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LOCATION, LOCATION, LOCATION: THE FEDERAL SENTENCING GUIDELINES' ABDUCTION ENHANCEMENT AND THE MEANING OF "DIFFERENT LOCATION"

Sabrina Jemail

I. INTRODUCTION

During the course of a robbery, a robber likely has several intentions in mind: grab the money, be quick, and of course, don't get caught. But the robber probably does not think: do not commit an inadvertent abduction. The Federal Sentencing Guidelines, the set of rules federal judges follow when sentencing convicted defendants, calls for an "enhancement," or increase, in sentence if the robber abducted someone during the robbery.¹ While it seems easy enough to avoid committing this additional crime, many defendants have seen this enhancement affect their sentence. Courts, however, disagree on the circumstances under which this enhancement applies.

The Fifth and Fourth Circuits have found that a criminal forcibly moving a bystander to another area of the same building constituted an abduction for purposes of sentencing.² However, the Sixth, Eleventh, and Seventh Circuits disagree and do not consider the same act an abduction.³ And still, the Third and Tenth Circuits use a three-prong test on a case-by-case basis to determine whether the court should implement the enhancement.⁴ Although the Federal Sentencing Guideline's goal is to create uniformity and avoid disparities in sentencing across the circuits, inconsistency regarding sentencing has still developed, as evident by the three-way circuit split here.⁵

Part II of this Note will first review the Federal Sentencing Guidelines, its history, and its purpose. It will also delve specifically into the sentencing guidelines for robbery. Part III will examine the circuit split. Part III will discuss which viewpoint best represents the intent of the robbery guideline as well as the goal of the U.S. Sentencing Commission. Finally, Part IV will address the circuit split's implications and whether the disparity can be reconciled.

1. U.S. SENT'G GUIDELINES MANUAL §2B3.1(b)(4)(A) (U.S. SENT'G COMM'N 2018).

2. *See* *United States v. Buck*, 847 F.3d 267 (5th Cir. 2017); *United States v. Osborne*, 514 F.3d 377 (4th Cir. 2008).

3. *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).

4. *See* *United States v. Reynos*, 680 F.3d 283 (3rd Cir. 2012); *United States v. Archuleta*, 865 F.3d 1280 (10th Cir. 2017).

5. *About*, U.S. SENT'G COMM'N, <https://www.ussc.gov/about-page> (last visited Jan. 26, 2021).

II. BACKGROUND

This Part will discuss the creation and drafting history of the Federal Sentencing Guidelines Manual, including its most recent iteration, effective November 1, 2018. Next, it will analyze the robbery sentencing guidelines before discussing the circuit split.

A. *The Federal Sentencing Guidelines and the United States Sentencing Commission*

The Federal Sentencing Guidelines Manual (“Manual”) is published by the United States Sentencing Commission (“Commission”).⁶ The Commission is an independent agency within the judicial branch of the federal government, an agency which was created by Sentencing Reform Act of 1984.⁷ The mission of the Commission is to “establish sentencing policies and practices for the federal courts,” “advise and assist” the federal government in developing criminal policy, and “collect, analyze, research, and distribute” data on federal crime and sentencing issues.⁸ When the Commission began in 1987, its goal was to create consistent sentencing ranges that considered the gravity of the crime, the defendant’s past criminal conduct, just punishment, rehabilitation, and deterrence.⁹

With seven voting members, at least three of whom are federal judges, and no more than four members from the same political party, the Commission is meant to remain diverse in thought and independent from politics.¹⁰ However, this independence and objectivity did not exist in the first Commission after the Sentencing Reform Act was passed; indeed, the first Commission was rather political and pro-prosecution.¹¹ Moreover, none of the original voting members had practical experience in sentencing.¹² The original Manual was based on Congress’ mandatory minimum sentences, and many cases resulted in greater sentences than those minimums, especially with enhancements.¹³ The Manual was

6. *Id.*

7. *Id.*

8. *Id.*

9. *United States Sentencing Commission*, FEDERAL REGISTER, <https://www.federalregister.gov/agencies/united-states-sentencing-commission> (last visited Jan. 26, 2021); 28 U.S.C. §991 (1984).

10. *Organization*, U.S. SENT’G COMM’N, <https://www.ussc.gov/about/who-we-are/organization> (last visited Jan. 26, 2021).

11. Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY, 691, 700-01 (2010) (citing Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 763-64 (2005) (describing the extent to which the United States Sentencing Commission was “stacked” in favor of prosecution interests from its inception and throughout its history)).

12. *Id.* at 700.

13. *Id.* at 701.

objective, but such objectivity eliminated the pre-Guideline mens rea factor of moral culpability, a factor that judges historically considered at sentencing.¹⁴ The Commission also implemented a “real offense” system, which allowed the judge to analyze additional factors regarding the crime beyond the charges.¹⁵

With strict, explicit guidelines, judges seemingly had less discretion at sentencing than before the Manual was implemented.¹⁶ At the same time, prosecutors could typically determine the exact outcome of their charges because judges were beholden to what the Guidelines set out for those charges.¹⁷ This limitation on judicial power remained until 2005, when the Supreme Court handed down its decision in *United States v. Booker*.¹⁸ The Court held that the Guidelines violated the Sixth Amendment of the U.S. Constitution because they required judges to find facts that increased the defendant’s sentence beyond what the verdict or plea deal required.¹⁹ The Court severed the provisions in the Sentencing Reform Act that made the Guidelines mandatory.²⁰ As a result, the Guidelines became advisory for federal judges, such that judges could “consider” the Manual’s sentence ranges but still adjust sentences to reflect statutory and circumstantial concerns.²¹ Subsequent decisions from the Court reiterated that judges were to exercise their discretion when sentencing and only use the Guidelines as consultative.²² While Congress still holds its role of mandating minimum sentences and enhanced sentences, the judges now maintain more power in the courtroom while the prosecutors’ charges no longer definitively predetermine the sentencing outcome.²³

B. Guidelines for Robbery

The Manual, effective November 1, 2018 sets the base level for robbery as twenty points.²⁴ The Manual also proscribes certain enhancements for the crime of robbery; “enhancements” are the additional points a judge may include for illegal conduct committed in furtherance of the crime, and these are applied cumulatively.²⁵ A 1989 amendment, Amendment

14. *Id.*

15. *Id.* at 702.

16. *Id.* at 704.

17. Gertner, *supra* note 11, at 702.

18. *Id.* at 705.

19. *Id.*

20. *Id.*

21. *Id.* (quoting *United States v. Booker*, 543 U.S. 220 (2005)).

22. *Id.* at 706.

23. Gertner, *supra* note 11, at 707.

24. U.S. SENT’G GUIDELINES MANUAL §2B3.1(a) (2018).

25. U.S. SENT’G GUIDELINES MANUAL §1B1.1 cmt. n.4(B).

110, increased the base number from eighteen to twenty and also provided for smaller enhancements based on robbery amounts exceeding \$2,500.²⁶ The Manual's other enhancements for robbery are numerous and include, as examples, a level increase if the offense involved a carjacking, a stolen firearm, or bodily injury to another.²⁷ Most notably, the Manual provides a four-point increase "if any person was abducted to facilitate commission of the offense or to facilitate escape."²⁸ The Guidelines define "abduction" as when "a victim was forced to accompany an offender to a *different location*."²⁹ Further, the commentary provides an example of abduction as "a bank robber's forcing a bank teller from the bank into a getaway car."³⁰

C. Same Building, Still an Abduction: The Fourth and Fifth Circuits

As the Supreme Court in *United States v. Booker* made clear, the Federal Sentencing Guidelines are meant to be advisory for trial court judges.³¹ Accordingly, the Fourth and Fifth Circuits have adopted rather broad interpretations of the Guidelines for robbery enhancements.³²

1. The Fourth Circuit

In 2008, the Fourth Circuit first addressed the meaning of abduction in the context of the Federal Sentencing Guidelines in *United States v. Osborne*.³³ In this case, Defendant Osborne was convicted of conspiracy to commit armed robbery of a Walgreens store in Virginia.³⁴ The Walgreens was divided into two distinct sections: a store area and a pharmacy area,³⁵ and during the robbery, the defendant directed two employees to lead him into the pharmacy area toward the narcotics safe and then toward the exit of the store.³⁶ Although he asked them to walk outside with him, they remained in the Walgreens building the entire time.³⁷

26. U.S. SENT'G GUIDELINES MANUAL §2B3.1(a) (1987), *amended by* Amendment 110 (1989).

27. U.S. SENT'G GUIDELINES MANUAL §2B3.1(b)(3), (5), (6) (2018).

28. U.S. SENT'G GUIDELINES MANUAL §2B3.1(b)(4)(A) (2018).

29. U.S. SENT'G GUIDELINES MANUAL §1B1.1 cmt. n.1(A) (2018) (emphasis added).

30. *Id.*

31. *United States v. Booker*, 543 U.S. 220, 261 (2005).

32. *See generally* *United States v. Buck*, 847 F.3d 267 (5th Cir. 2017); *United States v. Osborne*, 514 F.3d 377 (4th Cir. 2008).

33. *Osborne*, 514 F.3d 377.

34. *Id.* at 378-79.

35. *Id.* at 380.

36. *Id.* at 381-82.

37. *Id.* at 382.

At sentencing, the district court increased the defendant's robbery sentence level by adding the abduction enhancement, which he appealed.³⁸ On appeal, he argued that the trial court erred, among other things, in calculating his Sentencing Guidelines range—specifically the enhancement for “abducting” two employees.³⁹ The Fourth Circuit first noted that its sister circuits had recognized the abduction enhancement's purpose: to protect victims of robbery from additional harm that could result from being forced to accompany the robber as a hostage or for prolonged isolation leading to sexual assault.⁴⁰

The defendant argued that first, any movement within the same building is not “movement to a different location” within the meaning of the Guidelines' abduction enhancement.⁴¹ Second, he argued that even if forcibly moving victims within the building *can* mean “movement to a different location” to constitute abduction, his particular movement of the Walgreens employees was not the sort of relocation that qualifies as abduction.⁴²

The Fourth Circuit relied on its previous unpublished opinion in *United States v. Coates*, where the abduction enhancement increased the defendant's sentence because he moved a minor throughout the store as he committed sexual acts on her.⁴³ When Coates made the same assertion as the defendant here, the Fourth Circuit rejected the contention that an abduction did not take place because he and the victim remained within the store.⁴⁴ Although *Coates* was not controlling authority for the Fourth Circuit in *Osborne*, it emphasized that an abduction can take place even if the victim and robber remain in the same building.⁴⁵ Therefore, the court rejected Osborne's first argument that he did not abduct anyone because he did not move the employees to a different building.⁴⁶

The defendant made a second argument, that, even if a movement within the same store could in some circumstances constitute an abduction, his movement of the employees did not.⁴⁷ The Court disagreed, reasoning that in “ordinary parlance” the store and pharmacy sections of the Walgreens constituted different locations within the meaning of the Guidelines.⁴⁸ The fact that the two sections are physically divided by a

38. *Osborne*, 514 F.3d at 387.

39. *Id.* at 379.

40. *Id.*

41. *Id.* at 388.

42. *Id.*

43. *Id.* (citing *United States v. Coates*, 113 F. Appx. 520, 521 (4th Cir. 2004)).

44. *Id.* (citing *Coates*, 113 F. Appx. at 522).

45. *Osborne*, 514 F.3d at 389.

46. *Id.*

47. *Id.* at 390.

48. *Id.*

counter reiterates this point.⁴⁹ Even though the defendant asserted that he did not move the victims to isolate them, the Fourth Circuit concluded that his request that the employees follow him through the exit created a potential hostage situation, which is another activity the enhancements were designed to deter.⁵⁰ The court clarified that abduction would not be found in all cases where a robber directs the slight movement of others.⁵¹ The opinion distinguished Osborne’s scenario from one where a robber directs a bank teller from the reception area to the vault but does not accompany the teller, which the court reasoned would not constitute abduction for purposes of the enhancement.⁵² Indeed, the Fourth Circuit noted that the defendant’s accompaniment of the victims to the places where he directed them was “pivotal” in its conclusion that he had abducted them.⁵³

2. The Fifth Circuit

A few years later, in *United States v. Buck*, the Fifth Circuit took a similar approach when it held that the defendant committed an abduction for purposes of the Guidelines when he forced employees to move with him throughout the T-Mobile store during his robbery.⁵⁴ The defendant, Buck, objected to this enhancement arguing the language “different location” in the Guidelines was vague.⁵⁵ Further, the defendant contended that previous cases in the Fifth Circuit where the courts have construed an abduction during the robbery are distinguishable from the facts in his case because he merely forced employees to follow him from the front of the store to the back, while in previous cases the robber had forced victims off the premises completely.⁵⁶

The Fifth Circuit, however, noted that in previous cases where it found that robbers committed abductions during robbery, employees and bystanders were forced into different areas of the bank or parking area.⁵⁷ The court reiterated that it has consistently construed “different location” in the Federal Sentencing Guidelines’ abduction enhancement as movement within one structure as well as to different buildings, even if

49. *Id.*

50. *Id.*

51. *Osborne*, 514 F.3d at 390-91.

52. *Id.* at 391.

53. *Id.*

54. *United States v. Buck*, 847 F.3d 267, 276-77 (5th Cir. 2017).

55. *Id.* at 276.

56. *Id.*

57. *Id.* at 276-77 (citing *United States v. Smith*, 822 F.3d 755, 763-64 (5th Cir. 2016); *United States v. Hawkins*, 87 F.3d 722, 727-28 (5th Cir. 1996)).

that movement was only about fifty feet.⁵⁸ Historically, that language has been interpreted with significant flexibility, which allowed the court to find abduction in this case even when the employees were only moved within the T-Mobile store.⁵⁹

As made evident, the Fourth and Fifth Circuits interpreted the language for the abduction enhancement broadly. The two circuits used more of their own discretion when following the Federal Sentencing Guidelines, finding that the enhancement's "different location" could mean a place as close as a distinct area within the same structure, as long as the defendant forced the victims to that location.

D. Inside the Building, Outside the Parameters of Abduction: The Sixth, Seventh, and Eleventh Circuits

Not all circuits have interpreted the language of the abduction enhancement broadly. The Sixth, Seventh, and Eleventh Circuits have ruled that an abduction enhancement does not apply if the robber merely forced the victims to move within the store or bank.⁶⁰

1. The Sixth Circuit

In *United States v. Hill*, the Sixth Circuit ruled that the trial court's application of the abduction enhancement was improper where the defendant did not take the victims outside the store he was robbing.⁶¹ The Sixth Circuit first analyzed the plain language of the Guidelines, specifically the phrase "different location" and eventually concluded that it meant "a separate or distinct place or site."⁶² But the court emphasized that sometimes, when interpreting statutes, plain language is not a satisfactory analysis, and so it delved into a deeper discussion of what "different location" means within the context of a robbery.⁶³

First, the Sixth Circuit took a common language approach, discussing how people in everyday parlance would interpret "different location."⁶⁴ It noted that for purposes of the enhancement, the first location is the location of the robbery, which is typically a store or bank.⁶⁵ Most people would say, when referring to the robbery, in this case the "Universal

58. *Id.*

59. *Id.*

60. *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).

61. *Hill*, 963 F.3d at 530, 536.

62. *Id.* at 532.

63. *Id.* at 532-33.

64. *Id.* at 533-34.

65. *Id.*

Wireless store,” that the “store was robbed,” qualifying the store as its own location.⁶⁶ Therefore, in everyday language, the average person would construe “different location” to mean a location other than the store or business that the defendant robbed.⁶⁷

Next, the Sixth Circuit analyzed the phrase within the context of the entire enhancement.⁶⁸ The court cautioned that the enhancement cannot be construed too narrowly, as “abducted” already indicates that the defendant must accompany the victims that he or she forcibly moves.⁶⁹ The term “accompany” of course denotes movement in itself and is used in the statutory robbery enhancement 18 U.S.C. §2113, when the robbers force victims to accompany them. The Supreme Court even interpreted this enhancement to mean that movement from one area of the bank to the vault constitutes “accompaniment” for this enhancement.⁷⁰ The Sixth Circuit noted that if the Sentencing Commission meant for that short movement indicated by the word “accompany” to count as abduction, it would not have included the phrase “different location.”⁷¹ Thus, the presence of that short phrase means that small movements usually associated with an accompaniment enhancement do not constitute abduction.⁷²

The court then focused on the example in the Guidelines under “abduction” as a robber forcing a victim into the getaway car.⁷³ The Sixth Circuit indicated that because the example is a location *outside* the robbed location itself, the example comports with the generalized definition of “location” that the court has understood.⁷⁴ Furthermore, the term “abducted” means to be taken away; such little movement as from the front of a store to its stockroom does not fit into the everyday definition of “abduction.”⁷⁵ The court found that the language provided in the Guidelines itself does not match the idea that an abduction can occur with movement within the same store.⁷⁶

Finally, as further support for its conclusion, the Sixth Circuit pointed to the existence of a robbery enhancement for physically restraining the victim during the robbery.⁷⁷ Specifically, the court indicated that because

66. *Id.*

67. *Hill*, 963 F.3d at 534.

68. *Id.*

69. *Id.*

70. *Id.* (citing *Whitfield v. United States*, 574 U.S. 265, 267 (2015)).

71. *Id.*

72. *Id.*

73. *Hill*, 963 F.3d at 535.

74. *Id.*

75. *Id.* at 535.

76. *Id.*

77. *Id.*

the physical restraint enhancement is a lower level than the abduction enhancement, the Commission intended the former to be a less serious offense.⁷⁸ And because the lesser of the two offenses, physical restraint, often involves moving victims around within the store, certainly the same movements within the store cannot also qualify as abduction.⁷⁹ With this final reasoning, the Sixth Circuit concluded that the Guidelines' abduction enhancement cannot be satisfied when the robber has only forced the victims to move within the store he or she robbed.⁸⁰

2. The Seventh Circuit

The Seventh Circuit came to a similar conclusion as the Sixth Circuit, albeit earlier, in *United States v. Eubanks*, when it held that the trial court had improperly applied the abduction enhancement in a robbery case⁸¹—due in part to the trial court's reliance on the Fourth Circuit's decision in *Osborne*.⁸² Instead, where the defendant here merely forced the employees into smaller rooms of the stores he was robbing, the court found a physical restraint enhancement more appropriate.⁸³ In fact, the Seventh Circuit had applied only the physical restraint enhancement in prior robbery cases where the defendants had forced the victims to move within the store.⁸⁴ Therefore, it found that where the robber forces victims to move within the same building during a robbery, but does not force them outside of that building, only a physical restraint enhancement is appropriate, and the judge should not apply the abduction enhancement.⁸⁵

3. The Eleventh Circuit

The Eleventh Circuit cited to *Eubanks* in *United States v. Whatley* when it remanded a bank robbery case for resentencing after finding that the trial court had erred in applying the abduction enhancement.⁸⁶ The court mentioned the Seventh Circuit decision as well as the Fourth and Fifth Circuit decisions when declining to interpret the enhancement as including forced movement within the same bank. In *Whatley*, unlike the Fourth and Fifth Circuits, the Eleventh Circuit refused to interpret the

78. *Id.*

79. *Hill*, 963 F.3d at 535.

80. *Id.* at 536.

81. *United States v. Eubanks*, 593 F.3d 645, 654 (7th Cir. 2010).

82. *Id.* at 653.

83. *Id.* at 652.

84. *Id.* at 653 (citing *United States v. Carter*, 410 F.3d 942, 954 (7th Cir. 2005); *United States v. Doubet*, 969 F.2d 341, 346 (7th Cir. 1992)).

85. *Id.* at 654.

86. *United States v. Whatley*, 719 F.3d 1206, 1222-23 (11th Cir. 2013).

bank as more than a single location.⁸⁷ Because the defendant merely forced victims to either lie on the ground or open the vault and did not force any of them to leave the location of the bank, the court found he did not commit an abduction.⁸⁸ The court stated that the term “different location” means outside the bank.⁸⁹ It refused to interpret the phrase with varying levels of generality like the Fourth and Fifth had, which potentially would include offices or lobbies within the bank. Rather, it quoted a previous Eleventh Circuit opinion which emphasized that “the language of the Sentencing Guidelines, like the language of a statute, must be given its plain and ordinary meaning.”⁹⁰ Here, the plain and ordinary meaning of “different location” did not mean different areas within the bank but rather any area outside of the bank, just as the example in the Sentencing Guidelines mentioned a getaway car as a different location.⁹¹

Further, the Eleventh Circuit noted that this interpretation also comported with the ordinary meaning of the word “abduction” which usually connotes a defendant taking a victim away. In ordinary speech, a person would not describe the robber holding a victim hostage in the bank, as the defendant had done here, as an abduction.⁹² Moreover, the court referred to the physical restraint enhancement for robbery, just as the Sixth and Seventh Circuits did.⁹³ The court stated that its interpretation of abduction, unlike those of the Fourth and Fifth Circuits, “preserves the distinction” between the physical restraint and abduction enhancements.⁹⁴ Specifically, the court explained that the trial court should have only applied the physical restraint enhancement when analyzing the robber’s actions of demanding that the victims lie on the ground or open the vault; to characterize these also as an abduction would “blur the line” between the two enhancements.⁹⁵

Therefore, the Sixth, Seventh, and Eleventh Circuits all agreed on the interpretation of the abduction enhancement as applicable only when the defendant forcibly moves the victims from the scene of the robbery.⁹⁶

87. *Id.*

88. *Id.*

89. *Id.* at 1222.

90. *Id.* (quoting *United States v. Fulford*, 662 F.3d 1174, 1177 (11th Cir. 2011)).

91. *Id.*

92. *Whatley*, 719 F.3d at 1222-23.

93. *Id.* at 1223.

94. *Id.*

95. *Id.*

96. *United States v. Hill*, 963 F.3d 528, 536 (6th Cir. 2020); *United States v. Eubanks*, 593 F.3d 645, 654 (7th Cir. 2010); *Whatley*, 719 F.3d at 1223.

E. A Case-by-Case Test: The Third and Tenth Circuits

Two circuits, however, have declined to take a hardline approach. The Third and Tenth Circuits have instead approached abduction enhancement cases using a three-prong test, deciding whether to uphold the enhancement on a case-by-case basis.⁹⁷ The Third Circuit developed the following test in *United States v. Reynos*, and the Tenth Circuit adopted it a few years later in *United States v. Archuleta*.⁹⁸

1. The Third Circuit and the Creation of the Test

In *Reynos*, a case involving an armed robbery of a pizza shop, the Third Circuit developed “three predicates that must be met” for the abduction enhancement to apply.⁹⁹ In this case, the defendant had forced the workers from their hiding place in the bathroom to the front of the store to open the cash register, threatening to shoot them if they did not comply.¹⁰⁰ The trial court had described this action as “abduct[ing] them at gunpoint,” laying the basis for the abduction enhancement to the defendant’s sentence.¹⁰¹

According to the Third Circuit, three factors must exist before the court can apply the abduction enhancement: (1) the robbery victims must be forced from their position; (2) the robber must accompany the victims to this new location; and finally, (3) the robber’s relocation of the victims must be in furtherance of the robbery.¹⁰² In applying the test, the court described each factor in more depth.¹⁰³ First, on the force factor, the court noted that the Guidelines’ definition of “abduction” includes that the victims were “forced” to accompany the defendant, but that several prior cases have held that “force” does not include only physical force but can mean moral or intellectual compulsion as well.¹⁰⁴ In fact, the court stated that any abduction achieved “through threat, fear, or intimidation” was a forceful one, thus satisfying the first prong.¹⁰⁵ After having established that the Guidelines’ use of “force” in the abduction definition included a broader category than merely physical compulsion, the court determined that the defendant, by “brandishing” the automatic pistol at the victims in

97. *See* *United States v. Reynos*, 680 F.3d 283 (3rd Cir. 2012); *United States v. Archuleta*, 865 F.3d 1280 (10th Cir. 2017).

98. *Reynos*, 680 F.3d at 286-87; *Archuleta*, 865 F.3d at 1285-86.

99. 680 F.3d at 286-87.

100. *Reynos*, 680 F.3d at 285.

101. *Id.* at 286.

102. *Id.* at 286-87.

103. *Id.*

104. *Id.* at 287.

105. *Id.* at 287-88.

their hiding place, forced them to move from their location.¹⁰⁶

The Third Circuit then elaborated on what constitutes “accompaniment” and stated that as long as the robber follows the victims to their new location, he or she has accompanied them for the purposes of the abduction enhancement.¹⁰⁷ Here, the court noted that the record clearly showed that the defendant had accompanied the victims from the bathroom to the cash register. At this point, the court analyzed whether the cash register qualified as a “different location” to determine whether the actions fulfilled the “accompaniment” standard.¹⁰⁸ The court cited several cases in different circuits, including *United States v. Osborne*, where the courts had defined “location” with significant flexibility, finding that movement from one area of a building to another constituted a different location.¹⁰⁹ Of course, the court noted, the smaller a structure is, the more difficult it becomes to establish two or more distinct locations within it.¹¹⁰ However, in *Reynos*, the bathroom and the cash register were 39 feet apart and separated by several hallways and a locked door.¹¹¹ The trial court relied on these factors when it found that they were different locations within the shop, a finding which the Third Circuit upheld as thorough and reasonable.¹¹²

Finally, the court addressed the third prong: whether the abduction was committed in facilitation of the offense.¹¹³ The court noted that the Guidelines require that the abduction facilitates *either* “the commission of the crime or the offender’s escape,” not both.¹¹⁴ The Third Circuit found that because the defendant had forced the victim to the cash register so that he could access the money inside, he clearly “abducted” the employee in furtherance of the robbery.¹¹⁵ Therefore, the Third Circuit found that although the defendant only forced the victims to move within the shop, he had abducted them for the purposes of the sentencing enhancement; he met all three criteria of the case-by-case test set forth in the opinion.¹¹⁶

106. *Reynos*, 680 F.3d at 288.

107. *Id.*

108. *Id.* at 289.

109. *Id.* at 290.

110. *Id.*

111. *Id.*

112. *Reynos*, 680 F.3d at 290.

113. *Id.* at 291.

114. *Id.* (citing U.S. SENT’G GUIDELINES MANUAL § 1B1.1 app. note 1(A); § 2B3.1(b)(4)(A) (U.S. SENT’G COMM’N 2018)).

115. *Id.*

116. *Id.*

2. The Tenth Circuit and the Adoption of the Test

The Tenth Circuit adopted this three-factor test in a similar robbery case, a case of first impression for the court.¹¹⁷ Before applying the test to the bank robbery, the court explained the different positions taken by the federal circuit courts regarding application of the abduction enhancement.¹¹⁸ It identified that the dividing point for all the circuits is their definition of “location.”¹¹⁹ The court had previously established that when the Guidelines do not provide a definition for a term used, the first step is to apply the plain meaning of that word.¹²⁰ It found here that “location” most plainly means a different place or position; specifically, it noted the Third Circuit’s third-prong in its three-factor test requiring victims to be moved from their “original position.”¹²¹ The court explained that the word “position” fits within the plain meaning of “location,” but “position” also indicates a small enough movement so that a different position, or location, could exist within the same building.¹²²

Having established that it agreed with the Third Circuit’s interpretation of the Guidelines and three-prong test, the Tenth Circuit followed its lead.¹²³ The court found first that the defendant, in brandishing a firearm at a bank teller and manager, forced the two victims to accompany him from the lobby to the vault.¹²⁴ This action satisfied both the first and second prongs of the test, but only because the court also held that the lobby and the vault area constituted different locations.¹²⁵ Because the defendant engaged in this “abduction” to access the vault and further the robbery, his actions satisfied the last prong as well.¹²⁶ Therefore, both the Third and Tenth Circuits, in applying the case-by-case three-prong test, found that forced movement even within the same building can constitute an abduction for purposes of the sentencing enhancement, as long as force and victim accompaniment are present.¹²⁷

III. DISCUSSION

This Part will address which of the three approaches most closely

117. *United States v. Archuleta*, 865 F.3d 1280, 1285 (10th Cir. 2017).

118. *Id.* at 1287.

119. *Id.*

120. *Id.*

121. *Id.* at 1288 (quoting *United States v. Reynos*, 680 F.3d 280, 286-87 (3rd Cir. 2012)).

122. *Id.*

123. *Archuleta*, 865 F.3d at 1288

124. *Id.*

125. *Id.*

126. *Id.* at 1288-89.

127. *Id.*; *United States v. Reynos*, 680 F.3d 283, 291 (3rd Cir. 2012).

follows the purpose of the Guidelines' abduction enhancement. It will argue that both the Fourth and Fifth Circuits' approach and the three-factor test in the Third and Tenth Circuits do not accurately reflect the intent and meaning of the Manual. This Part will also discuss an approach not yet used by any circuit, which may provide the most holistic and most proper interpretation of the enhancement.

A. The Best of Three: Within the Same Building Does Not Constitute an Abduction

While each of the three federal circuit court approaches to the abduction enhancement has its own merits, none of them exist in a vacuum; indeed, courts must analyze and exercise their application of the enhancement within the parameters of the Guidelines' language and goal.¹²⁸ Despite judges' discretion under the Guidelines, they still must use the Guidelines as a model and standard.¹²⁹ The abduction enhancement is not exempt from this requirement, nor is any part of the Guidelines; therefore, judges, when deciding whether to apply the enhancement, must still use the Guidelines to assess whether an abduction has occurred.¹³⁰ The approach taken by the Sixth, Seventh, and Eleventh Circuits, that an abduction only occurs when the victims are moved from the building, best aligns with the Guidelines' goals.¹³¹ The other two interpretations are overly broad and do not fulfill those goals.¹³²

The Fourth and Fifth Circuits' approach is improper because it runs contrary to the plain language of the statute, the Commission's example under the Guidelines, and the Guidelines' intended goal. These Circuits have interpreted the enhancement to mean that a defendant has abducted victims if they are forced to move with the robber, even if that movement happens within the same store.¹³³ In doing so, the two circuits have established that the word "location" in the enhancement can mean either a different building or a different, distinct area within the same building.¹³⁴ In these decisions, the judges denied the defendants' assertions that in ordinary parlance, the word "location" denotes a wholly different place; instead, they agreed that a distance of even about fifty feet

128. *United States v. Booker*, 543 U.S. 220, 264 (2005).

129. *Id.*

130. *Id.*

131. *See United States v. Hill*, 963 F.3d 528, 536 (6th Cir. 2020); *United States v. Whatley*, 719 F.3d 1206 (11th Cir. 2013).

132. *See United States v. Osborne*, 514 F.3d 377, 387 (4th Cir. 2008) (explaining that the enhancement was intended to prevent additional harm to robbery victims).

133. *United States v. Buck*, 847 F.3d 267, 277 (5th Cir. 2017); *United States v. Osborne*, 514 F.3d 377, 388 (4th Cir. 2008)

134. *Id.*

could be a different location.¹³⁵ However, in everyday speech, “different location” often means an entirely separate place; in fact, the example that accompanies the Oxford Dictionary’s definition of location is “the property is set in a convenient location.”¹³⁶ This sentence indicates that the word “location” is rarely used as a synonym for a separate area within the same place but rather connotes a more general place, like a store or other building. Therefore, the Fourth and Fifth Circuits weakly assert that “location” can mean an area within the same building based on ordinary use of the word.

Furthermore, the example provided in the Guidelines reiterates this point.¹³⁷ When defining “abduction,” the comment states that an abduction could occur when a bank robber forces a hostage into the getaway car.¹³⁸ Through this specific example, the Commission clearly denotes that when it provides for an abduction enhancement to robbery, it means situations where the victim is forced outside the building. The getaway vehicle, by its nature, moves a significant distance from the place being robbed; indeed, the Guidelines do not provide an example of the bank teller being forced from the lobby to the vault. If the Commission had intended the term “different location” to mean “still within the same building,” an interpretation far outside the normal use of the term, it likely would have provided a specific example of an abduction within the same building to eliminate any confusion. Instead, however, the comment demonstrates that abduction occurs when the teller is forced to leave the bank.¹³⁹

Of course, the courts cannot interpret the enhancement on language alone but must also look to the purpose of the enhancement when applying it. The Fourth Circuit noted that the purpose of the abduction enhancement was to prevent and deter the robber from harming the robbery victims further, such as with sexual assault or a hostage situation.¹⁴⁰ However, each case discussed involved the victims being forced to move to the area where the robber needed them to access items or money to be taken.¹⁴¹ In none of these situations did the defendant show intent to commit a sexual assault or hold the victims hostage for a

135. *Buck*, 847 F.3d at 277; *Osborne*, 514 F.3d at 390.

136. “Location definition” OXFORD ENGLISH DICTIONARY, available at www.google.com (search: “location definition”) (last visited March 29, 2021).

137. U.S. SENT’G GUIDELINES MANUAL §1B1.1 cmt. n.1(A) (U.S. SENT’G COMM’N 2018).

138. *Id.*

139. *Id.*

140. *United States v. Osborne*, 514 F.3d 377, 387 (4th Cir. 2008).

141. *United States v. Buck*, 847 F.3d 267, 276-77 (5th Cir. 2017); *Osborne*, 514 F.3d at 381-82; *United States v. Hill*, 963 F.3d 528, 530 (6th Cir. 2020); *United States v. Whatley*, 719 F.3d 1206, 1209 (11th Cir. 2013); *United States v. Eubanks*, 593 F.3d 645, 652 (7th Cir. 2010); *United States v. Reynos*, 680 F.3d 283, 285 (3rd Cir. 2012); *United States v. Archuleta*, 865 F.3d 1280, 1288 (10th Cir. 2017).

prolonged period of time.¹⁴² This reveals why it is improper to apply the abduction enhancement to circumstances where the dangers it is intended to deter are not present. Doing so would ignore the purpose of the abduction enhancement and instead make it a tool for the overzealous judge to increase a criminal's sentence without grounds for doing so.

Moreover, these circumstances all present activities that are aligned better with the physical restraint enhancement, which allows for a two-level enhancement if the robber physically restrains any person to "facilitate the commission of the offense or to facilitate escape."¹⁴³ As the Eleventh Circuit noted, applying the abduction enhancement where the defendant has only forced the victims into an area or room within the store or bank blurs the distinction between the abduction and physical restraint enhancements; such an interpretation of the abduction enhancement almost obliterates the need for the physical restraint enhancement.¹⁴⁴ Therefore, since the Federal Sentencing Commission includes both an enhancement for physical restraint and one for abduction, it certainly intended that the abduction enhancement, a greater level increase, be significantly different and more severe from the actions that constitute physical restraint. The Fourth and Fifth Circuits' interpretation comports with neither the language nor purpose of the Federal Sentencing Guidelines.

The case-by-case test used by the Third and Tenth Circuits also is not wholly aligned with the intent or language of the Guidelines. Although the test seems complex and holistic, with three distinct prongs that must be satisfied for the judge to apply the enhancement, this thoroughness is deceptively superficial.¹⁴⁵ The test does not ask the judge to look for any different factors that are not already required by the language of the enhancement; namely, the test requires that (1) the victims be forcibly moved to a different location, (2) that the robber accompanies them, and (3) that the movement is done in furtherance of the commission of the crime or escape.¹⁴⁶ The three prongs are actually just the Guidelines' definition of "abduction" combined with the enhancement itself; the test does not guide the court any more than the bare Guidelines do.¹⁴⁷

In fact, the case-by-case test still leaves open the question of what constitutes a "different location." The Third Circuit took up that question

142. *Id.*

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

144. *United States v. Whatley*, 719 F.3d 1206, 1223 (11th Cir. 2013).

145. *United States v. Reynos*, 680 F.3d 283, 286 (3rd Cir. 2012).

146. *Id.*

147. U.S. SENT'G GUIDELINES MANUAL §2B3.1(b)(4)(A) (2018); U.S. SENT'G GUIDELINES MANUAL §1B1.1 cmt. n.1(A) (U.S. SENT'G COMM'N 2018).

when developing the test.¹⁴⁸ However, the Third Circuit's answer (and the one which the Tenth Circuit adopted) was the same as the Fourth and Fifth Circuits': a different location can mean a different area within the scene of the robbery.¹⁴⁹ With this definition of "different location," along with a "test," which merely restates the enhancement, the Third and Tenth Circuits effectively come to the same conclusion in each case with abduction enhancements as the Fourth and Fifth Circuits do. There is no greater analysis the three-pronged test facilitates that the other circuits do not already conduct on their own. Thus, the case-by-case test, by essentially following the same reasoning as the Fourth and Fifth Circuits, also fails to align application of the abduction enhancement with the Sentencing Manual's guidance.

B. An Approach Not Yet Taken: A Hybrid Test

Considering the three different approaches on this single issue, each court is using the broad discretion in interpreting the Guidelines that the Supreme Court gave federal judges in *Booker*.¹⁵⁰ However, because the Commission was initially assembled to provide more consistent sentencing ranges, perhaps this wide discretion has defeated the Guidelines' purpose.¹⁵¹ The Commission's purpose may be better served if the courts were to adopt the Guidelines with less flexibility, although the three approaches are perhaps not the only options. In fact, no circuit has yet developed an approach to this specific enhancement that balances the rigidity of the Sixth, Seventh, and Eleventh Circuits' approach with the fluidity of the Third Circuit's "totality of the circumstances" approach.

Indeed, one possibility that no circuit has considered is combining the two aforementioned approaches. Specifically, the courts could, and should, adopt a balancing test of several factors which blends the three-prong test with the stricter definition of "different locations." The current three-prong test looks to whether the victims accompanied the robber to a different location and determines that when the victims follow the robber, an abduction has taken place.¹⁵² The new test would require a high

148. *Reynos*, 680 F.3d at 289.

149. *Id.*; see also *United States v. Archuleta*, 865 F.3d 1280, 1287 (10th Cir. 2017).

150. See *United States v. Booker*, 543 U.S. 220 (2005); *United States v. Buck*, 847 F.3d 267 (5th Cir. 2017); *United States v. Osborne*, 514 F.3d 377 (4th Cir. 2008); *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); *United States v. Reynos*, 680 F.3d 283 (3rd Cir. 2012); *United States v. Archuleta*, 865 F.3d 1280 (10th Cir. 2017).

151. *United States Sentencing Commission*, FEDERAL REGISTER, <https://www.federalregister.gov/agencies/united-states-sentencing-commission> (last visited Jan. 26, 2021); 28 U.S.C. §991 (1984).

152. See *United States v. Reynos*, 680 F.3d 283, 286 (3rd Cir. 2012).

level of compulsion that a reasonable person in the victims' situation would feel to move with the robber, along with a large degree of difference in the two positions, to determine whether an abduction has taken place. Under this test, not every movement the defendant forces within the building would constitute an abduction, but where victims fear for their lives and potentially face a long-term hostage situation, the court would likely find an abduction. Moreover, not every movement from inside to outside the building would count as an abduction if the victims did not feel that their safety or lives were threatened.

This proposed test resembles a more holistic approach compared to the Third Circuit's three-prong test, which essentially leads to the same result as the Fourth and Fifth Circuits' approach. The new hybrid approach would better comport with the enhancement's intent to prevent further harm to robbery victims, because the test considers the victims' perceived fear of harm in the alleged "abduction." Under this test, it is unlikely that the situation in either the Fourth or Fifth Circuit's cases would prompt the court to apply the abduction enhancement because in no situation were the victims moved in a way that posed increased danger, like a sexual assault or hostage situation.¹⁵³ Instead, under the proposed test, courts would likely only apply the abduction enhancement where an abduction, within the Commission's meaning of the word, existed; indeed, the test would find an abduction had taken place where the robber had "forced" a victim into the getaway car and driven away, just as the Guidelines' example of abduction defines the word.¹⁵⁴ The term "forced" would indicate to the judge that the victims felt strongly compelled to follow the robber for fear of their lives, while the mobile nature of a getaway car implies a potentially far distance between the two locations, which would lead to more harm, either in a hostage or sexual assault situation.¹⁵⁵ Therefore, the holistic test most accurately comports with the Sentencing Guidelines' definitions and purposes, and, applied across all circuits, would result in the most uniform application of criminal sentencing for the robbery abduction enhancement.

IV. CONCLUSION

While courts have discretion to apply the Guidelines fluidly, they have

153. *United States v. Buck*, 847 F.3d 267, 276-77 (5th Cir. 2017); *United States v. Osborne*, 514 F.3d 377, 381-82 (4th Cir. 2008); *United States v. Hill*, 963 F.3d 528, 530 (6th Cir. 2020); *United States v. Whatley*, 719 F.3d 1206, 1209 (11th Cir. 2013); *United States v. Eubanks*, 593 F.3d 645, 652 (7th Cir. 2010); *United States v. Reynos*, 680 F.3d 283, 285 (3rd Cir. 2012); *United States v. Archuleta*, 865 F.3d 1280, 1288 (10th Cir. 2017).

154. U.S. SENT'G GUIDELINES MANUAL §1B1.1 cmt. n.1(A) (U.S. SENT'G COMM'N 2018).

155. *Id.*

used that freedom to develop interpretations of the abduction enhancement that result in wholly different sentencing outcomes from similar robbery circumstances. From the three views taken, the Sixth, Seventh, and Eleventh Circuits' approach best aligns with the purpose and language of the Guidelines' abduction enhancement. This approach does not find an abduction has occurred where victims have not been forcibly moved from the building, which comports with the ordinary use of the word "abduction" as well as the Guidelines' example in the comments. Moreover, when the defendant does not forcibly move victims from the building to a different location, the risk of hostage or sexual assault is low, so the enhancement's deterrent purpose is not applicable. However, this hardline approach does not consider the totality of the circumstances of each case, circumstances which may show that an abduction has taken place, even if the victims remain in the same structure. Thus, the best approach is a case-by-case test that accounts for the degree of compulsion that the victims felt to accompany the robber as well as the degree of change in their location, whether that be within a large building, or from one building to another. Such a test enables a more holistic analysis under the enhancement that nicely comports with both the language and purpose of the Manual. If all circuits adopted this test, the Guidelines' main purpose, to create uniformity of sentencing, would be better served.