

January 2023

## Federal Sentencing: The Need for a New Test for the Abduction Enhancement in the Context of Robbery

Alex Leroy  
*West Virginia University College of Law*

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Criminal Law Commons](#)

---

### Recommended Citation

Alex Leroy, *Federal Sentencing: The Need for a New Test for the Abduction Enhancement in the Context of Robbery*, 125 W. Va. L. Rev. 725 (2023).

This Student Note is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact [researchrepository@mail.wvu.edu](mailto:researchrepository@mail.wvu.edu), [emily.fidelman@mail.wvu.edu](mailto:emily.fidelman@mail.wvu.edu).

**FEDERAL SENTENCING: THE NEED FOR A NEW TEST FOR THE ABDUCTION ENHANCEMENT IN THE CONTEXT OF ROBBERY**

ABSTRACT

*The abduction enhancement applied to the crime of robbery is inherently ambiguous; the enhancement reads, “‘abducted’ means that a victim was forced to accompany an offender to a different location.” The lack of a clear definition for “location” has caused a split within the federal circuits, with some circuits interpreting “location” as position and others interpreting “location” as place. This has caused disproportionate sentences for similar criminal conduct within separate circuits, creating the need for a more uniform interpretation of the sentencing enhancement for abduction.*

*This Note builds upon the work of David J. Sandefer<sup>1</sup> and proposes two additional factors to consider during sentencing. A clarified definition of abduction alone will not alleviate the confusion that has arisen when courts attempt to interpret this section of the Guidelines. By focusing on a static definition of location, a reviewing court would improperly focus on characteristics of the building robbed rather than the defendant’s underlying conduct.*

*To propose a solution, this Note presents several factors that courts should use in assessing the applicability of the abduction enhancement. This test seeks to balance all relevant factors implicated by a defendant’s conduct by considering the dangerousness presented to victims by relocation, the amount of distance traveled, the dimensions of the structure robbed, and the intent of the defendant in forcing relocation. This new test allows for a more robust system of initial application and review of the abduction enhancement, presenting both district and circuit courts a more definitive criteria for assessing the applicability of the abduction enhancement.*

I. INTRODUCTION ..... 726

II. EVENTS LEADING TO THE PROMULGATION OF THE SENTENCING GUIDELINES..... 730

    A. *The History of Federal Sentencing*..... 730

    B. *The Practical Application of the Guidelines* ..... 731

    C. *Recent Developments in the Federal Sentencing Process*..... 733

---

<sup>1</sup> See David J. Sandefer, *To Move or Not to Move, That is the Metaphysical Question*, 85 U. CHI. L. REV. 1973 (2018).

III.	THE EXISTING CIRCUIT SPLIT ON INTERPRETING “DIFFERENT LOCATION”	734
A.	<i>The Sixth, Seventh, and Eleventh Circuits Limit Forced Movement Within the Location Where a Robbery Occurs to Physical Restraint Rather Than Abduction</i>	735
1.	The Sixth Circuit	735
2.	The Seventh Circuit	735
3.	The Eleventh Circuit	736
B.	<i>The Three-Part Test of the Third and Tenth Circuits</i>	737
1.	The Third Circuit	737
2.	The Tenth Circuit	738
C.	<i>The Flexible Approach of the Fourth and Fifth Circuits</i>	738
1.	The Fourth Circuit	738
2.	The Fifth Circuit	739
IV.	ARGUMENT	740
A.	<i>The Commission Intended the Abduction Enhancement to Apply Only When a Victim is Relocated from Where a Robbery Occurs</i>	740
B.	<i>The Three-Part Test and Flexible Approach Tend to Produce Absurd Results</i>	742
1.	The Physical Restraint Enhancement Is More Applicable to Forced Movement Occurring Within a Building	743
C.	<i>A More Inclusive Definition of “Different Location” Should Be Considered Going Forward</i>	745
1.	The Meaning of “Different Location” in the Context of Sexual Assault and the Element of “Dangerousness”	745
2.	Substantial Distance	746
3.	Building Structure	747
4.	Offender’s Intent	747
V.	THE NEW TEST IN ACTION	748
VI.	CONCLUSION	749

## I. INTRODUCTION

Although the concept of robbery is relatively easy to grasp, courts are often tasked with considering additional circumstances implied by criminal conduct which might warrant an upward deviation in a sentence imposed during sentencing. These increases to sentences are typically referred to as aggravating circumstances,<sup>2</sup> such as obstructing justice by concealing evidence. Aggravating

---

<sup>2</sup> See generally *Zant v. Stephens*, 462 U.S. 862 (1983) (discussing how aggravating and mitigating circumstances are applied in the context of murder).

circumstances are considered and applied to increase sentences above base sentence ranges proposed by the Federal Sentencing Guidelines.<sup>3</sup> These circumstances differ from mitigating circumstances, such as compliance with authorities, which might decrease an offender's sentence.<sup>4</sup> One such circumstance that can increase a sentence for robbery is the "abduction enhancement," which requires that a victim be transported to a "different location" during the commission of a robbery.<sup>5</sup>

In some instances, the application of the abduction enhancement is essentially uncontroverted. For example, when a robbery victim who was forced at gunpoint to withdraw money from a Walmart ATM in Franklin, Virginia, and then subsequently forced to drive to North Carolina,<sup>6</sup> the abduction enhancement was logically applied to the offender's underlying conduct. Similar situations are the simplest examples of the application of the abduction enhancement to the crime of robbery.<sup>7</sup> However, the applicability of the abduction enhancement to a robbery offense becomes less clear when victims are forced to accompany an offender but remain within the same structure where the robbery occurred; under these circumstances, it is more difficult to definitively determine whether the victim was moved to a "different location."<sup>8</sup>

During some robberies, victims are never relocated from the site of the robbery and remain within the same building despite being forced to move between discrete areas, such as from a bank teller area to a bank vault. For an illustrative example, imagine a robber has entered a small convenience store located within a stand-alone building, and after obtaining the cash at the register, the robber escorts the clerk less than 50 feet from the register and through a doorway to a back room. Would this degree of movement on its face seem to amount to an "abduction"? In some circuits, this trivial degree of movement would qualify as an abduction. In these situations, a court only considers whether the cash register and the room where surveillance is conducted qualify as "different location[s]." This Note demonstrates that such application is contrary

---

<sup>3</sup> See Part *infra* II for a discussion on how sentences are calculated.

<sup>4</sup> See *Zant*, 462 U.S. at 865.

<sup>5</sup> U.S. SENT'G GUIDELINES MANUAL § 2B3.1.(b)(4)(A) (U.S. SENT'G COMM'N 2021).

<sup>6</sup> *Man Arrested in Connection to Robbery, Abduction at Franklin Walmart*, WKTR (Oct. 9, 2021, 11:00 PM), <https://www.wtkr.com/news/man-arrested-in-connection-to-robbery-abduction-at-franklin-walmart>.

<sup>7</sup> See U.S. SENT'G GUIDELINES MANUAL § 1B1.1 cmt. n.1(A) (U.S. SENT'G COMM'N 2021) ("'Abducted' means that a victim was forced to accompany an offender to a different location.").

<sup>8</sup> See generally *United States v. Archuleta*, 865 F.3d 1280, 1285–89 (10th Cir. 2017); *United States v. Buck*, 847 F.3d 267, 277 (5th Cir. 2017); *United States v. Whatley*, 719 F.3d 1206, 1221–23 (11th Cir. 2013); *United States v. Reynos*, 680 F.3d 283, 286 (3d Cir. 2012), *reh'g granted*, 682 F.3d 1053 (3d Cir. 2012), *cert. dismissed as improvidently granted*, 700 F.3d 690 (3d Cir. 2012); *United States v. Eubanks*, 593 F.3d 645, 652–54 (7th Cir. 2010); *United States v. Osborne*, 514 F.3d 377, 390 (4th Cir. 2008).

to the conduct the U.S. Sentencing Commission intended the abduction enhancement to encompass when the Guidelines were authored in 1987.

The focus of this hypothetical may seem trivial, but several courts have grappled with whether the abduction enhancement was properly applied in situations where victim relocation is confined to a single building and assessed whether such conduct warrants an increase in the offender's sentence.<sup>9</sup> In doing so, some courts have disregarded whether conduct is merely incidental to the underlying crime. There are two factors that must be considered in assessing whether the abduction enhancement in instances such as these is the correct punishment: (1) the goal of the criminal justice system is to reform the actions of offenders and reduce the risk of recidivism;<sup>10</sup> and (2) the costs of incarceration are to some degree covered by taxpayer money.<sup>11</sup>

Absent aggravating circumstances that increase the likelihood of harm to a robbery victim, the application of the abduction enhancement is directly contrary to the goals of the criminal justice system and the interests of an ordinary taxpayer because the defendant is already being punished and sentenced for the commission of a crime, robbery. Furthermore, given the overcrowding of federal prisons,<sup>12</sup> inmates should not be imprisoned for additional months when the base level offense for robbery only warrants imprisonment of 33 to 87 months,<sup>13</sup> given the base offense level of 20, depending on the offender's criminal history category. The abduction enhancement should only be applied when a robber's conduct presents increased potential for a victim to suffer harm and that conduct is not incidental to the underlying crime.

Although the Commission could not possibly have contemplated all potential situations that might present additional harm to a robbery victim during the promulgation of the Guidelines, the Commission did include a statement of policy<sup>14</sup> while drafting the Guidelines. The underlying policy of the abduction enhancement is to more harshly punish conduct that increases the likelihood that a victim will suffer additional harm due to relocation.<sup>15</sup> In practice, the burden

---

<sup>9</sup> See *Eubanks*, 593 F.3d at 652–55.

<sup>10</sup> See *Williams v. New York*, 337 U.S. 241, 248 (1949) (reasoning that the goal of contemporary criminal jurisprudence is reformation and rehabilitation, not retribution).

<sup>11</sup> See Christian Henrichson & Ruth Delaney, *The Price of Prisons: What Incarceration Costs Taxpayers*, VERA INST. OF JUST. (Jan. 2012), <https://shnny.org/uploads/Price-of-Prisons.pdf>.

<sup>12</sup> See U.S. SENT'G GUIDELINES MANUAL § 1A3 (U.S. SENT'G COMM'N 2021).

<sup>13</sup> See U.S. SENT'G COMM'N, FEDERAL SENTENCING: THE BASICS 42 (Nov. 2018) [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/201811\\_fed-sentencing-basics.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/201811_fed-sentencing-basics.pdf). This sentencing table is used as a reference by federal judges during sentencing and depicts the length of sentences in months.

<sup>14</sup> See U.S. SENT'G GUIDELINES MANUAL § 5K2.0 (U.S. SENT'G COMM'N 2021).

<sup>15</sup> See *United States v. Whootten*, 279 F.3d 58, 61 (1st Cir. 2002) (stating that “the abduction enhancement is intended . . . to protect victims against additional harm that may result from the victim's isolation”); see also *United States v. Cunningham*, 201 F.3d 20, 28 (1st Cir. 2000) (citing

2023]

## ROBBERY ABDUCTION ENHANCEMENT

729

rests with the defendant to prove that their conduct did not satisfy the criteria of the abduction enhancement.<sup>16</sup> Despite this, many circuits have improperly applied the abduction enhancement to conduct in which robbery victims remain within the same building during the commission of a robbery and relocation is limited to the structure where the robbery occurs. The application of abduction in cases such as these is typically improper, because movement did not occur between “different locations” as intended by the Commission.<sup>17</sup>

This Note specifically looks at the abduction enhancement in the context of felony robbery and argues that in most circumstances, the abduction enhancement can only be properly applied when a victim is relocated to a location separate and distinct from the structure robbed. Part II provides a background of the events that led to the creation of the Sentencing Commission and subsequent promulgation of the Guidelines. Additionally, Part II explains substantial developments pertaining to the Guidelines at the Supreme Court level and the federal sentencing process. Part III addresses the existing circuit split in applying the abduction enhancement and articulates the three distinct approaches circuits have taken when interpreting this enhancement. Part IV provides a critique of these three approaches and suggests a new approach for assessing conduct and determining whether the abduction enhancement is applicable based on existing appellate case law that concerns sexual assault and related state law concepts involving kidnapping.

Law on sexual assault and kidnapping serve as the basis for the first two elements of the new test: dangerousness and substantial distance. This new test also considers the dimensions of the structure robbed and the intent of the defendant in forcing movement. These four factors should be balanced against one another to provide a reviewing court a more practical method of assessing the applicability of the abduction enhancement, rather than requiring that court to focus on whether two locations are “different” within the statutory context. This new test could be applied by district courts issuing a sentence and reviewed by an appellate court for reasonableness. This Note seeks to eliminate the inherent ambiguities presented by reviewing the abduction enhancement’s application to relocation within the same structure where a robbery occurs.

---

United States v. Saknikent, 30 F.3d 1012, 1013 (8th Cir. 1994)) (reasoning isolation increases the likelihood a victim will be harmed).

<sup>16</sup> See United States v. Viktor, 719 F.3d 1288, 1291 (11th Cir. 2013); see also United States v. Felix, 561 F.3d 1036, 1043 (9th Cir. 2009) (quoting United States v. Howard, 894 F.2d 1085, 1090 (9th Cir. 2009)) (stating “the defendant should bear the burden of proof when the defendant seeks to lower the offense level”).

<sup>17</sup> See U.S. SENT’G GUIDELINES MANUAL § 1B1.1 cmt. n.1(A) (U.S. SENT’G COMM’N 2021).

## II. EVENTS LEADING TO THE PROMULGATION OF THE SENTENCING GUIDELINES

The process and objectives of federal sentencing have shifted drastically since the 1980s. This evolutionary history is important to understand because it demonstrates the need for a more uniform sentencing structure under federal law. Problems arise when the same laws are applied in vastly different manners across the circuits, leading to disparate sentences for relatively identical underlying conduct. This section explains the history of federal sentencing that eventually resulted in the formation of the Guidelines, the practical operation of the Guidelines, and recent developments in federal sentencing that allow judicial discretion in applying and deviating from the Guidelines.

### A. *The History of Federal Sentencing*

Before the 1980s, federal sentencing in the United States was an indeterminate process that gave a presiding judge full discretion to impose a sentence they deemed fitting.<sup>18</sup> This was especially problematic because before this point there was no existing structure for the appellate review of a federal sentence.<sup>19</sup> This lack of review led to vast disparities for sentences imposed on offenders across different circuits, despite the similarities in their underlying conduct. These discrepancies highlighted the necessity of a uniform structure for federal sentencing because judges among the circuits were applying the same federal law but imposing inconsistent sentences. As a result, the United States Sentencing Commission was established following Congress's passage of the Comprehensive Crime Control Act of 1984.<sup>20</sup>

The establishment of the United States Sentencing Commission was largely influenced by the "War on Drugs" attributed to President Ronald Reagan.<sup>21</sup> The mass incarceration resulting from this new policy led to a vast increase in the number of inmates within federal prisons.<sup>22</sup> In fact, a New York Times article authored in 2008 detailed that federal prisons in the United States accounted for one-fourth of all individuals incarcerated worldwide, despite the

---

<sup>18</sup> U.S. SENT'G COMM'N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 16 (1991).

<sup>19</sup> See *Dorszynski v. United States*, 418 U.S. 424, 431 (1974) (stating "the general proposition that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end").

<sup>20</sup> Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (1984).

<sup>21</sup> *Reagan Names Panel to Standardize Sentencing*, N.Y. TIMES (Sept. 11, 1985), <https://www.nytimes.com/1985/09/11/us/reagan-names-panel-to-standardize-sentencing.html>.

<sup>22</sup> See Marc Mauer & Ryan S. King, SENTENCING PROJECT, A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY 1 (2007), <https://www.sentencingproject.org/publications/a-25-year-quagmire-the-war-on-drugs-and-its-impact-on-american-society/>.

2023]

## ROBBERY ABDUCTION ENHANCEMENT

731

United States only accounting for 5% of the global population.<sup>23</sup> This phenomenon has largely been attributed to the change in sentencing strategy resulting from the Sentencing Reform Act.<sup>24</sup> While this vast increase in incarcerated individuals is mostly attributable to drug related crimes, other crimes contemplated by the Guidelines contribute to this phenomenon, such as sentencing enhancements allowed under the Guidelines applicable to the crime of robbery.

As a component of the Comprehensive Crime Control Act, the Sentencing Reform Act<sup>25</sup> provided for the formation of sentencing guidelines. The three main objectives of the Sentencing Reform Act were (1) to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system; (2) to establish reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders; and (3) to create proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.<sup>26</sup> As a result of the Sentencing Reform Act, the Commission promulgated the United States Sentencing Guidelines as a logical solution to address the discrepancies in sentencing resulting from the discretionary power of district courts and a method to ensure uniformity and proportionality in sentences imposed for comparable underlying conduct.<sup>27</sup> The Guidelines achieved this through the imposition of mandatory minimum sentences based on categorically organized conduct, such as robbery or sexual assault.<sup>28</sup> While adherence to the Guidelines during sentencing was initially mandatory, a judge retained the discretion to deviate from the Guidelines, so long as a justification was provided for departure from sentence range.<sup>29</sup>

*B. The Practical Application of the Guidelines.*

Under the Guidelines, each step in the sentencing process is addressed by an independent chapter of The Guidelines Manual.<sup>30</sup> The following paragraphs seek to illustrate the complete federal sentencing process, which occurs as follows.

---

<sup>23</sup> Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, N.Y. TIMES (Apr. 23, 2008), [http://www.nytimes.com/2008/04/23/us/23prison.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2008/04/23/us/23prison.html?pagewanted=all&_r=0).

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

<sup>25</sup> Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1976 (1984) (codified as amended in scattered sections of 18 and 28 U.S.C.).

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

<sup>27</sup> See U.S. SENT'G GUIDELINES MANUAL § 1A3 (U.S. SENT'G COMM'N 2021).

<sup>28</sup> SPECIAL REPORT, *supra* note 18.

<sup>29</sup> ANDREW VON HIRSCH, KAY A. KNAPP & MICHAEL H. TONRY, THE SENTENCING COMMISSION AND ITS GUIDELINES 8–9 (1987).

<sup>30</sup> See U.S. SENT'G GUIDELINES MANUAL § 1B1.1 (U.S. SENT'G COMM'N 2021).



First, as a preliminary step, a federal probation officer conducts initial guidelines calculations that are submitted to the court in the pre-sentence report,<sup>31</sup> which is submitted to the court after counsel for the defense and prosecution are given the opportunity to respond to the probation officer's proposed guideline application. Next, a court must determine which Chapter Two offense guideline applies by consulting Appendix A of the Guidelines Manual.<sup>32</sup> For the purposes of this discussion, the robbery category would be selected at this stage. After identifying the proper Chapter Two guideline, the "offense level" is calculated from that guideline through consideration of the applicable "base offense level" combined with any "specific offense characteristics" (which are aggravating and mitigating factors related to a particular offense).<sup>33</sup> The offense of robbery has a base offense level of 20,<sup>34</sup> and the abduction enhancement acts as a specific offense characteristic, which adds 4 to the base level.<sup>35</sup> These specific offense characteristics are outlined in Chapter Three of The Guidelines Manual.<sup>36</sup> Next, Chapter Four considers a defendant's criminal history.<sup>37</sup> A defendant's criminal history is calculated based upon points referenced in this chapter, and typically increases based upon prior offending conduct. Chapter Five is where the sentence range calculation begins and is determined by the intersection of defendant's offense level and criminal history score.<sup>38</sup> The final step in this calculation is to consult Chapter Six to determine if any departure or variance from the guidelines are applicable.<sup>39</sup>

The Guidelines already contemplate potential injury to victims by creating three tiers of increasing injuries which add to a defendant's offense level.<sup>40</sup> As discussed below, this is significant when the "dangerousness" element of the proposed test is considered.<sup>41</sup> Furthermore, *Federal Sentencing, The Basics* outlines a robbery scenario<sup>42</sup> as a practical example of how the federal sentencing process operates. Interestingly, the example even states, "[n]or did the defendant physically restrain anyone or force anyone to move to a d[i]fferent

---

<sup>31</sup> See FEDERAL SENTENCING: THE BASICS, *supra* note 13, at 13.

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

<sup>33</sup> *Id.* (noting that "Chapter One's provisions concerning 'relevant conduct' are sometimes used to determine the BOL and usually used to determine the applicable SOCs.").

<sup>34</sup> U.S. SENT'G GUIDELINES MANUAL § 2B3.1(a) (U.S. SENT'G COMM'N 2021).

<sup>35</sup> U.S. SENT'G GUIDELINES MANUAL § 2B3.1(b)(4)(A) (U.S. SENT'G COMM'N 2021).

<sup>36</sup> See FEDERAL SENTENCING: THE BASICS, *supra* note 13, at 14.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* This chart is located in Part A of the Sentencing Guidelines Manual. U.S. SENT'G GUIDELINES MANUAL ch. 5, pt. A (U.S. SENT'G COMM'N 2021).

<sup>39</sup> FEDERAL SENTENCING: THE BASICS, *supra* note 13, at 14.

<sup>40</sup> See U.S. SENT'G GUIDELINES MANUAL § 2B3.1(b)(3)(A)–(E) (U.S. SENT'G COMM'N 2021).

<sup>41</sup> See *infra* Part III.

<sup>42</sup> See FEDERAL SENTENCING: THE BASICS, *supra* note 13, at 15–20.

location within or outside the bank.”<sup>43</sup> This implies that different locations can in fact exist within a single building because the example states that the hypothetical defendant did not force anyone to “move to a different location within the bank.” This distinction will be considered during the formulation of a new test in Part V.

*C. Recent Developments in the Federal Sentencing Process.*

Two years after the Guidelines were promulgated, the mandatory requirement of the Guidelines was challenged in *Mistretta v. United States*,<sup>44</sup> where the Supreme Court upheld the mandatory nature of the Guidelines during sentencing as constitutional. In *Mistretta*, the Supreme Court rejected the petitioner’s claims that the Guidelines were unconstitutional on the basis of excessive delegation of legislative power and violation of the separation of powers principle.<sup>45</sup> However, in 2005, the United States Supreme Court rendered the Sentencing Guidelines as advisory in nature after issuing the opinion of *United States v. Booker*,<sup>46</sup> which eliminated certain provisions of 18 U.S.C. § 3551(a) by declaring provisions reflecting the mandatory nature of the Guidelines unconstitutional.<sup>47</sup> Following the *Booker* decision, federal courts reviewed a sentence for reasonableness under an abuse of discretion standard.<sup>48</sup> While *Booker* did not explicitly overrule *Mistretta*, the Court reasoned an advisory guideline system would “continue to move sentencing in Congress’ preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary.”<sup>49</sup>

---

<sup>43</sup> *Id.* at 15.

<sup>44</sup> 488 U.S. 361, 391 (1989).

<sup>45</sup> *Id.* at 372–84, 396–97.

<sup>46</sup> *See United States v. Booker*, 543 U.S. 220, 246 (2005) (reasoning that a court is permitted to deviate from the guidelines during sentencing, thus rendering the guidelines as merely advisory in nature).

<sup>47</sup> *Id.*

<sup>48</sup> *See United States v. Gall*, 552 U.S. 38, 51 (2007) (stating “Regardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard. It must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence— including an explanation for any deviation from the Guidelines range. Assuming that the district court’s sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard. When conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range.”).

<sup>49</sup> *See Booker*, 543 U.S. at 264–65.

Furthermore, rendering the Guidelines as advisory worked to prevent district judges from being reversed simply because a sentence imposed was not within the authorized Guideline range.<sup>50</sup> Despite these significant developments, the Guidelines still hold persuasive authority and have influenced the three predominant circuit positions used to interpret the abduction enhancement and increase the sentence imposed on an individual convicted of robbery.

Although the Sentencing Guidelines were intended to ensure uniformity in sentencing, circuit courts across the United States differ primarily in how they interpret the phrase “different location” included in the abduction enhancement. Courts have struggled to determine whether “location” is a reference to position or place. Defining location as position implies that movement of any degree is sufficient to justify the abduction enhancement. To the contrary, defining location as place requires that movement must occur to a place that is separate from where the robbery occurred.<sup>51</sup> The following section discusses the existing three-way circuit split regarding the interpretation of “different location.” The inherent flaws of each approach are outlined in subsequent sections.

### III. THE EXISTING CIRCUIT SPLIT ON INTERPRETING “DIFFERENT LOCATION”

The existing circuit split currently hinges upon the meaning of “location.” Some circuits conclude that location should be interpreted as place, holding the abduction enhancement inapplicable to forced movement within the same building where a robbery occurs.<sup>52</sup> However, other circuits interpret location as position, merely requiring forced movement which leads to a change in position of any degree as the pretext to applying the abduction enhancement during sentencing.<sup>53</sup> Other circuits modify the previous approach and permit a more flexible interpretation of location, resulting in a more fact intensive determination of whether forced movement actually occurred between “different locations” when assessing whether the relocation qualifies as an abduction.<sup>54</sup>

---

<sup>50</sup> *Id.*

<sup>51</sup> *See* United States v. Archuleta, 865 F.3d 1280, 1288 (10th Cir. 2017) (defining “location” as position). *But see* United States v. Whatley, 719 F.3d 1206, 1222 (11th Cir. 2013) (“The ordinary meaning of the term ‘different location’ would not apply to each individual office or room in a local branch of a bank.”).

<sup>52</sup> *E.g.*, United States v. Eubanks, 593 F.3d 645 (7th Cir. 2010).

<sup>53</sup> *E.g.*, United States v. Reynos, 680 F.3d 283 (3d Cir. 2012), *reh’g granted*, 682 F.3d 1053 (3d Cir. 2012), *cert. dismissed as improvidently granted*, 700 F.3d 690 (3d Cir. 2012).

<sup>54</sup> *E.g.*, United States v. Hawkins, 87 F.3d 722 (5th Cir. 1996).

2023]

## ROBBERY ABDUCTION ENHANCEMENT

735

*A. The Sixth, Seventh, and Eleventh Circuits Limit Forced Movement Within the Location Where a Robbery Occurs to Physical Restraint Rather Than Abduction*

The Sixth, Seventh, and Eleventh Circuits interpret the purpose of the abduction enhancement to apply to situations where robbery victims are relocated from the structure, robbed, and subjected to greater risks of harm.<sup>55</sup> Thus, any such action justifies the imposition of an increased sentence. These circuits form the minority position in the current circuit split regarding the abduction enhancement. The Sixth, Seventh, and Eleventh Circuits' approach interprets "different location" as meaning a physically distinct building.<sup>56</sup> This Note refers to the position of these circuits as the "proportional approach."

1. The Sixth Circuit.

In *United States v. Hill*,<sup>57</sup> the Sixth Circuit held that an abduction could not result by forcing employees to move from a sales floor to a back room during the robbery of a small cellphone store.<sup>58</sup> The Sixth Circuit reasoned that relocation to a "different location" was not satisfied because the sales floor and back room of the cellphone store were part of the same location.<sup>59</sup> Furthermore, the Sixth Circuit stated that the physical restraint enhancement<sup>60</sup> was more applicable to conduct where the defendants forced employees into the back room of the store and immobilized the employees with zip ties which bound their feet and ankles.<sup>61</sup> The *Hill* case provides an example of how drastically different a sentence can be following the application of the abduction enhancement. Hill's sentence range would have been between 130 and 162 months<sup>62</sup> with the abduction enhancement applied but was only 110 to 137 months when the physical restraint enhancement was used instead.

2. The Seventh Circuit.

Similarly, in *United States v. Eubanks*, the Seventh Circuit concluded that movement within a store where a robbery occurred could not constitute an

---

<sup>55</sup> See *United States v. Hill*, 963 F.3d 528 (6th Cir. 2020); *United States v. Whatley*, 719 F.3d 1206 (11th Cir. 2013); *United States v. Eubanks*, 593 F.3d 645 (7th Cir. 2010).

<sup>56</sup> See *Hill*, 963 F.3d at 530; *Whatley*, 718 F.3d at 1222; *Eubanks*, 593 F.3d at 653.

<sup>57</sup> *Hill*, 963 F.3d at 530.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* (stating that "we think the phrase 'different location' is best read to refer to a place different from the store that is being robbed.")

<sup>60</sup> See U.S. SENT'G GUIDELINES MANUAL § 2B3.1(b)(4)(B) (U.S. SENT'G COMM'N 2021).

<sup>61</sup> *Hill*, 963 F.3d at 530.

<sup>62</sup> *Id.* at 531.

abduction.<sup>63</sup> In *Eubanks*, three defendants entered a store and used weapons to secure the contents of the store's cash registers; the defendants subsequently attacked the store's owner, causing bruising and lacerations.<sup>64</sup> The defendants were charged on two counts of abduction: one for forcing movement of an employee from the sales floor of a beauty supply store to the back of the store to retrieve a surveillance video and the other for dragging a jewelry store employee less than six feet.<sup>65</sup> The Seventh Circuit reasoned that applying the abduction enhancement to these facts would cause movement of any degree within a store to constitute an abduction.<sup>66</sup> The court held that the physical restraint enhancement was more applicable because movement did not occur to a "different location."<sup>67</sup>

Furthermore, the Seventh Circuit has made several other assertions that are somewhat more attenuated from the underlying movement aspect of the abduction enhancement. These situations provide a greater understanding of exceptions to the general rule that victims must be relocated from the structure that is robbed to qualify as an abduction under the proportional approach. For example, the Seventh Circuit has held that an abduction may result when a bank employee is forced from a bank's parking lot back into the bank.<sup>68</sup> Additionally, the Seventh Circuit has applied the abduction enhancement when a robbery victim did not physically move at all, but instead was relocated while they operated and remained within their own vehicle.<sup>69</sup>

### 3. The Eleventh Circuit.

In *United States v. Whatley*,<sup>70</sup> the Eleventh Circuit held that an abduction could not result from relocation within a bank during a robbery.<sup>71</sup> In *Whatley*, the defendant used a gun to force a bank employee to move between the offices, restrooms, and conference room of a bank's second floor to verify the absence of any witnesses during an attempted bank robbery.<sup>72</sup> Despite the Eleventh Circuit reaching a similar conclusion to the Sixth and Seventh circuits regarding the inapplicability of the abduction enhancement to the facts of this case, this

---

<sup>63</sup> *United States v. Eubanks*, 593 F.3d 645 (7th Cir. 2010).

<sup>64</sup> *Id.* at 647.

<sup>65</sup> *Id.* at 652.

<sup>66</sup> *Id.* at 654.

<sup>67</sup> *Id.* at 653–54.

<sup>68</sup> *See generally* *United States v. Davis*, 48 F.3d 277, 278–79 (7th Cir. 1995); *see also* *United States v. Taylor*, 128 F.3d 1105, 1110–11 (7th Cir. 1997).

<sup>69</sup> *See* *United States v. Gail*, 116 F.3d 228, 230 (7th Cir. 1997).

<sup>70</sup> 719 F.3d 1206 (11th Cir. 2013).

<sup>71</sup> *Id.* at 1221.

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

2023]

## ROBBERY ABDUCTION ENHANCEMENT

737

case can be distinguished from both *Hill* and *Eubanks*. In those cases, victims were not relocated among floors and several different rooms within the bank. Despite this difference, the Eleventh Circuit still deemed the abduction enhancement inapplicable. The Eleventh Circuit reasoned that the ordinary meaning of “different location” does not apply to separate areas within the same building, and that individual rooms or offices within a bank are extensions of a single location—the bank itself.<sup>73</sup> The Eleventh Circuit remanded with instructions to apply the physical restraint enhancement.<sup>74</sup>

*B. The Three-Part Test of the Third and Tenth Circuits.*

The Third and Tenth Circuits have articulated a much narrower approach to interpreting the abduction enhancement. Their approach is known as the “Three-Part Test,”<sup>75</sup> which requires satisfaction of the following three elements regarding the forced movement element of abduction: (1) robbery victims must be forced to move from their original position; (2) accompany the offender to a new location; and (3) such movement must have been to further either the commission of the crime or the offender’s escape.<sup>76</sup> This approach only requires movement from one position to another to form the pretext for the “different location” element of the abduction enhancement.<sup>77</sup> Despite containing a more rigid structure of elements, the three-part test permits a degree of flexibility in assessing the location element of the abduction enhancement.<sup>78</sup>

1. The Third Circuit.

In *United States v. Reynos*, the Third Circuit affirmed the lower court’s application of the abduction enhancement when a defendant entered a pizza shop, kicked in a bathroom door where employees were hiding, and forced these employees to travel roughly 34 to 39 feet through several hallways to cash registers.<sup>79</sup> The Third Circuit reasoned the abduction enhancement was applicable because the bathroom and cash registers of the pizza shop constituted

---

<sup>73</sup> *Id.* at 1223.

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

<sup>75</sup> See *United States v. Reynos*, 680 F.3d 283, 286 (3d Cir. 2012), *reh’g granted*, 682 F.3d 1053 (3d Cir. 2012), *cert. dismissed as improvidently granted*, 700 F.3d 690 (3d Cir. 2012); see also *United States v. Archuleta*, 865 F.3d 1280, 1288 (10th Cir. 2017).

<sup>76</sup> *Reynos*, 680 F.3d at 286–87.

<sup>77</sup> See *id.*; *Archuleta*, 865 F.3d at 1288.

<sup>78</sup> *Reynos*, 680 F.3d at 290 (“It is precisely because of the broad scope of the term ‘location’ that courts must use a highly flexible approach in finding one; an approach that recognizes that the abduction enhancement may properly be applied even though the victim remained within the confines of a single building.”).

<sup>79</sup> *Id.* at 291.

a “different location.”<sup>80</sup> Essentially, the Third Circuit placed less emphasis on contemplating whether cash registers and a bathroom were different locations, but instead focused on whether the defendant forced victims to move and accompanied them during relocation to complete the crime of robbery.

## 2. The Tenth Circuit.

In *United States v. Archuleta*, the Tenth Circuit held a different location is reached during movement between a teller area and a separate vault area within a bank in the context of a bank robbery.<sup>81</sup> The Tenth Circuit also considered the defendant’s knowledge that employees were needed to complete the bank robbery to establish that their forced movement was intended in furtherance of a felony.<sup>82</sup>

### C. *The Flexible Approach of the Fourth and Fifth Circuits.*

The “three-part test” was modified by the Fourth and Fifth Circuits into the “flexible approach,” which assesses conduct in the context of each case presented.<sup>83</sup> Rather than simply requiring a change in position, this approach considers the structural layout of where a robbery occurs to determine if a different location has been reached.<sup>84</sup>

## 1. The Fourth Circuit.

In *United States v. Osborne*, the Fourth Circuit applied the abduction enhancement when a robbery victim was relocated but remained within the store

---

<sup>80</sup> *Id.* (“By virtue of its locked door, separate walls and distance from the cash register, the District Court found the bathroom of the pizza shop to be a different location from the cash register area, a conclusion well within its considerable discretion.”).

<sup>81</sup> *Archuleta*, 865 F.3d at 1289 (holding that the defendant’s conduct of forcing bank employees to accompany the defendant around a corner from the lobby area to the vault area warranted the abduction enhancement).

<sup>82</sup> *Id.* (“More specifically, Archuleta was familiar with Wells Fargo’s operating procedures and knew that two employees were needed to access the vault.”).

<sup>83</sup> *See United States v. Osborne*, 514 F.3d 377, 390 (4th Cir. 2008); *see also United States v. Hawkins*, 87 F.3d 722, 726–28 (5th Cir. 1996) (asserting that “different location” is “flexible and thus susceptible of multiple interpretations, which are applied case by case to the particular facts under scrutiny”).

<sup>84</sup> *See Osborne*, 514 F.3d at 390 (reasoning “different locations” were present within a Walgreens due to the presence of a counter and a secured door which separated the pharmacy area from the customer area); *Hawkins*, 87 F.3d at 727–28 (stating that an interpretation of “a different location” is “not mechanically based on the presence or absence of doorways, lot lines, thresholds, and the like”).

<sup>84</sup> *Id.* at 381.

robbed for the duration of a robbery. In *Osborne*, the defendant robbed a Walgreens pharmacy and brandished a knife at a pharmacy worker when the defendant was attempting to secure their escape through a secure pharmacy door.<sup>85</sup> The Fourth Circuit reasoned that the defendant forced the victims to move, that relocating the pharmacy employee using a knife satisfied the forced movement and accompaniment factors, and that movement to the door was with the intent to facilitate escape, which established all three elements of the Three-Part test.<sup>86</sup> The court held that movement within a drugstore from a secured pharmacy section through the retail area of the store to the front of the drugstore is sufficient to classify as movement to a “different location.”<sup>87</sup>

## 2. The Fifth Circuit.

In *United States v. Hawkins*, the Fifth Circuit applied the abduction enhancement when victims remained within a parking lot during a robbery. In *Hawkins*, the victims of a robbery were forced to move roughly forty to fifty feet across a parking lot towards a van.<sup>88</sup> The Fifth Circuit considered that the victims were relocated within a parking lot at gunpoint for the ultimate purpose of kidnapping the victims and held that the abduction enhancement was applicable.<sup>89</sup> The Court further reasoned that a change in location should not be “based on the presence or absence of doorways, lot lines, thresholds and the like.”<sup>90</sup>

Overall, the Three-Part test is the broadest interpretation of the term “location” within the abduction enhancement. Circuits using this test simply require forced movement and accompaniment initiated to either further the commission of a crime or secure escape.<sup>91</sup> This approach modifies the Three-Part test, reasoning that location must be interpreted flexibly based on the facts of each case under review.<sup>92</sup> The proportional approach does not support the applicability of the abduction enhancement to relocations that are limited to movement within the structure where a robbery occurs.<sup>93</sup>

---

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* (considering the defendant’s use of a knife to threaten pharmacy employees to not sound alarms and accompany him to the pharmacy’s exit and open the exit was clearly within the plain language of the abduction enhancement’s consideration of forcing movement to “secure escape”).

<sup>87</sup> *Id.* at 389–90 (reasoning the separation of these areas by a counter and a secured door denotes the areas as different locations).

<sup>88</sup> *Hawkins*, 87 F.3d at 726.

<sup>89</sup> *Id.* (reasoning that the abduction enhancement applied even though the victim never entered a van after being relocated forty to fifty feet across a parking lot).

<sup>90</sup> *Id.* at 727–28.

<sup>91</sup> *E.g.*, *United States v. Reynos*, 680 F.3d 283, 286–87 (3d Cir. 2012).

<sup>92</sup> *E.g.*, *Osborne*, 514 F.3d at 390.

<sup>93</sup> *E.g.*, *United States v. Eubanks*, 593 F.3d 645, 647 (7th Cir. 2010).



## IV. ARGUMENT

*A. The Commission Intended the Abduction Enhancement to Apply Only When a Victim is Relocated from Where a Robbery Occurs.*

The abduction enhancement requires movement to a “different location” during the course of a robbery.<sup>94</sup> While the Guidelines do not explicitly define “different location,” words are generally accorded their plain accepted meaning when not specifically defined.<sup>95</sup> One source of determining plain meaning is to use a dictionary, which provides the ordinary meaning of words as they are used and understood in everyday context.<sup>96</sup> The United States Supreme Court has specified that during the review of sentencing guidelines, the words used by The Commission should be defined according to their definition at the time The Guidelines were promulgated.<sup>97</sup> Policy and purpose should be considered when plain meaning does not provide a definitive interpretation in an effort to determine the enacting body’s intention in selecting specific words.<sup>98</sup>

While the Guidelines do not provide an explicit definition of “different location” or provide a context for these words individually, common canons of statutory construction may be utilized to determine the words’ meaning. A textual interpretation of “different” is straightforward; “different” is defined as “not identical; separate or distinct.”<sup>99</sup> However, “location” is more difficult to precisely define because “location” is inherently ambiguous.<sup>100</sup> A plain meaning analysis of “different location” is not dispositive because “location” may be interpreted as referring to either place or position, which lends support to both divergent Circuit interpretations. However, an example of what constitutes an abduction is provided by the application instructions to the Guidelines and acts as a form of legislative history.

---

<sup>94</sup> See U.S. SENT’G GUIDELINES MANUAL § 1B1.1 cmt. n.1(A) (U.S. SENT’G COMM’N 2004) (“‘Abducted’ means that a victim was forced to accompany an offender to a different location.”).

<sup>95</sup> *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006).

<sup>96</sup> See *Smith v. United States*, 508 U.S. 223, 229 (1993) (consulting various dictionaries to determine the meaning of “use” as contained within the Sentencing Guidelines regarding use of a weapon).

<sup>97</sup> *United States v. Hill*, 963 F.3d 528, 532 (6th Cir. 2020) (citing *Whitfield v. United States*, 574 U.S. 265, 267 (2015) (“[W]e look to dictionaries that defined the relevant words when the Sentencing Commission initially used them in 1987.”)).

<sup>98</sup> *Rudd v. Cal. Cas. Gen. Ins. Co.*, 219 Cal. App. 3d 948, 952 (Cal. Ct. App 1990) (applying an approach which first considers ordinary meaning of statutory text, then the entire statute, and finally the policies and purposes of the statute).

<sup>99</sup> *Different*, OXFORD ENGLISH DICTIONARY (2d ed. 1989).

<sup>100</sup> Compare *Location*, RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1987) (defining location as “a place of settlement, activity, or residence”), with *Location*, BLACK’S LAW DICTIONARY (6th ed. 1990) (defining location as the “site or place where something is or may be located”).

Although different location is not explicitly defined by the Guidelines, the Commission's intent may be deduced based upon a singular example provided by supplemental commentary to the guidelines.<sup>101</sup> This example is significant because supporting commentary must be considered when assessing whether an enhancement is applicable.<sup>102</sup> Although the commentary provides only one example that does not detail all conduct qualifying as an abduction, or establish exceptions by detailing conduct that does not amount to an abduction, a common theme may be derived from this singular example. A "different location" means a place that is separate and distinct from the victim's initial location because the phrase "from the bank" implies that movement must occur to a location outside the bank. Additionally, this example demonstrates that for the purpose of assessing "location," the building where a robbery occurs is a singular location. Furthermore, because this example does not reference specific areas within the bank, separate areas within the bank should be considered extensions of a singular location—the bank. The phrase "into a getaway car" establishes that one must enter a place unassociated with their initial location. The Commission's intent becomes evident by the theme this example establishes: one must be moved from where the robbery occurred and relocated to a "different location" for the abduction enhancement to become applicable.

When interpreting the guidelines, "location" should only be read to refer to a place—such as a store or bank—and not a position. After all, no one refers to their location in common parlance by geographic coordinates denoting position,<sup>103</sup> and it is unlikely that the Sentencing Commission intended otherwise. Furthermore, an interpretation of "location" as place not only renders

---

<sup>101</sup> U.S. SENT'G GUIDELINES MANUAL § 1B1.1 cmt. n.1(A) (U.S. SENT'G COMM'N 2004) ("[f]or example, a bank robber's forcing a bank teller from the bank into a getaway car would constitute an abduction").

<sup>102</sup> *See* *Stinson v. United States*, 508 U.S. 36, 42 (1993) (holding that commentary in the Sentencing Guidelines is binding on federal courts unless it violates the Constitution or a federal statute or is an inconsistent or plainly erroneous reading of that guideline); *see also* U.S. SENT'G GUIDELINES MANUAL § 1B1.7 (U.S. SENT'G COMM'N 2004) ("Failure to follow such commentary could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal.").

<sup>103</sup> *See* *United States v. Hill*, 963 F.3d 528, 529–30 (6th Cir. 2020) ("In the interpretation of a legal text, as in an ordinary conversation, the way in which a drafter (or speaker) uses an indeterminate word is critical for deciding the word's meaning on a particular occasion. That is true for the phrase we must interpret in this case: 'different location.' Consider this phrase in relation to a store. Depending on the context, the phrase could refer to a distinct place within the store or to a separate place outside it. Suppose, for example, a friend says to you while cellphone shopping, 'The cellphones used to be right here, but must have been moved to a different location.' You would likely take your friend to be referring to a different area within the store. Suppose instead your friend says, 'We have to go to a different location because the cellphone I want is out of stock.' You would likely take your friend to be referring to a different store. Context is key to meaning.").

the physical restraint enhancement meaningless<sup>104</sup> by preventing a court from distinguishing between the move applicable enhancement, but it also introduces the potential for the abduction enhancement to be applied with absurd results by causing the abduction enhancement to become applicable in virtually all circumstances where a victim is relocated to any degree. This reading could cause an offender's sentence to be increased based upon movement incidental to the underlying robbery. However, a reading of "location" as place prevents the potential for this absurd result.

*B. The Three-Part Test and Flexible Approach Tend to Produce Absurd Results*

It has long been the position of the Supreme Court that statutes should be read to prevent an absurd interpretation.<sup>105</sup> This proposition is from *United States v. Katz*, a 1926 case that did not involve federal sentencing guidelines but was instead applied to a statute in Title 28 of the United States Code rather than a criminal statute under Title 18. However, despite the differences between the underlying cause of action in the *Katz* case and the cases in this Note that involve abduction, this canon of statutory interpretation has been applied to Title 18<sup>106</sup> and should also be applied to interpreting the language used within The Guidelines. In fact, courts defining location as position have not unanimously supported the abduction enhancement applied to cases under review.<sup>107</sup>

In *Archuleta*, Judge Seymour authored a dissent to voice his opinion that interpreting location to refer to place produced the potential for absurd results by causing the abduction enhancement to become applicable in any instance where victims were relocated even a minute degree. This sentiment<sup>108</sup> was echoed in the *Hill* case only three years after *Archuleta* was decided on appeal. Indeed, with

---

<sup>104</sup> See *United States v. Whatley*, 719 F.3d 1206, 1223 (11th Cir. 2013) ("To interpret the abduction enhancement to apply to this conduct would blur the distinction between physical restraint and abduction.").

<sup>105</sup> *United States v. Katz*, 271 U.S. 354, 357 (1926) ("[A] literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose").

<sup>106</sup> See *Harbison v. Bell*, 556 U.S. 180, 207 (2009) ("We also note that the Government's proposal to read the word 'federal' into § 3599(e) would lead to absurd results").

<sup>107</sup> See *United States v. Archuleta*, 865 F.3d 1280, 1294 (10th Cir. 2017) (Seymour, J., dissenting) ("[I]t appears that the only way a person could receive an enhancement for physical restraint while not being eligible for an abduction enhancement is if all of his victims remain perfectly still throughout the entire robbery. This is an absurd result.").

<sup>108</sup> See *Hill*, 963 F.3d at 536 ("According to the government, these definitions show that 'location' has one—and only one—meaning: It refers to the specific spot where a person stands. And the government believes that the victim has moved to a different 'location' whenever the victim takes a step. Indeed, the government forthrightly acknowledged at oral argument that its reading would trigger the abduction enhancement if a robber accompanied the victim the few feet separating the counsel tables in our courtroom.").

these two cases being the most recent substantial developments in courts reviewing application of the guidelines on appeal, it appears that the trend in the Circuits has begun to shift towards an interpretation which limits the application of the abduction enhancement to movement within a building where a robbery occurs.

Interpreting movement to a “different location” to apply to movement within the building where a robbery occurs creates the potential for an absurd result because movement of any degree would result in the applicability of the abduction enhancement to a sentence. Furthermore, given that the goal of criminal justice is to reduce the risk of recidivism rather than to seek retribution, the prosecution in both cases seemed to mistakenly focus on the latter. This is especially apparent in the *Hill* case, where the government outrightly acknowledged that under their interpretation of the abduction enhancement, movement between counsel tables at oral argument would classify as an abduction.<sup>109</sup> This absurd result<sup>110</sup> simply could not have been what The Commission contemplated as an act of abduction when The Guidelines were written in 1987; if it were, there would be no need to create a separate enhancement for physical restraint with a less severe punishment. It seems logical that the Commission intended to punish conduct where victims were relocated to another place separate from a robbery more harshly due to the potential for victims to suffer additional harm during a more involved relocation.<sup>111</sup>

1. The Physical Restraint Enhancement Is More Applicable to Forced Movement Occurring Within a Building.

The robbery provision of the Guidelines states: “(A) If any person was abducted to facilitate commission of the offense or to facilitate escape, increase by 4 levels; or (B) if any person was physically restrained to facilitate

---

<sup>109</sup> *Id.*

<sup>110</sup> *United States v. Whatley*, 719 F.3d 1206, 1223 (11th Cir. 2013); *United States v. Eubanks*, 593 F.3d 645, 654 (7th Cir. 2010). These cases also support the assertion requiring a change in position rather than place would produce an absurd result because the movement typically associated with the two-level physical-restraint enhancement could automatically trigger the four-level abduction enhancement and would “blur the distinction between physical restraint and abduction.” *Whatley*, 719 F.3d at 1223.

<sup>111</sup> *Hill*, 963 F.3d at 535 (“[T]he robbery guideline’s structure confirms [location refers to place rather than position] . . . The Sentencing Commission established two related enhancements. The one for abducting a victim generates a four-level enhancement; the other for physically restraining a victim generates a two-level enhancement. The two-level difference between these enhancements shows that abduction qualifies as the more serious of the two. Yet movements within a store typically will occur whenever a robber ‘physically restrains’ a victim. The commentary, for example, lists being ‘locked up’ as an example of physical restraint, and robbers often must take their victims to the area in which they are ‘locked up.’”).

commission of the offense or to facilitate escape, increase by 2 levels.”<sup>112</sup> Physical restraint is defined as “the forcible restraint of the victim such as by being tied, bound, or locked up.”<sup>113</sup> But physical restraint is not limited to conduct in which individuals are “tied, bound, or locked up.”<sup>114</sup> Conditions which effectuate compliance can constitute a physical restraint.<sup>115</sup> Forcing movement within a building can also constitute physical restraint.<sup>116</sup>

Given these considerations, it seems that The Commission formed two distinct enhancements that were intended to apply to different circumstances. This is supported by the inclusion of “or” between the two enhancements, implying they are mutually exclusive and apply to separate and distinct conduct. Because both enhancements implicitly denote victims will undergo some degree of forced movement, the only clear way to differentiate these enhancements is to hold that physical restraint should be applied to forced movement within the building where a building was robbed. Such forced movement could be satisfied by forcing compliance, such as forcing employees to enter a back room from a sales floor area within a store, or by restraining victims with conventional means or through threat of force.

For example, if a victim is not bound up or restrained with tangible objects, the physical restraint enhancement would still be applicable if they were held up at gunpoint and preventing from leaving the site of the robbery. To the contrary, the abduction enhancement would be applied in instances where individuals were relocated from the site of the robbery to any location unassociated with the robbery. As these changes alone would be too rigid to properly apply the abduction enhancement going forward, a new test which allows courts a wide berth of discretion to consider several factors would be a more sufficient way of properly enhancing sentences. As a threshold matter, the abduction enhancement presumes relocation to a separate building. However, additional criteria should be established to permit a court discretion in considering several other factors which might warrant the imposition of an upward deviation in sentencing, based upon circumstances the defendant creates that foster an increased likelihood a victim will be harmed, even if the victim remains in the building being robbed.

---

<sup>112</sup> U.S. SENT’G GUIDELINES MANUAL § 2B3.1(b)(4) (U.S. SENT’G COMM’N 2021).

<sup>113</sup> U.S. SENT’G GUIDELINES MANUAL § 1B1.1 n.1(L) (U.S. SENT’G COMM’N 2021).

<sup>114</sup> See *United States v. Rosario*, 7 F.3d 319, 320–21 (2d Cir. 1993) (stating “[t]he use of the modifier ‘such as’ in the definition indicates that the illustrations of physical restraint ‘are listed by way of example rather than limitation’”).

<sup>115</sup> *United States v. Kirtley*, 986 F.2d 285, 286 (8th Cir. 1993) (reasoning a defendant physically restrains his victims if he “creates circumstances allowing the persons no alternative but compliance”).

<sup>116</sup> See *United States v. Eubanks*, 593 F.3d 645, 654 (7th Cir. 2010) (reasoning that using a gun to force movement within a small retail store was an act of physical restraint rather than abduction).

*C. A More Inclusive Definition of “Different Location” Should Be Considered Going Forward.*

To provide clarity, the phrase “different location” should be defined to mean “a place separate from where the victim was located when the robbery occurred.” Practically, a robbery victim must be relocated to a separate area or building from where the robbery occurred. This definition would not only differentiate physical restraint from abduction by implying the victim must be moved from where the robbery occurred but would still be broad enough to permit the abduction enhancement to be applied to movement limited to within a building if a defendant’s interactions with a robbery victim resembled an attempted kidnapping. As discussed in Part II, a court would be free to consider both aggravating and mitigating circumstances to form an individualized sentence and still apply the abduction enhancement if an offender’s conduct posed a concrete threat to a victim’s safety, but the victim remained confined to the building where a robbery occurred.

This definition would attempt to eliminate arbitrary application of the abduction enhancement based sheerly on the degree of movement and would allow a court to account for circumstances consistent with policy<sup>117</sup> supporting the abduction enhancement. Furthermore, providing an explicit definition of “different location” would eliminate the need for a court to consider what classifies as a different location and instead focus on whether an offender’s conduct presented an increased likelihood that the victim would suffer additional harm not incidental to the robbery. While courts have struggled to define “different location” in the context of robbery, there are several contexts that help define “different location” to reach a more intuitive result.

1. The Meaning of “Different Location” in the Context of Sexual Assault and the Element of “Dangerousness.”

“Different location” in the context of sexual assault should be considered because the felonies of sexual assault and robbery both rely on the same definition of “abducted.” Given this similarity, it is logical to draw from other sources of law which have developed a method of defining a different location because the meaning of “different location” has not yet been defined in the context of robbery. The guidelines for sexual assault cases use the same definition of “abducted” that is applied to the felony of robbery.<sup>118</sup> Given this similarity, it is logical for a court to draw from law on sexual assault and apply

---

<sup>117</sup> See *United States v. Whooten*, 279 F.3d 58, 61 (1st Cir. 2002) (“[T]he abduction enhancement’s intention . . . is to protect victims against additional harm that may come to them by virtue of their isolation.”); see also *United States v. Cunningham*, 201 F.3d 20, 28 (1st Cir. 2000) (reasoning isolation increases the likelihood a victim will be harmed).

<sup>118</sup> U.S. SENT’G GUIDELINES MANUAL § 2A3.1 cmt. n.1 (U.S. SENT’G COMM’N 2021).

it to robbery. Furthermore, because abduction is more inherently likely during crimes of sexual assault, it is unsurprising that the definition of “different location” in the context of sexual assault has received more scrutiny and been contemplated to a greater degree than “different location” in the context of robbery.

The abduction enhancement is applicable to sexual assault cases when the act of relocating a victim presents an *additional* potential of harm.<sup>119</sup> This approach allows courts to differentiate between mere physical restraint and actions closer to abduction. For example, when victims are relocated for the purpose of hostage taking in the same building a strict application of “different location” would merely punish this as physical restraint. However, the victim would face an increased risk of harm by the potential they might suffer additional injury, such as being caught in the crossfire of police and an offender. The “additional harm” test would allow the abduction enhancement to apply in hostage scenarios, which would be consistent with underlying policy and would not be prevented based upon a mechanical consideration of the exact distance the victim was moved. However, even if victims were not taken hostage or presented with unduly dangerous complications because of their relocation, the amount of distance travelled should also be considered under this test.

## 2. Substantial Distance

Furthermore, case law regarding kidnapping is another logical consideration because the definition of “abduction” in Black’s Law Dictionary<sup>120</sup> explicitly references the term “kidnapping.” The crime of kidnapping requires that movement occur over a “substantial distance.”<sup>121</sup> Because the potential for incidental harm only increases with the amount of distance travelled due to the increased potential for harm, the amount of distance travelled by a victim should also be assessed when formulating a new test for the abduction enhancement. Furthermore, because abduction is analogized to kidnapping, kidnapping law seems a logical consideration to draw from.

Under kidnapping law, brief movements incidental to the crime which do not substantially increase the risk of harm to victims do not satisfy the “substantial distance” analysis.<sup>122</sup> Because the inherent dangerousness [of

---

<sup>119</sup> United States v. Kills in Water, 293 F.3d 432, 437 (8th Cir. 2002); *see also* United States v. Saknikent, 30 F.3d 1012, 1013 (8th Cir. 1994) (reasoning an offender’s ability to isolate a victim through relocation increases the likelihood the victim will be harmed).

<sup>120</sup> *See Abduction*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>121</sup> *See* People v. Sheldon, 771 P.2d 1330, 1340 (Cal. 1989) (reasoning movement within a home does not constitute kidnapping); *see also* People v. Daniels, 459 P.2d 225, 238 (Cal. 1969) (reasoning movement across a room does not satisfy the substantial distance requirement of kidnapping).

<sup>122</sup> *Daniels*, 459 P.2d at 238.

2023]

## ROBBERY ABDUCTION ENHANCEMENT

747

relocation] and substantial distance analysis are heavily intertwined, the new test for an abduction enhancement should consider other factors to balance against these two such as the building's dimensions and the offender's intention in relocating the victims. The following two factors, building structure and intent, have already been implicitly considered by courts in the *Osbourne* and *Archuleta* cases, respectively, and thus make sense to employ as additional balancing factors in abduction enhancement considerations.

### 3. Building Structure

Another factor that should be balanced against the dangerousness and substantial distance elements of this test are the dimensions of the structure that was robbed. As the *Osbourne* case stated, the presence of walls and doorways within a building allows a building to contain "different locations."<sup>123</sup> This consideration is relevant to assessing whether a different location was reached because it allows flexibility in assessing whether movement within the structure occurred to a different location. As this would certainly be the most arbitrary element of the new test, it could act as a baseline for determining if the abduction enhancement is applicable but easily be outweighed by the other factors.

### 4. Offender's Intent.

The final factor considered under the new test is the specific intent of the robber in relocating victims. Because this factor is the most subjective, the following example seeks to clarify how such a determination would practically operate. Consider a situation in which an individual enters a bank to commit a robbery. The robber enters the bank while initially brandishing a firearm, is unsurprisingly met with no resistance, and proceeds to the vault area of the bank. Unbeknownst to the robber at the time of entry, the bank vault may only be accessed using two cards which are possessed by the bank's tellers. The robber now has two options: he can go obtain these cards from the tellers, or he can leave the premises without robbing the bank. Logically it seems a fruitless effort to enter a bank with a gun without taking the money; at this rate the robber will likely be charged with a crime regardless of their next course of action. If the robber does not obtain these cards, he cannot complete the robbery. So, they return to the teller area, and order the bank tellers to come with them to the vault to open it.

In this hypothetical, the robber would lack the intent to abduct the employees, he only intends to complete the robbery. An example of a real crime which provides a stark contrast to this hypothetical is the *Archuleta* case, where the defendant was intimately familiar with the fact that Wells Fargo employees

---

<sup>123</sup> See *United States v. Osborne*, 514 F.3d 377, 390 (4th Cir. 2008) (holding separation of areas within a Walgreens by a counter and a secured door created "different locations" within the store).



were needed to rob the bank prior to initiating the robbery.<sup>124</sup> It seems just to enhance the defendant's sentence in *Archuleta* due to the fact they had notice prior to initiating the robbery that the employees were necessary to complete the robbery, whereas in the above hypothetical the defendant lacks such notice. Because the crime of robbery already warrants punishment, this hypothetical robber should be sentenced for robbing a bank with their sentence enhanced only for brandishing a firearm. The robber should only have their sentence enhanced further for abduction if they placed the bank tellers in a situation where the tellers potentially could suffer some harm separate from the underlying crime of the bank robbery.

While it is difficult, and in some instances impossible, to say with certainty what a robber's motives for moving victims was, this may be deduced by considering the facts at hand. For example, in the *Osbourne* case, the defendant essentially took the pharmacy worker as a hostage to secure their escape by walking them to the exit door while brandishing a knife.<sup>125</sup> Despite the relatively small degree of movement travelled, this relocation of the victims was not merely incidental to the crime; the defendant in *Osbourne* had already secured prescription drugs and cash and could have exited the premises without the assistance of the pharmacy worker and without leading them to the door. Because the defendant in *Osbourne* undoubtedly had the motive to relocate the victim to secure escape rather than to commit the robbery itself, the abduction enhancement was properly applied.

#### V. THE NEW TEST IN ACTION

The new test articulated above in Part IV would have altered the outcome of some cases discussed in Part III. An example of how this test would prevent the application of the abduction enhancement to movement within a building is the *Reynos* case.<sup>126</sup> Conversely, under the new test, the defendant's conduct in *Eubanks* might support the application of the abduction enhancement, despite movement only occurring over six feet.

Under the new test, the defendant's conduct in *Reynos* where the defendant forced employees from within a locked bathroom roughly thirty-four feet to a register would only pass the structural dimension element because it could be argued that the employees were relocated from a bathroom to the cash registers, which may constitute separate locations depending on whether location is interpreted as position or place. However, *Reynos* would fail the substantial distance requirement because 34 to 39 feet is not a substantial distance; this distance roughly represents the dimensions of an average room, and it has been

---

<sup>124</sup> See *United States v. Archuleta*, 865 F.3d 1280 (10th Cir. 2017).

<sup>125</sup> See *United States v. Osborne*, 514 F.3d 377 (4th Cir. 2008).

<sup>126</sup> See *United States v. Reynos*, 680 F.3d 283, 286 (3d Cir.), *reh'g granted*, 682 F.3d 1053 (3d Cir. 2012), *cert. dismissed as improvidently granted*, 700 F.3d 690 (3d Cir. 2012).

2023]

## ROBBERY ABDUCTION ENHANCEMENT

749

held that movement across a room is not a substantial distance in the context of kidnapping. Furthermore, *Reynos* would fail the inherent dangerousness element because no additional dangers were presented to the victims; they were not relocated and subsequently isolated nor were the victims held hostage. Finally, the intent element would not be met because the defendant did intend to relocate the victims to secure their escape or to isolate or take the victims hostage. The relocation of the victims was simply incidental to the completion of the crime that the defendant had already initiated and occurred after the defendant unsuccessfully attempted to access the registers himself.

However, the conduct of the defendant in *Eubanks* might warrant the application of the abduction enhancement. The substantial distance requirement would not be met because movement over six feet across a sales floor is not substantial according to kidnapping case law. Furthermore, the building dimension element would not support the existence of different locations within the jewelry store because the store was a “small store” comprised of only a front and back room. However, the dangerousness element would be met because it is foreseeable a victim could sustain injuries unassociated with the underlying robbery by virtue of being forcibly dragged across the store’s floor. Additionally, the intent element would be met because the offender intended to relocate the jewelry store employee and the movement was not associated with the completion of the robbery.

Under this new test, the greatest weight would be placed upon the dangerousness and substantial distance factors, with less consideration to the dimension and intent elements. This would allow the abduction enhancement to be applied to movement within a building, such as when victims are taken as hostages but only relocated a short distance, or when victims are moved a short distance but are subjected to dangerous conduct not associated with the underlying robbery like in *Eubanks*. However, it would also eliminate the potential for absurd results by preventing the abduction enhancement from being applied solely based upon the fact that victims experienced a change in position by virtue of travelling a short distance, such as in *Reynos*.

## VI. CONCLUSION

The abduction enhancement only applies when individuals are forced to relocate to a different location. Because an interpretation of location that considers place rather than position is consistent with both the intent of the Commission and an underlying policy of preventing absurd results, the abduction enhancement should generally not be read as applicable to movement within the building where a robbery occurs unless extraordinary circumstances present a greater potential for victims to be harmed. Additionally, to prevent the potential of double counting that might result from defining location as position and basing an enhancement on conduct that was ultimately incidental to the underlying robbery, a new test should be considered by circuits assessing criminal conduct in the context of robbery going forward.

This new test acts as a balancing test that allows courts to exercise their discretion and assess conduct against several factors to determine if the abduction enhancement should be applied to a defendant's sentence.<sup>127</sup> These factors include the dangerousness of relocation, the distance traveled, the dimensions of the structures robbed, and the intent of the defendant in relocating the victims. Such a test would not only limit the potential for absurd results by focusing on substantial distance and dangerousness, thus preventing the abduction enhancement from being applied sheerly based on any degree of movement, but it would also allow defendants to have their sentence enhanced if the victim remained within the location robbed but was subjected to circumstances which increased the possibility for them to be harmed. The actual occurrence of such harm would be irrelevant to this consideration because the robbery guidelines already contemplate enhancements based on whether an injury occurred and the degree of such injury but would instead be allow defendants to have their sentence increased if their actions presented increased danger to the victims. Overall, this new test would allow circuit courts reviewing the application of the abduction enhancement a more concrete method of reviewing the reasonableness of a district court decision.

*Alex Leroy\**

---

<sup>127</sup> See *supra* Part IV.

\* J.D. Candidate, West Virginia University College of Law, 2023; Master of Business Administration Candidate, West Virginia University John Chambers College of Business & Economics, 2023; Senior Editor, Volume 125 of The West Virginia Law Review. The Author would like to thank his peers at the West Virginia Law Review for their hard work preparing this Note. Any errors contained herein are the Author's alone.