.

[261] U.S. SENTENCING GUIDELINES MANUAL § 2B3.1(b)(4)(B) (U.S. SENTENCING COMM'N 2018) (emphasis added).

[262] *Physically*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/physically (last visited Dec. 15, 2020).

[263] *In Pari Materia*, BLACK'S LAW DICTIONARY (11th ed. 2019).

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notes to § 2B3.1 make it clear that "physically restrained" is defined in § 1B1.1, and so these sections should be construed together.[264] Section 1B1.1 defines "physically restrained" as the "forcible restraint of the victim such as by being tied, bound, or locked up."[265] By applying the *in pari materia* canon of statutory interpretation, it should become clear that "physically restrained" has a physical, tangible nature to it, given the definition supplied in§ 1B1.1.

The *expressio unius est exclusio alterius* canon of statutory interpretation says that choosing to include or express one thing necessarily implies the exclusion of the alternative.[266] Section 2B3.1 is modified by § 1B1.1's definition of "physically restrained," and that section used the following to define physical restraint: "being tied, bound, or locked up."[267] If this sentencing enhancement was intended to apply to *all* restraints generally, then it would state as much; however, it does not. In fact, these sections, taken together, list examples that are very clearly physical in nature, such as being tied up.[268] By including *only* physical restraints, the *expressio unius* canon suggests that non-physical restraints were intended to be excluded. Further bolstering this conclusion is the *noscitur a sociis* canon of statutory interpretation, which holds that the meaning of unclear phrases or words should be determined by the words that immediately surround it.[269] Again, the words that follow "physically restrained" are "forcible restraint of the victim such as by being tied, bound, or locked up."[270] The word "physically," construed in accordance with the words that immediately surround it, should be taken to mean something that is tangible and involves more than a mental or psychological restraint to a victim.

Even if the Court were not convinced that the ambiguity is resolved either through (1) the plain meaning, or (2) the canons of statutory construction applied above, it would still have to resolve this circuit split and hold that the use of a firearm is *not* a physical restraint by applying the rule of lenity. The rule of lenity is a maxim that holds that statutory ambiguities in a law should be construed against the

[264] *See* U.S. SENTENCING GUIDELINES MANUAL § 2B3.1; *id.* at § 1B1.1 cmt. n.1(L).

[265] *Id.* § 1B1.1 cmt. n.1(L).

[266] *Expressio Unius Est Exclusio Alterius*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[267] *See* U.S. SENTENCING GUIDELINES MANUAL § 2B3.1; *id.* at § 1B1.1 cmt. n.1(L).

[268] U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 cmt. n.1(L).

[269] *Noscitur A Sociis*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[270] U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 cmt. n.1(L).

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government and in favor of a defendant.[271] This rule of statutory construction has a long history dating back to at least Chief Justice Marshall, who described the rule as "perhaps not much less old than construction itself."[272] In this case, even if the Court were to find that there is still ambiguity in the language, application of the rule of lenity would lead to the same result. Under the rule of lenity, the Court would have to strictly construe the language against the government and hold that the use of a firearm during a robbery does not constitute a *physical* restraint.

Even if the Supreme Court were to reject all of the above methods of interpretation and follow the line of thinking of the circuits holding that brandishing a firearm *is* sufficient to constitute physical restraint—namely that the examples given in the comment are exemplary rather than limiting—the Court should still reach the same result.[273] If the examples listed in the comment are exemplary, they are all of a physical nature; none of them could be considered a mental restraint as opposed to a physical restraint because they would have the same effect on *every* individual, regardless of their mental state.[274] Being tied up, bound, or locked up would equally restrain all people, but pointing a firearm at a person—even coupled with a threat to remain on the ground—will most certainly not have the same effect on every person. Accordingly, the distinction between a mental and physical restraint must be drawn by the Supreme Court in reaching a decision and resolving this circuit split.

As the Second Circuit held, there must be a distinction between what constitutes a physical restraint versus a mental restraint. A physical restraint must apply equally to all individuals, something that brandishing a firearm will not accomplish as people have widely varying personalities, experiences, and reactions to such encounters.[275] It would be unjust for the Supreme Court to rule otherwise because there would be no limiting principle for this sentencing enhancement; it could presumably and reasonably be applied to every single armed robbery, a reality that would greatly

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[271] United States v. Bass, 404 U.S. 336, 347 (1971) ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."). *See* Zachary Rice, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 885 (2004).

[272] United States v. Wiltberger, 18 U.S. 76, 95 (1820); Note, *The New Rule of Lenity*, 119 HARV. L. REV. 2420, 2420 (2006).

[273] U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 cmt. n.1(L); *Expressio Unius Est Exclusio Alterius*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[274] U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 cmt. n.1(L) (listing examples of physical restraint: "the forcible restraint of the victim such as by being tied, bound, or locked up").

[275] United States v. Anglin, 169 F.3d 154, 164–65 (2d Cir. 2009).

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prejudice defendants and lead to a miscarriage of justice based on subjective factors.[276] Accordingly, in the interests of justice, the Supreme Court must hold that brandishing a firearm during the commission of a robbery is not sufficient to constitute a physical restraint triggering a sentencing enhancement.

IV. CONCLUSION

To resolve this circuit split among eleven United States Courts of Appeals, the Supreme Court should hold that brandishing a gun is not a physical restraint, as counting it as such would be prejudicial to defendants by allowing an additional sentencing enhancement on top of the enhancements that are available for using, possessing, or brandishing a firearm during the commission of a robbery.[277] This would also disallow any limiting principle, meaning that this enhancement could potentially apply to almost every armed robbery, even if a victim was not truly restrained. Allowing this split among the circuits to stand is inequitable and leads to disparities in sentencing for the commission of the same crime, one of the main reasons the United States Sentencing Guidelines were enacted in the first place.[278] For these reasons, the Supreme Court should grant certiorari in a case involving this issue and hold that brandishing a firearm alone does not constitute a physical restraint.

[276] United States v. Hickman, 151 F.3d 446, 461–62 (5th Cir. 1998).

[277] U.S. SENTENCING GUIDELINES MANUAL §§ 2B3.1(b)(2), 2B3.1(b)(4).

[278] OVERVIEW, *supra* note 17, at 1.

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