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## United States v. Herman

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TYLER WILKERSON

*United States v. Herman*

65 N.Y.L. SCH. L. REV. [\*] (2020–2021)

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*“I froze when I saw that big gun and that mask . . . I just kept my eyes closed because I was scared he might shoot me.”*<sup>1</sup>

In 2018, there were 282,061 robberies reported in the United States.<sup>2</sup> Of these, 1,805 were sentenced under the Federal Sentencing Guidelines (“Guidelines”),<sup>3</sup> which list a series of numerical adjustments that may be applied to increase or decrease the sentencing range for crimes, depending on the circumstances.<sup>4</sup>

In *United States v. Herman*, the Seventh Circuit Court of Appeals considered in 2019 whether employing a sentencing range using the physical restraint enhancement for a defendant found guilty of robbery was proper.<sup>5</sup> The *Herman* court concluded that the defendant “pointing a gun at someone and ordering [them] not to move” was insufficient to trigger that enhancement.<sup>6</sup>

This Case Comment contends that the *Herman* court erred in finding that the physical restraint enhancement was not applicable. The *Herman* court not only erred in its understanding of the plain meaning of the physical restraint enhancement,<sup>7</sup> but

1. Jacob Rascon, *Grandmother Injured During Robbery at Phone Store*, CLICK2HOUSTON (June 3, 2019, 10:13 PM), <https://www.click2houston.com/news/2019/06/04/grandmother-injured-during-armed-robbery-at-phone-store/>.
2. *2018 Crime in the United States, Table 1*, U.S. DEP’T OF JUST., FED. BUREAU OF INVESTIGATION: CRIM. JUST. INFO. SERVS. DIV., <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/table-1> (last visited Jan. 27, 2021).
3. *Quick Facts: Robbery Offenses*, U.S. SENT’G COMM’N, [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Robbery\\_FY19.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Robbery_FY19.pdf) (last visited Jan. 27, 2021) [hereinafter *Quick Facts: Robbery*]. This number reflects data from the U.S. federal government fiscal year 2019. *Id.* See generally U.S. SENT’G COMM’N, AN OVERVIEW OF THE FEDERAL SENTENCING GUIDELINES [hereinafter FED. SENT’G GUIDELINES: OVERVIEW], [https://www.ussc.gov/sites/default/files/pdf/about/overview/Overview\\_Federal\\_Sentencing\\_Guidelines.pdf](https://www.ussc.gov/sites/default/files/pdf/about/overview/Overview_Federal_Sentencing_Guidelines.pdf) (last visited Jan. 27, 2021) (providing an overview of how the Federal Sentencing Guidelines work, how the sentencing range is determined, and when departures from the Guidelines may occur).
4. See FED. SENT’G GUIDELINES: OVERVIEW, *supra* note 3, at 1–2. The sentences in just over 407 (22.6 percent) of the robbery cases sentenced under the Guidelines in the fiscal year from October 1, 2018 to September 30, 2019 were increased because the crimes involved abducting or physically restraining a victim. *Quick Facts: Robbery*, *supra* note 3.
5. 930 F.3d 872 (7th Cir. 2019). A physical restraint enhancement is an upwards sentencing adjustment that can be made “if any person was physically restrained to facilitate commission of the offense or to facilitate escape . . .” U.S. SENT’G GUIDELINES MANUAL § 2B3.1(b)(4)(B) (U.S. SENT’G COMM’N 2018).
6. *Herman*, 930 F.3d at 877.
7. *Compare Herman*, 930 F.3d at 877 (finding the physical restraint enhancement not applicable), *with* *United States v. Coleman*, 664 F.3d 1047, 1049 (6th Cir. 2012) (“Both the plain language of the Guidelines and case law from other circuits suggest that the enhancement applies . . .”), *United States v. Dimache*, 665 F.3d 603, 607 (4th Cir. 2011) (citations omitted) (analyzing the plain meaning of the physical restraint enhancement and recognizing that it applies broadly when “the defendant points the gun at the victim, thereby restricting the victim’s movements and ensuring the victim’s compliance with the desires of the defendant”), *United States v. Wilson*, 198 F.3d 467, 472 (4th Cir. 1999) (applying the plain meaning of the physical restraint enhancement and noting that “carjacking does not necessarily involve physical restraint”), *and* *United States v. Fisher*, 132 F.3d 1327, 1330 (10th Cir. 1997) (emphasis omitted) (recognizing that the plain meaning of physical restraint is “[k]eeping someone from doing something”).

also curbed the deterrent effect of the physical restraint enhancement by limiting its application.<sup>8</sup>

On May 4, 2016, Joshua Herman contacted Jacob Kirk through Facebook, and Kirk invited Herman to his home in Hammond, Indiana.<sup>9</sup> When Herman arrived, he and Kirk chatted in the front room for a few minutes.<sup>10</sup> Herman then went to the bathroom.<sup>11</sup> On his way back to Kirk, Herman passed Kirk's mother, Samantha Daniels, and spotted a handgun protruding from her purse.<sup>12</sup> Herman asked if he could take a closer look at the gun and Daniels agreed.<sup>13</sup> While Herman was holding Daniels' gun, he pulled out a second gun, a revolver, and said, "Look ... stay seated. I don't want to blow you guys back, but I will if I have to."<sup>14</sup> Herman then turned and ran out the door.<sup>15</sup> Kirk and Daniels were initially confused, but when they realized that Herman intended to steal Daniels' gun, they both ran after him.<sup>16</sup> By the time Kirk and Daniels stepped outside, Herman had already reached a green car that was waiting for him with the door open.<sup>17</sup> Herman then turned around pointing both guns at Kirk and Daniels and said, "I told you not to . . . ." and fired a shot from his revolver that flew past Daniels' ear.<sup>18</sup>

Kirk and Daniels called the police, who quickly found Herman's escape vehicle.<sup>19</sup> When the police pulled up, they saw Herman and two other men standing near the car.<sup>20</sup> Herman walked away from the police and was passing a fence when the officers

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8. See Daniel Kessler & Steven D. Levitt, *Using Sentence Enhancements to Distinguish Between Deterrence and Incapacitation*, 42 J.L. & ECON. 343, 352–59 (1999) (“[A]ny immediate decrease in crime [due to sentence enhancements] that is observed is attributable to deterrence. In the long run, however, both the full deterrent and the incapacitation effects of sentence enhancements become operative . . . . [C]rime will . . . decline gradually over time.”).
  9. Brief for the United States at 2, *Herman*, 930 F.3d 872 (No. 18-3057), 2019 WL 1559397 (noting that Herman and Kirk met to discuss fights they each had with another man, Mikey Miles); *Herman*, 930 F.3d at 873.
  10. Brief for the United States, *supra* note 9, at 2.
  11. *Id.*
  12. *Id.* at 2–3.
  13. *Id.* at 3; *Herman*, 930 F.3d at 873.
  14. *Herman*, 930 F.3d at 873.
  15. *Id.*
  16. Brief and Required Short Appendix of Defendant-Appellant, Joshua T. Herman at 9, *Herman*, 930 F.3d 872 (No. 18-3057), 2019 WL 495860 [hereinafter Brief for Defendant].
  17. *Id.* at 8–9.
  18. *Id.*; Brief for the United States, *supra* note 9, at 3.
  19. See Government's Sentencing Memorandum at 2, *United States v. Herman*, No. 2:16-cr-00061-RL-PRC, 2017 WL 1321241 (N.D. Ind. Feb. 23, 2017), 2017 WL 1316333 (stating that Daniels and Kirk “advised dispatch that the suspects fled the area in a green vehicle”); see also Brief for Defendant, *supra* note 16, at 3–4 (“Shortly [after the “shots fired” call], the officers observed a vehicle matching the description and caught up with the car.”).
  20. Brief for Defendant, *supra* note 16, at 4.

heard an object drop onto the grass near the fence.<sup>21</sup> The officers searched the area and found Daniels' handgun.<sup>22</sup> According to the police, Herman later admitted that he had attempted to conceal Daniels' handgun when the police approached.<sup>23</sup> Herman explained to the police that he was a felon<sup>24</sup> and was prohibited from possessing any firearms.<sup>25</sup>

Herman was charged with and pleaded guilty to being a felon in possession of a firearm in the U.S. District Court for the Northern District of Indiana.<sup>26</sup> The district court then used the Guidelines to determine Herman's sentence.<sup>27</sup>

The U.S. Sentencing Commission created the Guidelines in 1987 for courts to use when determining a sentencing range.<sup>28</sup> To calculate that range, a judge starts with the base offense level for the specific offense and adds or subtracts a series of points, depending on the presence or absence of certain circumstances at the time of the offense, to determine a total offense level.<sup>29</sup> Next, the judge looks to the defendant's criminal history.<sup>30</sup> The judge then determines a recommended sentencing range by examining the sentencing table and finding the point where the total offense level and criminal history category intersect.<sup>31</sup>

Because the offense that Herman was charged with—possession of a firearm by a felon—took place in connection with a robbery, the district court applied section

21. Brief for the United States, *supra* note 9, at 4; Brief for Defendant, *supra* note 16, at 4.

22. *See* Brief for Defendant, *supra* note 16, at 4.

23. *See id.* (citations omitted).

24. Herman had three prior felony convictions, including a six-year sentence for armed robbery. Government's Sentencing Memorandum, *supra* note 19, at 4.

25. Brief for Defendant, *supra* note 16, at 4. 18 U.S.C.A. § 922(g)(1) states:

It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

*Id.*

26. Brief for Defendant, *supra* note 16, at 1, 4.

27. *See* United States v. Herman, 930 F.3d 872, 874 (7th Cir. 2019) (calculating the defendant's sentence based on the Guidelines and concluding that the final sentence was 120 months).

28. *See* U.S. SENT'G COMM'N, FEDERAL SENTENCING: THE BASICS 2, 7 (2020), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/202009\\_fed-sentencing-basics.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/202009_fed-sentencing-basics.pdf) (noting that the Federal Sentencing Guidelines went into effect on November 1, 1987 and "have proved to be 'the lodestone of sentencing' in federal court"); *see also* FED. SENT'G GUIDELINES: OVERVIEW, *supra* note 3, at 1–3.

29. FED. SENT'G GUIDELINES: OVERVIEW, *supra* note 3, at 1–2.

30. *See id.* at 2 ("The guidelines assign each offender to one of six criminal history categories based upon the extent of an offender's past misconduct."). The categories range from the least serious category—Criminal History Category I—which "includes many first-time offenders," to the most serious category—Criminal History Category VI—which "includes offenders with serious criminal records." *Id.*

31. *Id.* at 3.

2B3.1 of the Guidelines, pertinent to robberies, to determine the ultimate sentence.<sup>32</sup> Under that section, robbery has a base offense level of twenty points.<sup>33</sup> In addition, the district court tacked on seven points because a firearm was discharged, one point because a firearm was stolen, and two points because the court found that Herman physically restrained Kirk and Daniels.<sup>34</sup> The court subtracted three points because Herman displayed acceptance of responsibility by pleading guilty.<sup>35</sup> Thus, Herman's total offense level came to twenty-seven points and, along with his criminal history, led to a recommended sentencing range of 120–150 months.<sup>36</sup> Because the statutory maximum sentence for possession of a firearm by a felon was 120 months, the district court sentenced Herman to 120 months.<sup>37</sup>

On February 27, 2017, Herman appealed his initial sentencing<sup>38</sup> on two grounds: (1) the district court could have ruled that his federal sentence run concurrently<sup>39</sup> with his unrelated state sentence; and (2) the district court did not properly interpret the Guidelines' term "physically restrained."<sup>40</sup> During Herman's initial appeal, the Seventh Circuit Court of Appeals reached the issue of concurrent sentencing only, resolving it in Herman's favor.<sup>41</sup> The appeals court remanded the case to the district court regarding the interpretation of "physically restrained," noting that the district court should consider whether the physical restraint enhancement is applicable.<sup>42</sup>

On remand, the district court noted that there was a circuit split about whether pointing and shooting a gun at someone qualifies as physical restraint, and then held that here, the physical restraint enhancement should apply.<sup>43</sup> On September 24, 2018,

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32. *Herman*, 930 F.3d at 874; U.S. SENT'G GUIDELINES MANUAL § 2B3.1 (U.S. SENT'G COMM'N 2018).

33. U.S. SENT'G GUIDELINES MANUAL § 2B3.1(a).

34. *Herman*, 930 F.3d at 874 (citing U.S. SENT'G GUIDELINES MANUAL §§ 2B3.1(b)(2)(A), (b)(6), (b)(4)(B)).

35. *Id.* (citing U.S. SENT'G GUIDELINES MANUAL § 3E1.1).

36. *Id.* Herman's criminal history level was categorized as "V." *Id.* Sections 4A1.1 and 4A1.2 of the Guidelines explain how points are allocated and computed to determine the criminal history category (I–VI) on the sentencing table. U.S. SENT'G GUIDELINES MANUAL §§ 4A1.1–2.

37. *Herman*, 930 F.3d at 873–74. A judge may impose any sentence within the Guidelines' range, so long as it does not exceed the statutory maximum sentence. U.S. SENT'G GUIDELINES MANUAL § 5G1.1(c).

38. Brief for Defendant, *supra* note 16, at 10.

39. Concurrent sentences are "[t]wo or more sentences of jail time to be served simultaneously." *Concurrent Sentences*, BLACK'S LAW DICTIONARY (11th ed. 2019). Consecutive sentences are "[t]wo or more sentences of jail time to be served in sequence." *Consecutive Sentences*, BLACK'S LAW DICTIONARY (11th ed. 2019).

40. *United States v. Herman*, 884 F.3d 705, 707 (7th Cir. 2018). The first issue is beyond the scope of this Case Comment.

41. *See id.* at 707 ("Because we conclude that Herman is entitled to be resentenced based on his first argument, we need not consider his second.").

42. *Id.* at 708.

43. *United States v. Herman*, 930 F.3d 872, 874 (7th Cir. 2019).

Herman appealed<sup>44</sup> this determination to the Seventh Circuit and requested another remand, in order to be sentenced without the physical restraint enhancement.<sup>45</sup>

Sentencing in the United States has gone through many changes over time.<sup>46</sup> Until the end of the eighteenth century, juries were the sole sentencing body in the criminal justice system.<sup>47</sup> Often, the sentence was simply determined by the verdict—a verdict of guilty meant certain death and a verdict of not guilty meant freedom.<sup>48</sup> Scalable punishments and sentences involving terms of years were rare because there were very few prisons.<sup>49</sup>

Once prisons became more prevalent in the nineteenth century, sentencing became more complex.<sup>50</sup> No longer did a conviction for any one crime carry with it a particular, uniform sentence.<sup>51</sup> The jury's role was limited to finding liability and the judge determined sentencing.<sup>52</sup> Congress allowed for a broad range of punishments<sup>53</sup> and there was minimal appellate review of sentencing.<sup>54</sup> In the absence of any

44. Brief for Defendant, *supra* note 16, at 13.

45. *Herman*, 930 F.3d at 873–74. If the court had not applied the physical restraint enhancement, the final offense level would have been twenty-five, lowering the sentencing range to 100–120 months and allowing the district court discretion to impose a shorter sentence. *Id.*

46. *See generally* Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691 (2010) (discussing the progression of American sentencing, especially federal sentencing).

47. *Id.* at 692.

48. *Id.*

49. *Id.* In the late eighteenth century in America, there existed a “crude arrangement of . . . colonial jails and workhouses” which started to be replaced by a prison system when Pennsylvania attempted to convert its Walnut street jail into a state prison. Harry Elmer Barnes, *The Historical Origin of the Prison System in America*, 12 J. CRIM. L. & CRIMINOLOGY 35, 48 (1921). However, the conversion was a “complete failure,” and it was not until 1829 before Pennsylvania’s prison “system was finally established.” *Id.* at 48–49.

50. *See* Gertner, *supra* note 46, at 694 (“The turn of the nineteenth century brought scalable punishments—penitentiaries, and, in time, reformatories—thus, a more complex set of sentencing outcomes.”).

51. *See id.* (explaining that “[t]he jury could no longer link conviction to a particular sentence” because now, the jury “[was] explicitly instructed to find only the facts” while “the power to sentence or decide questions of law” was left to judges).

52. *Id.*

53. *See* KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 9 (1998) (“The great majority of federal criminal statutes have stated only a maximum term of years and a maximum monetary fine, permitting the sentencing judge to impose any term of imprisonment and any fine up to the statutory maximum.”). During the First Congress, a criminal statute was enacted mandating a maximum punishment of twelve months of imprisonment, a one-thousand-dollar fine, or both for bribery of a customs official. *Id.* at 9. Similar laws still exist today, including a mandated maximum punishment of five years of imprisonment, a five-hundred-dollar fine, or both for a post office employee who unlawfully detains mail. *Id.* at 11.

54. *See* Gertner, *supra* note 46, at 695 (explaining that before the Federal Sentencing Guidelines were enacted, “the ‘doctrine of non-reviewability’ prevailed,” resulting in “appellate review of sentences [being] extremely limited in American courts”).

guidance from Congress or appellate review, very few standards or rules existed, judges were given great deference, and wide disparity in sentencing was unavoidable.<sup>55</sup>

To bring structure to sentencing, the federal government passed the Sentencing Reform Act of 1984,<sup>56</sup> which created the U.S. Sentencing Commission,<sup>57</sup> whose purpose is to craft guidelines for federal judges to use while sentencing.<sup>58</sup> While the Guidelines initially contained a provision making them mandatory,<sup>59</sup> in 2005 the U.S. Supreme Court found this provision unconstitutional.<sup>60</sup> Even so, the Court stated that “[t]he district courts . . . must consult those Guidelines and take them into account when sentencing.”<sup>61</sup> Although the Guidelines are only used at the federal level, many states have created their own sentencing commissions or guidelines.<sup>62</sup>

The Guidelines provide a sentencing range that “take[s] into account both the seriousness of the criminal conduct and the defendant’s criminal record.”<sup>63</sup> First, the judge determines seriousness of the conduct, which is calculated by starting with the

55. *Id.* at 696–97. One study found that in the period before the Guidelines, “[t]he expected difference in the sentence lengths of two judges [with] comparable caseloads” was between sixteen and eighteen percent. *See generally* James M. Anderson et. al., *Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines*, 42 J.L. & ECON. 271 (1999) (discussing a study conducted to “examine[] the impact of the Guidelines on . . . interjudge disparity in the average length of prison sentences of criminal defendants in federal district courts”).

56. 28 U.S.C. § 991.

57. Gertner, *supra* note 46, at 698.

58. *See* U.S. SENT’G COMM’N, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION 1 [hereinafter SENT’G COMM’N: OVERVIEW], [https://www.ussc.gov/sites/default/files/pdf/about/overview/USSC\\_Overview.pdf](https://www.ussc.gov/sites/default/files/pdf/about/overview/USSC_Overview.pdf) (last visited Jan. 27, 2021) (stating that the Sentencing Commission has three principal purposes, including “to establish sentencing policies and practices for the federal courts”).

59. 18 U.S.C. § 3553(b)(1), *declared unconstitutional by* United States v. Booker, 543 U.S. 220 (2005).

60. United States v. Booker, 543 U.S. 220, 264–65 (2005). The Court held that “the [mandatory] imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge’s determination of a fact . . . that was not found by the jury or admitted by the defendant” violates the Sixth Amendment because “the Sixth Amendment requires juries, not judges, to find facts relevant to sentencing.” *Id.* at 245 (internal quotation marks omitted). Therefore, the district courts are not bound to use the Guidelines when sentencing, but “must consult those Guidelines and take them into account . . .” *Id.* at 264.

61. *Id.* The Supreme Court has since stressed the importance of the Guidelines, noting that they should be the starting point in sentencing and must be included in the factors considered. SENT’G COMM’N: OVERVIEW, *supra* note 58, at 2 (citing *Gall v. United States*, 552 U.S. 38 (2007), then citing *Kimbrough v. United States*, 552 U.S. 85 (2007)).

62. *See* Kelly Lyn Mitchell, *State Sentencing Guidelines: A Garden Full of Variety*, FED. PROB., Sept. 2017, at 28, (providing that “Minnesota was the first state to enact sentencing guidelines” and “multiple states, the federal government, and Washington, D.C.” followed, but explaining that “no two states or jurisdictions are the same, no two sets of sentencing guidelines are the same”). Currently, twenty-five states have a sentencing commission, sentencing guidelines, or both. *Id.* Some jurisdictions have mandatory guidelines, some require a certain standard to be met to depart from the guidelines (e.g. substantial or compelling reasons), and some allow parties to appeal for sentences within the guidelines range, while others allow parties to appeal only when the judge has departed from the sentencing range. *Id.* at 34–35.

63. SENT’G COMM’N: OVERVIEW, *supra* note 58, at 2.



base offense level,<sup>64</sup> and increasing or decreasing that level for specific offense characteristics and aggravating or mitigating adjustments.<sup>65</sup> Specific offense characteristics vary depending on the crime, but include considerations such as the amount of loss involved in a fraud or the discharge of a firearm during a robbery.<sup>66</sup> Adjustments can apply to any crime and include factors such as whether the offender was a minimal participant or obstructed justice.<sup>67</sup> Next, the defendant is assigned a criminal history category, from I to VI, which is determined by the seriousness of their criminal history.<sup>68</sup> Finally, after the offense level and criminal history category are determined, the judge finds the sentencing range by looking at the point on the sentencing table where the offense level and criminal history meet.<sup>69</sup>

Even within this seemingly rigid system, there is leeway for judges to make adjustments to the offense level.<sup>70</sup> The language of the Guidelines leaves room for interpretation, creating confusion when judges apply them.<sup>71</sup> Section 2B3.1(b)(4)(B) of the Guidelines states: “if any person was physically restrained to facilitate commission of the offense or to facilitate escape, increase [the offense level] by 2 levels.”<sup>72</sup> Similarly, section 3A1.3<sup>73</sup> also “permits a two-level enhancement ‘if a victim was physically restrained’ during the course of any offense.”<sup>74</sup> One issue that has split the courts is the meaning of “physical restraint.”<sup>75</sup> The debate concerns the applicability of the physical restraint enhancement when a defendant points a gun at

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64. The base offense level differs for each offense and acts as the starting point for determining the seriousness of the offense. FED. SENT’G GUIDELINES: OVERVIEW, *supra* note 3, at 1. Each crime is assigned a specific base offense level. *Id.*

65. *Id.* at 1–2.

66. *Id.* at 1. For example, a fraud involving a six-thousand-dollar loss results in a two-level increase to the base offense level whereas a fraud involving a fifty-thousand-dollar loss results in a six-level increase. *Id.*

67. *Id.* at 2. For example, “[i]f the offender was a minimal participant in the offense, the offense level is decreased by [four] levels” whereas “if the offender obstructed justice, the offense level is increased by [two] levels.” *Id.*

68. *Id.* “Criminal History Category I is the least serious category and includes many first-time offenders” and “Criminal History Category VI is the most serious category and includes offenders with serious criminal records.” *Id.* A higher criminal history category results in a higher sentencing range calculated using the sentencing table. *See id.* at 3 (providing an “excerpt from the sentencing table” which shows final offense levels nineteen through twenty-one and the differences in sentencing ranges based on the criminal history category).

69. *Id.*

70. *See id.* at 2 (explaining that judges have discretion in adjusting offense levels downwards based on whether, “in the judge’s opinion, the offender accepted responsibility for his offense”).

71. *See generally* Andrea Wilson, *Federal Sentencing Guidelines*, 46 MERCER L. REV. 1395 (1995) (offering examples of sections of the Guidelines that have been interpreted in varying ways by the courts).

72. U.S. SENT’G GUIDELINES MANUAL § 2B3.1(b)(4)(B) (U.S. SENT’G COMM’N 2018).

73. *Id.* § 3A1.3.

74. *United States v. Wallace*, 461 F.3d 15, 33 (1st Cir. 2006).

75. *United States v. Herman*, 930 F.3d 872, 874–75 (7th Cir. 2019).

somebody and orders that person not to move.<sup>76</sup> To date, ten circuit courts have ruled on this issue, four holding that the physical restraint enhancement can apply in such circumstances and six holding that it cannot.<sup>77</sup>

In *United States v. Herman*, the government argued that Herman physically restrained Kirk and Daniels because he aimed and fired his gun at them, restricting their movement within the meaning of the Guidelines.<sup>78</sup> Herman argued that the physical restraint enhancement was inapplicable because he did not continuously aim the gun at Kirk and Daniels and did not compel their movement.<sup>79</sup> An armed robber simply ordering his victims not to move, argued Herman, is insufficient to trigger the physical restraint enhancement.<sup>80</sup>

The Seventh Circuit held that the physical restraint enhancement was not properly applied under the circumstances, vacated Herman's sentence, and remanded the case for resentencing without the enhancement.<sup>81</sup> The *Herman* court reasoned that the physical restraint enhancement should not apply when a defendant points a

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76. *Id.*

77. Compare the following cases that found the enhancement applicable: *United States v. Dimache*, 665 F.3d 603, 607–08 (4th Cir. 2011), *United States v. Miera*, 539 F.3d 1232, 1236 (10th Cir. 2008), *Wallace*, 461 F.3d at 33–35, and *United States v. Gonzalez*, 183 F.3d 1315, 1327 (11th Cir. 1999), with the following cases that found the enhancement not applicable: *United States v. Bell*, 947 F.3d 49, 61 (3d Cir. 2020), *Herman*, 930 F.3d at 877, *United States v. Parker*, 241 F.3d 1114, 1118–19 (9th Cir. 2001), *United States v. Drew*, 200 F.3d 871, 880 (D.C. Cir. 2000), *United States v. Anglin*, 169 F.3d 154, 164 (2d Cir. 1999), and *United States v. Hickman*, 151 F.3d 446, 461 (5th Cir. 1998).

78. 930 F.3d at 874; Brief for the United States, *supra* note 9, at 15.

79. Brief for Defendant, *supra* note 16, at 23–24 (quoting *United States v. Carter*, 410 F.3d 942, 954 (7th Cir. 2005)).

80. *Id.* at 25 (citing *Anglin*, 169 F.3d at 164).

81. *Herman*, 930 F.3d at 877. In several analogous prior cases, however, the Seventh Circuit has held that the physical restraint enhancement did, in fact, apply. Compare *id.* (majority opinion) at 877 (holding that “more than pointing a gun at someone and ordering that person not to move is necessary for the application” of the physical restraint enhancement), with *United States v. Taylor*, 620 F.3d 812, 815 (7th Cir. 2010) (holding that the physical restraint enhancement was warranted when “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”), *United States v. Carter*, 410 F.3d 942, 954 (7th Cir. 2005) (holding that the physical restraint enhancement applied because the defendant’s “sustained focus of the weapon on the victim coupled with the compelled movement of the victim to another area constitutes sufficient forceable restraint”), and *United States v. Doubet*, 969 F.2d 341, 347 (7th Cir. 1992) (holding that the physical restraint enhancement was warranted when the defendant’s “victims were led to an isolated room . . . secured by [defendant’s] threats of death while carrying the sawed-off shotgun, as well as an admonition by [defendant] that an armed accomplice stood guard outside the door”). Typically, this would lead to a stare decisis problem. See Amy Coney Barrett, *Statutory Stare Decisis in the Court of Appeals*, 73 GEO. WASH. L. REV. 317, 327–28 (2005) (noting that the courts of appeals, just like the Supreme Court, are bound by stare decisis). Stare decisis is a “super-strong presumption against overruling statutory precedents” that obliges the court to follow past decisions when they are interpreting the same statute. *Id.* However, the Seventh Circuit has a rule permitting the court to set aside precedent. *Herman*, 930 F.3d at 877. Circuit Rule 40(e) allows the judiciary to collectively disapprove of prior holdings as long as they circulate the opinion to “all judges in regular active service” for approval, and the appropriate process was followed in deciding the present case in a manner contrary to previous cases with factual similarities. *Id.*

gun at someone and orders that person not to move because, by specifying physical restraints,<sup>82</sup> the Guidelines rule out psychological coercion alone, though the results of both types of restraints might be the same.<sup>83</sup> Thus, for the enhancement to apply, a defendant needs to take a physical action that causes physical limitation of the victim's mobility.<sup>84</sup>

The dissenting opinion, however, stated that the physical restraint enhancement should apply when a defendant points a gun at someone and tells them not to move, as that is the figurative equivalent of a physical restraint.<sup>85</sup> The dissent determined that the phrase “physically restrained” encompasses such an instance because the defendant takes a “violent or coercive action to restrict [someone’s] ability to act or move.”<sup>86</sup> In doing so, the defendant acts in a way that “physically restrains” the victim.<sup>87</sup>

The *Herman* court was wrong. First, the *Herman* court erred in its interpretation of the plain meaning<sup>88</sup> of the physical restraint enhancement because “physical restraint” does not require physical contact.<sup>89</sup> Instead, the plain meaning of “physical

82. The Guidelines define “[p]hysically restrained’ [as] the forcible restraint of the victim such as by being tied, bound, or locked up.” U.S. SENT’G GUIDELINES MANUAL § 1B1.1 cmt. n.1(L) (U.S. SENT’G COMM’N 2018).

83. See *Herman*, 930 F.3d at 875–77 (“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 physical coercion . . .”) (emphasis in original).

84. See *id.* at 876 (“If the defendant ties someone up, confines someone in a room from which there is no clear exit, renders the person immobile by knocking her out, or takes any of a thousand other physical actions against the targeted person that result in a physical limitation on her mobility, it makes sense to speak of physical restraint. . . . Her physical response to the defendant’s attempt to coerce, however, is not something that logically belongs within the scope of the physical-restraint guideline.”).

85. *Id.* at 878–79 (Flaum, J., dissenting).

86. *Id.*

87. See *id.* at 879. (“The act of commanding someone at gun point not to move is certainly . . . an act of violence or coercion—and the targeted individual is physically restrained because he does not have control over his body or bodily means.”).

88. Plain-meaning rule is “[t]he doctrine that if a legal text is unambiguous it should be applied by its terms without recourse to policy arguments, legislative history, or any other matter extraneous to the text unless doing so would lead to an absurdity.” *Plain-meaning rule*, BLACK’S LAW DICTIONARY (11th ed. 2019).

89. See *United States v. Coleman*, 664 F.3d 1047, 1048–50 (6th Cir. 2012) (analyzing the plain meaning of “physical restraint” and holding that the physical restraint enhancement applied when the defendant “pointed the pistol at [the victim] and ordered him to come out of his office and sit . . . in the lobby” during a robbery); see also *United States v. Dimache*, 665 F.3d 603, 607 (4th Cir. 2011) (citations omitted) (analyzing the plain meaning of the physical restraint enhancement and recognizing that it applies broadly when “the defendant points the gun at the victim, thereby restricting the victim’s movements and ensuring the victim’s compliance with the desires of the defendant”); see also *United States v. Fisher*, 132 F.3d 1327, 1329–30 (10th Cir. 1997) (“Physical restraint is not limited to physical touching of the victim.”).

restraint” merely requires some act by the defendant that is intended to restrain the free movement of the victim.<sup>90</sup>

In the 2012 case *United States v. Coleman*, the defendant robbed a bank and ordered an employee to exit his office and sit on the lobby floor.<sup>91</sup> The Sixth Circuit, in deciding that the physical restraint enhancement applied, discussed the definition of “physical restraint.”<sup>92</sup> First, the court looked to the Guidelines, which define “physical restraint” as “the forcible restraint of the victim such as by being tied, bound, or locked up.”<sup>93</sup> The court then defined “force” as “physical means or . . . legal requirement” and “restraint” as “an act that checks free activity or otherwise controls.”<sup>94</sup> Building on these definitions, the Sixth Circuit determined that physical restraint occurs when a defendant requires the victim to “go to a different place and maintain position” there.<sup>95</sup>

In the 2011 case *United States v. Dimache*, the defendant, while robbing a bank, ordered the bank’s patrons and tellers to get on the ground, told one teller to put money in a bag, and then commanded her to count to one hundred.<sup>96</sup> The Fourth Circuit discussed the plain meaning of “physical restraint” and declined to accept a narrow interpretation that required bodily contact or confinement.<sup>97</sup> Instead, the court stated that physical restraint enhancement concerns “deprivation of a person’s ‘freedom of physical movement’” and that such deprivation happens when a defendant points a gun at their victim because it restricts the victim’s movement and ensures compliance.<sup>98</sup>

Further, in *United States v. Fisher*, a 1997 decision, the defendant in a bank robbery case held a gun to a security guard’s head “to dissuade [him] from moving [or] interfering with the robbery.”<sup>99</sup> The Tenth Circuit stated that the physical

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90. See *Coleman*, 664 F.3d at 1050–51 (“Coleman used a pistol . . . ‘to require[] Mr. Sawyer to go to a different place and maintain position in a different place.’ Imposing this restraint on Sawyer’s movement suffices for application of [the physical restraint enhancement] . . . .”); see also *Dimache*, 665 F.3d at 608 (explaining that ordering “two bank tellers . . . to the floor at gunpoint” was a physical restraint because they “were prevented from both leaving the bank and thwarting the bank robbery”); see also *Fisher*, 132 F.3d at 1329–30 (explaining that “physical restraint occurs whenever a victim is specifically prevented at gunpoint from moving” because “[k]eeping someone from doing something is inherent within the concept of restraint”) (emphasis in original).

91. 664 F.3d at 1048. The defendant pointed a gun at the bank employee while ordering him into the lobby. *Id.*

92. *Id.* at 1049.

93. *Id.* (quoting U.S. SENT’G GUIDELINES MANUAL § 1B1.1 cmt. n.1(L) (U.S. SENT’G COMM’N 2018)).

94. *Id.* at 1049 (internal quotations omitted). The court looked to Black’s Law Dictionary and case law for these definitions. *Id.*

95. *Id.* at 1050.

96. 665 F.3d 603, 604 (4th Cir. 2011). Although the record is absent on this point, the purpose of the order to count to one hundred was, presumably, in order to buy the defendant more time to escape.

97. See *id.* at 606–07 (citations omitted).

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

99. 132 F.3d 1327, 1329 (10th Cir. 1997).

restraint enhancement “is applicable when [a] defendant uses force to [stop] others from interfering with [the] commission of the offense,” and further added that “[p]hysical restraint is not limited to physical touching.”<sup>100</sup> The court concluded that physical restraint occurs when a defendant prevents a victim’s movement to facilitate a crime because “[k]eeping someone from doing something is inherent within the concept of restraint.”<sup>101</sup>

In *United States v. Wilson*, decided two years later, hitchhiking defendants forced their driver to stop by pointing a gun at her, demanded her money, forced her out of the car, and stole the vehicle.<sup>102</sup> The Fourth Circuit found that the physical restraint enhancement was applicable because the victim was prevented from leaving her car, even if only briefly, and the defendants were then able to gain possession of her money and vehicle.<sup>103</sup> The defendants thus physically restrained her to facilitate the commission of the robbery.<sup>104</sup>

Based on the plain meaning of the physical restraint enhancement, the *Herman* court should have found that Herman’s actions met the enhancement’s requirements.<sup>105</sup> First, like the defendant in *Coleman*, Herman ordered Kirk and Daniels not to move.<sup>106</sup> In doing so, Herman met the requirement of physical restraint because he required his victims to maintain their positions.<sup>107</sup> Second, like the defendant in *Dimache*, Herman physically restrained Kirk and Daniels because Herman ensured compliance from his victims by pointing a gun at them.<sup>108</sup> Third, like the defendant in *Fisher*, Herman pointed a gun at Kirk and Daniels to dissuade them from moving

100. *Id.*

101. *Id.* at 1329–30 (emphasis omitted).

102. 198 F.3d 467, 469 (4th Cir. 1999).

103. *Id.* at 472.

104. *Id.*

105. Compare *United States v. Herman*, 930 F.3d 872, 875–77 (finding the physical restraint enhancement not applicable), with *United States v. Coleman*, 664 F.3d 1047, 1049 (6th Cir. 2012) (“Both the plain language of the Guidelines and case law from other circuits suggest that the enhancement applies . . .”), *United States v. Dimache*, 665 F.3d 603, 607 (4th Cir. 2011), *Wilson*, 198 F.3d at 472, and *Fisher*, 132 F.3d at 1330.

106. Compare *Coleman*, 664 F.3d at 1050 (ordering the victim to “go to a different place and maintain position”), with *Herman*, 930 F.3d at 873 (ordering Kirk and Daniels to “stay seated” or else Herman would “blow [them] back”).

107. Compare *Coleman*, 664 F.3d at 1050 (applying the physical restraint enhancement), with *Herman*, 930 F.3d at 873 (declining to apply the physical restraint enhancement).

108. Compare *Dimache*, 665 F.3d at 604 (finding that the physical restraint enhancement applied because the defendant “pointed the gun at the two other bank tellers . . . behind the counter and told them to get down on the floor. He warned them to be quiet, stating if they were not, ‘[y]ou know what will happen.’”), with *Herman*, 930 F.3d at 873–74 (declining to apply the physical restraint enhancement when the defendant pointed a gun at Kirk and Daniels, telling them, “Look . . . stay seated. I don’t want to blow you guys back, but I will if I have to.”).

and preventing the robbery.<sup>109</sup> In fact, Herman explicitly told them to stay seated because he did not want them to chase after him.<sup>110</sup> Finally, like the defendants in *Wilson*, Herman briefly prevented Kirk and Daniels from leaving the house by pointing a gun at them and, once outside, shooting at them, to impede their interference with the robbery and restrict their movement.<sup>111</sup> Overall, Herman physically restrained Kirk and Daniels by pointing a gun at them to ensure compliance and successful commission of the robbery, which is consistent with the plain meaning of the physical restraint enhancement.<sup>112</sup>

Instead, the *Herman* court defined “physical restraint” extremely narrowly, holding that “physical restraint” requires a physical act against the victim that prevents their movement, and that this definition expressly precludes psychological coercion.<sup>113</sup> It is clear from *Coleman*, *Dimache*, *Fisher*, and *Wilson* that the plain meaning of “physical restraint” does not require a physical act against a victim and that psychological coercion alone can result in a physical restraint.<sup>114</sup> Therefore, the *Herman* court erred in its analysis of the plain meaning of the physical restraint enhancement and in finding it inapplicable.<sup>115</sup>

Second, by limiting the application of the physical restraint enhancement, the *Herman* court has curbed its deterrent effect.<sup>116</sup> In the judicial system, actions are criminalized for reasons including deterrence, retribution, incapacitation, and rehabilitation.<sup>117</sup> Deterrence is an important goal of the criminal justice system because it aims to prevent illegal activity without the need to capture, prosecute, and

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109. Compare *Fisher*, 132 F.3d at 1330 (“The conduct warranting the physical restraint enhancement was . . . that the co-conspirator struck the security guard with the gun and then restrained him by holding the gun to his head for a period longer than it took to strike him.”), with *Herman*, 930 F.3d at 873–74.

110. *Herman*, 930 F.3d at 873–74.

111. Compare *United States v. Wilson*, 198 F.3d 467, 472 (4th Cir. 1999) (“A gun was held to [the victim’s] head, and she was prevented from leaving her car, albeit briefly, until [the defendants] were able to get her money and gain control of her car.”), with *Herman*, 930 F.3d at 873–74.

112. *Herman*, 930 F.3d at 879 (Flaum, J., dissenting) (“Returning to the Guidelines’ definition, and reading it as a whole with these plain meanings in mind, I fail to see how a defendant who points a gun at a person and instructs him not to move has not ‘physically restrained’ the person.”).

113. *Id.* at 875–76.

114. See *United States v. Coleman*, 664 F.3d 1047, 1048–50 (6th Cir. 2012); see also *United States v. Dimache*, 665 F.3d 603, 607–08 (4th Cir. 2011); see also *Fisher*, 132 F.3d at 1329–30; see also *Wilson*, 198 F.3d at 472.

115. See *Herman*, 930 F.3d at 877 (Flaum, J., dissenting) (internal citations omitted) (“[T]he panel’s holding that the enhancement cannot apply if it is ‘based solely on psychological coercion—including the coercion of being held at gunpoint,’ is problematic for three reasons: It is contrary to the Guidelines’ language; it departs from over twenty-five years of this Court’s precedents; and it is in direct conflict with four other circuits.”).

116. See *Kessler & Levitt*, *supra* note 8.

117. Gertner, *supra* note 46, at 691. Incapacitation aims to “impede [a] person from carrying out whatever criminal inclinations he or she may have,” through imprisonment, exile, or house arrest, among others. *Incapacitation*, BLACK’S LAW DICTIONARY (11th ed. 2019).

incarcerate the offender.<sup>118</sup> Since the daily cost of a single incarceration sits at around one hundred dollars, deterrence is a much cheaper alternative to retribution, incapacitation, and rehabilitation.<sup>119</sup>

Sentencing enhancements may have a deterrent effect on crime because criminals are less likely to engage in behavior that they know will increase their prison sentence.<sup>120</sup> In fact, a study that looked at the effect of a sentencing enhancement on robberies, applicable when the offender possesses a firearm during the crime, found that gun robbery rates declined between 5 to 18 percent within the first three years of the sentencing enhancement's introduction.<sup>121</sup> In *Herman*, the Seventh Circuit narrowed the applicability of the physical restraint enhancement by adopting an unduly formalistic analysis.<sup>122</sup> In doing so, the Seventh Circuit has potentially curtailed deterrence of robberies and thereby contributed to the increase in crime and associated costs to the criminal justice system and society.<sup>123</sup>

In summary, the *Herman* court erred in finding that the physical restraint enhancement was not applicable. First, the *Herman* court erred in its interpretation of the plain meaning of the enhancement.<sup>124</sup> Additionally, the *Herman* court limited not only the application of the physical restraint enhancement, but also its deterrent effect.<sup>125</sup> When deterrence goes down, crime and costs go up.<sup>126</sup> The court seems to be working against itself.

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118. Aaron Chalfin & Justin McCrary, *Criminal Deterrence: A Review of the Literature*, 55 J. ECON. LITERATURE 5, 5 (2017).

119. David S. Abrams, *Estimating the Deterrent Effect of Incarceration Using Sentencing Enhancements*, 4 AM. ECON. J.: APPLIED ECON., Oct. 2012, at 32, 32–33. For fiscal year 2018, the average cost of incarceration was \$102.60 per day (\$37,449 per year) for federal inmates in Bureau of Prisons facilities and \$94.50 per day (\$34,492.50 per year) for federal inmates in Community Corrections Centers. Annual Determination of Average Cost of Incarceration Fee (COIF), Fiscal Year 2018, 84 Fed. Reg. 63891–92 (Nov. 19, 2019).

120. See Abrams, *supra* note 119 (stating that sentence enhancements serve as deterrence to incarceration); see also Kessler & Levitt, *supra* note 8, at 359 (analyzing the deterrent effect a sentencing enhancement law had on criminals in California and concluding “that the increasing reliance on sentencing enhancements . . . may represent an effective means of reducing crime”).

121. Abrams, *supra* note 119, at 44–45.

122. See *United States v. Herman*, 930 F.3d 872, 875–77 (7th Cir. 2019) (declining to adopt other courts’ broad interpretation of the physical restraint enhancement and holding that “more than pointing a gun at someone and ordering that person not to move is necessary for the application” of the physical restraint enhancement).

123. See Abrams, *supra* note 119 (“If deterrence is very small, increasing sentencing lengths would only reduce crime by taking potential offenders off the streets for longer periods of time [which] is a very expensive proposition . . .”).

124. See *Herman*, 930 F.3d at 879 (Flaum, J., dissenting).

125. See Kessler & Levitt, *supra* note 8.

126. See Abrams, *supra* note 119.