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EXAMINING THE NEED FOR A UNIFIED THEORY AMONG THE U.S. FEDERAL CIRCUITS IN THE APPLICATION OF THE SENTENCING ENHANCEMENT OF ABDUCTION IN CRIMES OF ROBBERY

*Rebekah Nickerson**

I. INTRODUCTION

For more than twenty years, the U.S. federal circuits have struggled to agree on a unified approach to the abduction sentencing enhancement in the U.S. Sentencing Guidelines Manual § 2B3.1(b)(4)(A), which is a sentencing enhancement that specifically attaches to the underlying base crime of robbery in the event that an abduction took place in the course of the crime.[1] The circuits are deeply divided on the issue of what constitutes abduction for the purpose of the sentencing enhancement.[2] The Third, Fourth, Fifth, and, most recently, the Tenth Circuits have all determined that the forced movement of victims from one area or room within a structure to another area or room within the same structure is satisfactory for the purpose of applying the abduction sentencing enhancement.[3] In contrast, the Seventh and Eleventh Circuits have determined that movement within the same structure is not sufficient to apply the abduction sentencing enhancement; rather, the defendant must force a victim to enter, leave, or move between distinct structures before receiving the abduction enhancement.[4]

Even when applied uniformly among the circuits, sentencing enhancements generally create ambiguity and a lack of uniformity in sentencing outcomes by virtue of prosecutorial discretion.[5] In the case of the abduction sentencing enhancement, the deeply entrenched

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1. *See infra* Parts III, IV.
2. *See infra* Part IV.
3. *See infra* Section IV.B.
4. *See infra* Section IV.A.
5. *See infra* Section V.B.

divide among the circuits introduces a further heightened degree of nonuniformity in sentencing.[6] Therefore, the circuit split must be resolved in order to minimize sentencing disparity and maximize predictability within our justice system.[7] To avoid the danger of double counting or stacking penalties for the same conduct, the abduction enhancement should be limited to circumstances in which the defendant forced victims to enter, leave, or move between distinct structures.[8] Forced movement within the same structure should not constitute abduction for the purpose of the abduction enhancement and should instead trigger the physical restraint enhancement.[9]

This Comment consists of six parts following this introduction. Part II details the historical and political background of the federal sentencing guidelines, giving particular attention to the Sentencing Reform Act of 1984 and the period immediately preceding it known as the "age of indeterminate sentencing."[10] The examination of key changes in federal sentencing guidelines is essential to develop an understanding of the shifting public opinion in regards to the aim of imprisonment and of the function criminal sentencing is meant to fulfill within our society.[11] An understanding of the purpose and design of the federal sentencing guidelines will later inform this Comment's recommended solution to resolve the split among the nation's federal circuits.[12]

Part III of this Comment outlines the statutory construct of the abduction enhancement itself, as well as the closely related physical restraint enhancement, which may be applied in cases of the forceful restraint of victims undertaken in the course of a robbery.[13] Additionally, Part III provides a key contextual understanding of the interpretative conflict among the circuits by outlining definitional terms used to clarify the guidelines.[14]

Part IV of this Comment investigates the various approaches taken by the circuits as each encountered case, all sharing similar fact patterns, demand an articulation of a stance on the abduction enhancement in crimes of robbery.[15] Part IV also discusses the

6. *See infra* Section V.C.
7. *See infra* Part V.
8. *See infra* Part VI.
9. *See infra* Section VI.C.
10. *See infra* Part II.
11. *See infra* Part II.
12. *See infra* Part V.
13. *See infra* Part III.
14. *See infra* Part III.
15. *See infra* Part IV.

various responses the circuits have developed by considering the key cases of relevance.[16]

Part V of this Comment carefully considers the stated goals of the federal sentencing guidelines and discusses both the broad implications of sentencing enhancements on these goals and the more focused implications of the nonuniformity of the application of the abduction enhancement on these goals.[17] Part V exposes the necessity for a resolution of the circuit split on the issue of the abduction enhancement in order to maintain the integrity of congressional efforts to reduce sentencing disparity.[18]

Finally, Part VI of this Comment defines and addresses the issue of double counting, which is of particular relevance in determining the appropriate resolution of the circuit court split on the issue of the abduction enhancement.[19] Ultimately, the danger of double counting requires that the abduction enhancement must be distinguished from the physical restraint enhancement.[20] Therefore, this Comment concludes by asserting that the circuit split must be decided in favor of construing the abduction enhancement to exclusively apply to situations in which the defendant has forced victims to enter, leave, or move between distinct structures.[21]

II. A BRIEF HISTORY OF RECENT KEY DEVELOPMENTS IN FEDERAL CRIMINAL SENTENCING

Before considering the narrow issue this Comment addresses, namely the deeply divided application of the abduction sentencing enhancement among the federal appellate circuits, it is useful to first examine the genesis of our modern federal sentencing guidelines and the increasingly important role federal appellate courts have assumed in the interpretation of these guidelines.[22]

A. The Age of Indeterminate Sentencing Prior to the Creation of the Federal Sentencing Guidelines

Prior to the major sentencing reform of the 1980s, trial courts exercised a great deal of discretion in sentencing and were only

16. *See infra* Part IV.
17. *See infra* Part V.
18. *See infra* Part V.
19. *See infra* Part VI.
20. *See infra* Section VI.C.
21. *See infra* Section VI.C.
22. *See infra* Sections II.A–C.

fenced in by broad statutory margins.[23] In what became known as the "age of 'indeterminate' sentencing," there was no appellate review of sentencing, and the chief goal of sentencing was rehabilitation.[24] During this era, it was widely believed that criminals suffered from a disease that could ultimately be cured through the intervention of well-intentioned criminal system actors, including judges, probation officers, and prison wardens.[25]

In the 1949 capital case of *Williams v. New York*, the U.S. Supreme Court dramatically reinforced the immense discretion of trial judges in matters of sentencing.[26] A jury convicted the defendant of first-degree murder with the recommendation of life imprisonment.[27] However, the trial judge decided to instead sentence the defendant to death on the basis of information not considered in the trial, specifically an extensive criminal history and "morbid sexuality."[28] The defendant unsuccessfully appealed the sentencing decision on the basis of a due process violation.[29] Both the Court of Appeals of New York and the U.S. Supreme Court affirmed the trial court's decision.[30] The Supreme Court held that the Due Process Clause should not be read as a "uniform command that courts throughout the Nation [must] abandon their age-old practice of seeking information from out-of-court sources."[31]

In response to the broad discretion aptly demonstrated in *Williams v. New York*, critical outcry against the indeterminate model of sentencing began by the 1970s.[32] Proponents of sentencing reform argued that the immense discretion enjoyed by trial courts led to arbitrary sentencing results, sometimes as a result of racial prejudice, and that the goal of rehabilitation was not being realized.[33] In response to these concerns, among others, Congress passed the Sentencing Reform Act of 1984 (the Act).[34]

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23. Elliot Edwards, Note, *Eliminating Circuit-Split Disparities in Federal Sentencing Under the Post*-Booker *Guidelines*, 92 IND. L.J. 817, 818–19 (2017).
24. *Id.*
25. *See* J.C. Oleson, *Blowing Out All the Candles: A Few Thoughts on the Twenty-fifth Birthday of the Sentencing Reform Act of 1984*, 45 U. RICH. L. REV. 693, 699–700 (2011).
26. *See* Edwards, *supra* note 23, at 819.
27. *Id.*; *see also* Williams v. New York, 337 U.S. 241, 251–53 (1949).
28. *See Williams*, 337 U.S. at 242–44.
29. *See id.* at 243.
30. *See id.* at 243, 252.
31. *Id.* at 250–51.
32. *See* Edwards, *supra* note 23, at 819; *see also* Oleson, *supra* note 25, at 700.
33. *See* Edwards, *supra* note 23, at 819.
34. *See id.* at 819–20.

B. The Sentencing Reform Act of 1984 and the Creation of the Federal Sentencing Guidelines

The Act has been alleged to be "perhaps the most dramatic change in sentencing law and practice in our Nation's history."[35] The Act was the culmination of a decade-long bipartisan effort[36] to eliminate rehabilitation as the sole aim of imprisonment and instead, incorporate a four-fold philosophy giving equal weight to the aims of retribution, deterrence, incapacitation, and rehabilitation in the determination of punishment.[37] The Act embodied a distinct shift from the indeterminate sentencing heralded by the Supreme Court in *Williams* to determinate sentencing designed to "redress past wrongs . . . not to influence future conduct."[38]

To accomplish these aims, the Act implemented several sweeping changes.[39] Firstly, appellate review of sentencing was granted, and secondly, federal parole was abolished in an effort to reduce uncertainty and inconsistency in sentencing.[40] The Act also created a nonpartisan commission tasked with developing fair and uniform federal sentencing guidelines called the United States Sentencing Commission.[41]

The Sentencing Commission was designed to be an insulated group of experts who would remain immune from political pressure.[42] However, the Commission was marked by fundamental disagreements, resulting in frequent shifts in leadership,[43] and when the Commission released its first sentencing guidelines manual it was met with a refrain of constitutional attacks.[44] Although the U.S. Supreme Court quieted many dissenters in *Mistretta v. United States* by declaring the guidelines constitutional,[45] the guidelines are still

35. Oleson, *supra* note 25, at 695.
36. Edward M. Kennedy, *The Sentencing Reform Act of 1984*, 32 FED. B. NEWS & J. 62, 62 (1985).
37. *See* Oleson, *supra* note 25, at 696.
38. *Id.* at 701.
39. *See* Kennedy, *supra* note 36, at 62.
40. *See id.*
41. *See id.*; *see also* Edwards, *supra* note 23, at 820.
42. *See* Edwards, *supra* note 23, at 820.
43. *See* Oleson, *supra* note 25, at 704–05.
44. Edwards, *supra* note 23, at 820.
45. *Id.*; *see* Mistretta v. United States, 488 U.S. 361, 412 (1989).

criticized as being too severe[46] and have even been labeled as a "catastrophe" by some.[47]

C. The Elevated Role of Federal Appellate Courts in the Interpretation of Sentencing Guidelines

While the guidelines were initially treated as law, the Supreme Court ruled that they were unconstitutional if made mandatory in *United States v. Booker* in 2005, effectively reducing the guidelines to advisory in nature.[48] This major shift in function of the guidelines has resulted in a tension between the "two seats of sentencing discretion: the Sentencing Commission, whose Guidelines still carry procedural weight despite being advisory and whom Congress continues to direct to research and promulgate sentencing policy, and the federal district courts, who can freely vary from the Guidelines' instructions when sentencing."[49] By extension, the federal appellate courts further influence sentencing within their circuits by their interpretation of the guidelines.[50]

The Supreme Court formally recognized the Commission's authority to revise and clarify the guidelines in *Braxton v. United States* and has proven to be reluctant to intervene for the purpose of resolving conflicting interpretations by various circuits.[51] This leaves the Commission with the sole responsibility of fixing any ambiguity in the interpretation of the guidelines, and, as a result of the absence of active Supreme Court review, the federal appellate courts have successfully carved out substantial power to adjust sentencing guidelines through broad statutory interpretation.[52] This is the precise power that many of the circuits have independently exercised in relation to the abduction enhancement found in § 2B3.1(b)(4)(A) of the U.S. Sentencing Guidelines Manual (the Guidelines), leading to an array of various approaches in interpretation.[53]

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46. Matthew G. White, *Federal Sentencing Guidelines: Too Blunt an Instrument?*, LAW360 (June 7, 2012, 1:15 PM), https://www.law360.com/articles/347498 [https://perma.cc/P9MW-QVPA].
47. Rakesh N. Kilaru, Comment, *Guidelines as Guidelines: Lessons from the History of Sentencing Reform*, 2 CHARLOTTE L. REV. 101, 102 (2010).
48. *See* United States v. Booker, 543 U.S. 220, 224 (2005); *see also* Edwards, *supra* note 23, at 823.
49. Edwards, *supra* note 23, at 824.
50. *Id.*
51. *See* Braxton v. United States, 500 U.S. 344, 348 (1991); *see* Edwards, *supra* note 23, at 825.
52. *See* Edwards, *supra* note 23, at 825–26.
53. *See infra* Part IV.

III. AN OVERVIEW OF THE ABDUCTION SENTENCING ENHANCEMENT AND THE ALTERNATIVE PHYSICAL RESTRAINT ENHANCEMENT FOUND IN § 2B3.1(B)(4)(A) OF THE U.S. SENTENCING GUIDELINES MANUAL

Sentencing enhancements appear throughout federal criminal law, but they only apply if "the defendant has already committed some other underlying crime[,] . . . the prosecutor elects to charge it[,] and . . . the sentencing enhancement has not been incorporated into the Guidelines calculation for the underlying crime."[54]

One such sentencing enhancement can be found in Chapter Two of the Guidelines.[55] Section 2B3.1(b)(4)(A) of the Guidelines provides for an increase in the sentencing of robbery by four levels if "any person was abducted to facilitate commission of the offense or to facilitate escape," which is the abduction enhancement at issue.[56] Alternatively, an increase in sentencing by two levels may apply if "any person was physically restrained to facilitate commission of the offense or to facilitate escape," which is the similar, but distinct, physical restraint enhancement.[57]

Several pertinent definitions used by courts in the interpretation and application of these enhancements are outlined in Chapter One:[58]

> The following are definitions of terms that are used frequently in the guidelines and are of general applicability (except to the extent expressly modified in respect to a particular guideline or policy statement):
>
> (A) *"**Abducted**"* means that a victim was forced to accompany an offender to a different location. For example, a bank robber's forcing a bank teller from the bank into a getaway car would constitute an abduction.
>
> . . . .

54. Michael A. Simons, *Prosecutors as Punishment Theorists: Seeking Sentencing Justice*, 16 GEO. MASON L. REV. 303, 329 (2009).
55. U.S. SENTENCING GUIDELINES MANUAL § 2B3.1(b)(4)(A) (U.S. SENTENCING COMM'N 2018).
56. *Id.*
57. *Id.*
58. *Id.* § 1B1.1 cmt. n.1(A), (K).

> (K) *"**Physically restrained**"* means the forcible restraint of the victim such as by being tied, bound, or locked up.[59]

These definitional terms have proven to be susceptible to various interpretations ultimately resulting in a significant circuit court split on the appropriate application of the abduction enhancement.[60]

IV. A SURVEY OF THE CURRENT CIRCUIT COURT SPLIT ON THE ABDUCTION SENTENCING ENHANCEMENT AS ATTACHED TO THE UNDERLYING CRIME OF ROBBERY

The federal appellate circuits have taken diverse approaches to the abduction sentencing enhancement as interpreted through the lens of the definition of "location."[61] The Seventh and Eleventh Circuits have taken the position that the definition of abduction is not always satisfied when a defendant forces a victim from one room or area to another room or area in the same structure during the course of a robbery.[62] On the other hand, the Third, Fourth, Fifth, and Tenth Circuits have all taken the contradictory approach that the abduction enhancement does apply when a defendant forces a victim from one room or area to another room or area within the same structure.[63] These opposing views have formed significantly dissimilar sentencing outcomes for similarly situated defendants.[64]

A. Circuits Finding that the Abduction Enhancement Does Not Apply when a Defendant Forces a Victim from One Room or Area to Another Room or Area Within the Same Structure

1. The Seventh Circuit

Beginning with the Seventh Circuit in 1992, the court began fleshing out case law on the appropriate selection of a sentencing enhancement to attach to the conviction of robbery by considering the lesser enhancement of physical restraint.[65] In an express rejection of an overly restrictive or too literal interpretation of the Guidelines § 1B1.1 cmt. n.1(K), the court held in *United States v. Doubet* that forcing a bank teller at gunpoint from the teller's counter to an

59. *Id.*
60. *See infra* Part IV.
61. *See infra* notes 95–100 and accompanying text.
62. *See infra* Section IV.A.
63. *See infra* Section IV.B.
64. *See infra* notes 65–105 and accompanying text.
65. *See* United States v. Doubet, 969 F.2d 341, 345–46 (7th Cir. 1992), *abrogated by* United States v. Herman, 930 F.3d 872 (7th Cir. 2019).

unlocked restroom in the back of the building constituted a physical restraint regardless of the fact that the victim had not been bound, tied, or locked up.[66]

In 1995, the Seventh Circuit further established that forced entry from a parking lot to the interior of a building satisfied the definitional element of abduction requiring forced movement to another location.[67] In *United States v. Davis*, the court held that a defendant who approached the branch supervisor of a credit union in the parking lot, who requested entry into the building prior to normal business hours but was denied, and who in turn forced the supervisor to enter the bank at gunpoint satisfied the definition of abduction for the purposes of the sentence enhancement.[68]

In 1997, the Seventh Circuit expanded its interpretation of forced movement between locations to include movement that occurs while in a vehicle.[69] *United States v. Gail* held that a defendant who forced victims at gunpoint to accompany him to various locations while the victims' remained in their vehicles satisfied the abduction enhancement.[70]

However, the Seventh Circuit wrestled with and ultimately rejected the leap that many other circuits have made in the 2010 decision of *United States v. Eubanks*.[71] The court noted that the line between the two-level enhancement of physical restraint and the four-level enhancement of abduction was a "bit hazy."[72] Ultimately, the court decided that "*transporting the victims from one room to another is simply not enough for abduction*. To find otherwise would virtually ensure that any movement of a victim from one room to another within the same building . . . would result in an abduction enhancement."[73]

66. *Id.* at 342, 346; *see also* United States v. Carter, 410 F.3d 942, 954 (7th Cir. 2005) (holding that a defendant that forced a bank teller at gunpoint from the vault to her drawer constituted a restraint, not abduction).
67. *See* United States v. Davis, 48 F.3d 277, 278–79 (7th Cir. 1995).
68. *See id.*; *see also* United States v. Taylor, 128 F.3d 1105, 1110–11 (7th Cir. 1997) (holding that a defendant that forced an employee from the parking lot into the bank at gunpoint constituted abduction).
69. *See* United States v. Gail, 116 F.3d 228, 230 (7th Cir. 1997).
70. *Id.*
71. *See* United States v. Eubanks, 593 F.3d 645, 653–54 (7th Cir. 2010).
72. *Id.* at 652.
73. *Id.* at 654 (emphasis added).

2. The Eleventh Circuit

Likewise in 2013, the Eleventh Circuit reached a similar conclusion regarding the abduction enhancement in *United States v. Whatley*.[74] The court held that a defendant who, in a series of bank robberies, forced bank employees to move from various locations within a branch to other locations within the same branch, such as the vault, did not satisfy the abduction enhancement.[75] In reaching this conclusion, the Eleventh Circuit followed its sister circuits in taking a case-by-case approach rather than adopting a categorical rule.[76] The court made an effort to avoid blurring the distinction between the physical restraint and abduction sentencing enhancements by determining that under the plain and ordinary meaning of the statute different rooms in a single structure should not be considered different locations.[77]

B. Circuits that Take the Position that Abduction Occurs when a Defendant Forces an Individual from One Room or Area to Another Room or Area Within the Same Structure

On the other end of the spectrum lie the Third, Fourth, Fifth, and Tenth Circuits, all of which agree that the abduction sentencing enhancement is satisfied when a defendant forces an individual from one room or area to another room or area within the same structure.[78]

1. The Third Circuit

In *United States v. Reynos*, the Third Circuit held that a defendant who forced employees of a pizza shop from the bathroom to the cash register at gunpoint satisfied the abduction definition.[79] *Reynos* articulated three elements needed to satisfy the abduction enhancement.[80] First, the defendant must have forced the victim to move from his or her original position.[81] Second, the victim must have accompanied the defendant to the new location.[82] Lastly, the relocation must have been made to further the commission of the

74. *See* United States v. Whatley, 719 F.3d 1206, 1221–22 (11th Cir. 2013).
75. *See id.* at 1208–12, 1222.
76. *Id.* at 1222.
77. *See id.* at 1222–23.
78. *See infra* Sections IV.B.1–4.
79. *See* United States v. Reynos, 680 F.3d 283, 285, 291 (3d Cir. 2012).
80. *See id.* at 286.
81. *Id.* at 286–87.
82. *Id.* at 287.

crime or facilitate the defendant's escape.[83] By articulating these elements, the Third Circuit adopted a three-part test that attempted to maintain a degree of flexibility regarding the term location to avoid being "unduly legalistic" or overly "punctilious."[84]

2. The Fifth Circuit

In contrast to the Third Circuit's articulation of specific elemental requirements for the abduction enhancement,[85] the Fourth and Fifth Circuits have adopted an even greater degree of flexibility when considering the meaning of location and a stronger allegiance to the case-by-case approach.[86] The Fifth Circuit initially interpreted the term location flexibly in the 1996 decision of *United States v. Hawkins* when it held that forced movement within a single parking lot at gunpoint constituted a change in location.[87] The court rejected a mechanical construction of the term "based on the presence or absence of doorways, lot lines, thresholds and the like."[88]

Over the course of the next twenty years, the Fifth Circuit did not depart from this flexible approach.[89] In *United States v. Washington*, the Fifth Circuit held that the movement of victims from room to room in a bank robbery constituted abduction.[90] Again in *United States v. Smith*, the court specifically stated,

> [W]e have consistently held that "[t]he forced movement of a bank employee from one room of a bank to another—so long as it is in aid of commission of the offense or to facilitate escape—is sufficient to support the enhancement given the flexible approach we have adopted in this circuit."[91]

Most recently in 2017, the Fifth Circuit expanded this stance to incorporate buildings other than bank branches.[92] In *United States v. Buck,* the court held that a defendant who forced phone store

83. *Id.*
84. *See id.* at 290–91.
85. *See supra* notes 80–83 and accompanying text.
86. *See infra* notes 87–98 and accompanying text.
87. *See* United States v. Hawkins, 87 F.3d 722, 724–25, 727–28 (5th Cir. 1996).
88. *See id.* at 727–28.
89. *See infra* notes 90–94 and accompanying text.
90. *See* United States v. Washington, 500 Fed. App'x 279, 285 (5th Cir. 2012).
91. United States v. Smith, 822 F.3d 755, 764 (5th Cir. 2016) (second alteration in original) (quoting *Washington*, 500 Fed. App'x at 285).
92. *See* United States v. Buck, 847 F.3d 267, 276–77 (5th Cir. 2017).

employees from the front of the store to the back of the store at gunpoint satisfied the abduction enhancement, stating "[w]e have repeatedly construed the 'abduction' enhancement as applicable when a victim is forced from one part of a building to another. We have also indicated that the term 'different location' should be interpreted with flexibility."[93] Therefore, the Fifth Circuit has demonstrated consistency in its commitment to broadly interpreting the sentencing guidelines as they pertain to the abduction enhancement.[94]

3. The Fourth Circuit

In remarkable parallel to the Fifth Circuit, the Fourth Circuit also adopted a flexible approach to the abduction sentencing enhancement.[95] In *United States v. Osborne*, the Fourth Circuit held that a defendant, who forced pharmacy employees from the secured pharmacy section to the front of a drugstore at knifepoint satisfied the definitional requirements of the abduction enhancement.[96] The Fourth Circuit largely relied on the Fifth Circuit's language in *Hawkins* to resolve the question of how to interpret the term location, holding that "movement within the confines of a single building can constitute movement 'to a different location.'"[97] Ultimately, the Fourth and Fifth Circuits have maintained the strongest pledge of all the circuits to search the facts of each case on an individualized basis with a willingness to interpret the definitional constraints of the enhancement liberally before determining if the abduction enhancement has been satisfied.[98]

4. The Tenth Circuit

Finally, the Tenth Circuit has rounded out the circuit split by recently aligning itself with the Third Circuit's approach.[99] In *United States v. Archuleta*, the Tenth Circuit confronted the heart of the division among the circuits in writing:[100]

93. *Id.*
94. *See id.*
95. *See* United States v. Osborne, 514 F.3d 377, 389–90 (4th Cir. 2008).
96. *Id.* at 381–82, 389–90.
97. *Id.* at 389–90 (quoting United States v. Hawkins, 87 F.3d 722, 727 (5th Cir. 1996)).
98. *See supra* notes 65–97 and accompanying text; *see also infra* notes 99–110 and accompanying text.
99. *See* United States v. Archuleta, 865 F.3d 1280, 1288 (10th Cir. 2017).
100. *See id.* at 1287.

> Considering all of these cases together, what appears to divide the circuits is a difference of opinion regarding the meaning of the term "location." As noted, § 1B1.1 defines the term "abducted" to mean "that a victim was forced to accompany an offender to a different location." Because the term "location" is not defined in the Guidelines, we must rely on the accepted rules of statutory construction in defining the term. One of the most basic of those rules is to accord statutory language its plain meaning. The term "location" is commonly defined to mean "[a] particular place or position" . . . and "[t]he specific place or position of a person or thing." . . . Although the term "place" is sometimes interpreted to refer to "[a] building or area used for a specific purpose or activity," . . . the term "position" appears to be more narrowly confined to the precise place or spot where a person or thing is located at a single moment in time.[101]

After exposing the crux of the interpretative issue leading to the circuit split, the court went on to explain its appreciation of the Third Circuit's close attention to the various definitional requirements in its development of a three-prong elemental test.[102] The court specifically clarified that the Third Circuit test did not require proof that victims were forced to relocate inside or outside of a structure but rather that the test only required proof that the victim was forced to move from one position to another.[103] In response to what the court considered a well-reasoned approach, the Tenth Circuit expressly adopted the three-prong test of *Reynos* in full.[104] Applying the test to the facts of *Archuleta*, the court held that a defendant who forced two bank employees to move from the lobby to the teller area to the vault within a single bank location at gunpoint satisfied the definitional requirements of the abduction enhancement.[105]

In summary, the circuits are split on the interpretation of the abduction enhancement attached to the underlying crime of robbery primarily due to a difference in the interpretation of the term location.[106] The various interpretations span a wide spectrum.[107] On

101. *Id.* (alterations in original) (citations omitted).
102. *See id.* at 1288.
103. *Id.*
104. *See id.*
105. *Id.* at 1288–89.
106. *See supra* notes 67–105 and accompanying text.

one end of the spectrum lies the interpretation that simply deems a singular structure to be a singular location.[108] A more neutral interpretation puts in place a three-prong test to allow both a degree of flexibility and a degree of uniformity while attempting to maintain integrity in the definitional requirements of the enhancement,[109] and finally, on the other end of the spectrum lies the entirely flexible, case-by-case approach shared by several circuits.[110]

V. THE STATED GOALS OF THE CRIMINAL SENTENCING GUIDELINES DEMAND A RESOLUTION OF THE CIRCUIT SPLIT ON THE ABDUCTION ENHANCEMENT

In considering the varied approaches taken by the federal circuit courts in the application of the abduction enhancement,[111] it is useful to examine the implications this lack of uniformity has on the stated goals of the federal sentencing guidelines.[112] Through this examination, it will become evident that without the emergence of a resolution in the circuit split the integrity of past congressional efforts to reform federal sentencing guidelines will be undermined.[113]

A. The Primary Goals of the Sentencing Reform Act of 1984

Congress had two primary, explicit purposes in the enactment of the 1984 Sentencing Act.[114] Firstly, Congress was concerned with "honesty in sentencing" and secondly, with the reduction of "unjustifiably wide sentencing disparity."[115] The first objective, honesty in sentencing, was accomplished in a straightforward, simplistic manner.[116] Congress abolished federal parole to ensure that a sentence given by a judge would be served in full, thereby making sentencing more predictable for judges, the offender, and the public.[117]

In contrast, the effort to reduce sentencing disparity through the creation of uniform punishments for identical crimes has proven to be

107. *See supra* notes 67−105 and accompanying text.
108. *See supra* Section IV.A.
109. *See supra* Section IV.B.1.
110. *See supra* Sections IV.B.2−4.
111. *See supra* Part IV.
112. *See infra* Section V.C.
113. *See infra* Sections V.A−C.
114. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4 (1988).
115. *Id.*
116. *See id.*
117. *See id.*

much more complex.[118] The aim of reducing sentencing disparity has suffered under the weight of another competing goal of the sentencing system: proportionality.[119] In an effort to avoid the inevitable inequities that arise when similar, but not identical, crimes are grouped and punished accordingly, various sentencing perspectives are used to ensure punishment is precisely proportional to the unique circumstances of each offense.[120] As more distinguishing factors are incorporated into a court's sentencing considerations, the goal of proportionality is further realized, but the predictability and uniformity of the sentencing system declines.[121]

B. The Implication of Sentencing Enhancements Generally on the Goals of Federal Sentencing

Most notably, sentencing enhancements often result in unwarranted sentencing disparity in an effort to serve the competing goal of proportionality.[122] This disparity originates with the charging discretion granted to prosecutors.[123] Prosecutors enjoy three options in the use of sentencing enhancements.[124] They may either "(1) charge sentencing enhancements in all possible cases; (2) refuse to charge sentencing enhancements; or (3) charge sentencing enhancements only in selected cases."[125] Although options one or two would significantly reduce sentencing disparity, it is apparent that Congress desired prosecutors to make case-by-case decisions on the appropriateness of enhancements by requiring prosecutorial action to trigger the enhancements.[126] As a result of prosecutorial discretion:

> Defendants with vastly different levels of culpability can receive essentially identical sentences. Defendants with essentially identical levels of culpability can receive vastly different sentences. And, even putting questions of

118. *See id.* at 13.
119. *See id.* at 4, 13.
120. *See id.* at 13.
121. *See id.*
122. *See* Simons, *supra* note 54, at 330−31.
123. *See id.* at 335. "Sentencing enhancements create a system where prosecutors effectively choose the sentence. . . . Moreover, because sentencing enhancements increase sentences so dramatically, they create a real risk that sentences will be unfairly disparate or unjustly severe." *Id.*
124. *Id.*
125. *Id.*
126. *See id.* at 335−36.

> uniformity and disparity aside, the indiscriminate use of sentencing enhancements can lead to extraordinarily harsh sentences that are grossly out of proportion to the defendant's conduct and difficult to justify under any principled theory of punishment.[127]

Therefore, sentencing enhancements in practice often hinder, rather than advance, the primary goal of the federal sentencing guidelines to reduce sentencing disparity and may even fail to advance secondary goals such as proportionality.[128]

C. The Implication of the Nonuniform Application of the Abduction Sentencing Enhancement on the Goals of Federal Sentencing

If the general use of sentencing enhancements frequently results in a lack of sentencing uniformity, it logically follows that the deeply divergent application of a particular sentencing enhancement by the federal circuits generates yet another substantial layer of sentencing disparity.[129] Therefore, while sentencing enhancements will likely remain a fundamental aspect of federal criminal sentencing without substantial reform,[130] it is imperative that, at a minimum, a uniform approach emerges from the federal circuits on the issue of the abduction enhancement in order to maximize sentencing uniformity among crimes of robbery.[131]

VI. THE DANGER OF DOUBLE COUNTING REQUIRES THE FEDERAL CIRCUIT SPLIT ON THE ABDUCTION ENHANCEMENT BE RESOLVED IN FAVOR OF FINDING MOVEMENT BETWEEN ROOMS IN A SINGULAR STRUCTURE TO BE INSUFFICIENT TO CONSTITUTE ABDUCTION

Although it is apparent that the stated goals of the federal criminal sentencing guidelines render necessary a resolution of the circuit split on the issue of the abduction enhancement, the issue of double counting assists in the articulation of the optimal resolution.[132]

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127. *Id.* at 341.
128. *See id.*
129. *See id.*
130. *See* Simons, *supra* note 54, at 329.
131. *See supra* notes 111−30 and accompanying text.
132. *See infra* Sections VI.A−C.

A. Double Counting Defined

Double counting refers to the application of "the Guidelines in a way that accounts for the same aspects of a defendant's conduct more than once to increase the severity of a sentence."[133] Predictably, defendants often argue that double punishment for the same conduct is impermissible.[134]

As was the case when examining the issue of sentencing goals, the concern of proportionality arises when considering double counting.[135] Often, various sentencing guidelines contain overlapping characteristics in response to the same underlying concern.[136] This can result in an accumulation of different offenses or enhancements, which amount to excessive punishments when viewed in light of the "real blameworthiness of a defendant's conduct."[137] In short, when double counting is employed, it results in disproportionately severe sentences because of stacked penalties for the same conduct.[138]

B. United States v. Eubanks

The 2010 Seventh Circuit decision in *United States v. Eubanks* provides a useful illustration of the danger of double counting.[139] In *Eubanks*, the defendant committed a string of robberies, and in each robbery the defendant forced store employees to move around to various parts of the store.[140] In one instance, the forced movement was from the front of the store to the back of the store, and in another instance, it was from the front of the store to a back room within the same building.[141] In both instances, the defendant used a gun to induce the movement.[142]

In *Eubanks*, the Seventh Circuit grappled with the appropriate enhancement to apply to the defendant's charge.[143] Under these

133. Carolyn Barth, Note, *Aggravated Assaults with Chairs Versus Guns: Impermissible Applied Double Counting Under the Sentencing Guidelines*, 99 MICH. L. REV. 183, 186 (2000).
134. *See id.*
135. Michael M. O'Hear, *The Myth of Uniformity*, 17 FED. SENT'G. REP. 249, 252 (2005).
136. *Id.*
137. *Id.*
138. *See id.*; *see also* Barth, *supra* note 133, at 186.
139. *See* United States v. Eubanks, 593 F.3d 645 (7th Cir. 2010).
140. *Id.* at 648.
141. *Id.*
142. *Id.*
143. *See id.* at 652.

facts, the court recognized that both the abduction enhancement, which is a four-point enhancement carrying more penalty, and the restraint enhancement, which is a two-point enhancement carrying less penalty, would be applicable.[144] The court further acknowledged, "the line between a restraint and an abduction is a bit hazy," noting that the restraint enhancement applies when a victim is tied, bound, or locked up while the abduction enhancement applies when the defendant forcibly removes the victim to another location.[145] While the Seventh Circuit did not ultimately choose to apply both enhancements, this case helps demonstrate a scenario where if the prosecutor was inclined to charge and the court was inclined to convict, so the same conduct could be punished under two separate sentencing enhancements.[146]

C. The Danger of Double Counting Requires a Clear Distinction Between the Abduction Enhancement and Other Similar Sentencing Enhancements

Undoubtedly, this scenario presented in the *Eubanks* case is not novel.[147] Many robberies entail the defendant forcefully directing victims to another part of a store or bank.[148] In each of these situations, double counting becomes a concern because the force used to persuade a victim to physically move may be punished under the restraint enhancement while the movement itself may be punished under the abduction enhancement.[149]

Although not all circuits permit double counting, many do under certain circumstances.[150] If the guideline provision at issue specifically prohibits double counting, all the federal circuits have determined it to be impermissible.[151] If, however, there is no explicit prohibition in the guideline provision, the circuits have adopted various approaches.[152] Some circuits will always allow double counting in the absence of an explicit prohibition.[153] Other circuits

144. *Id.*
145. *Id.*
146. *See id.* at 654.
147. *See id.* at 653 (stating this case is indistinguishable from other cases).
148. *See supra* Part IV.
149. *See Eubanks,* 593 F.3d at 652.
150. *See* Barth, *supra* note 133, at 186–87.
151. *Id.*
152. *See id.* at 187.
153. *See id.*

will always prohibit it regardless, and remaining circuits have not adopted a stance.[154]

Therefore, in cases that mirror *Eubanks* factually, it is imperative that the issue of double counting be addressed in order to ensure balanced and just sentencing outcomes.[155] While, it is clear that the abduction enhancement should be utilized where applicable, and it is equally clear that in order to achieve uniform and fair sentencing, it must not be utilized in conjunction with other enhancements seeking to punish the same characteristic, particularly the restraint enhancement.[156]

In summary, the sentencing enhancements must be interpreted and implemented uniformly to prevent overlapping enhancements that produce skewed, unfair, and widely diverse sentencing outcomes for abduction enhancements in robbery convictions.[157] If a victim is moved between distinct locations, such as from inside a structure to outside that structure, then separate conduct exists to justify the abduction enhancement.[158] However, if the defendant is merely forcing a victim to move to a separate part of the same structure for the purpose of restraining or controlling the victim during the course of the robbery, then no distinct conduct exists beyond what the restraint enhancement is meant to capture.[159]

VII. CONCLUSION

In conclusion, widespread nonuniformity in the application of the abduction enhancement creates unwarranted sentencing disparity.[160] This disparity in turn undermines the stated goals of the sentencing guidelines enacted by Congress in the Sentencing Reform Act of 1984.[161] Therefore, in order to maintain the integrity of extensive sentencing reform efforts, the lack of uniformity must be resolved.[162]

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154. *Id.*
155. *See* O'Hear, *supra* note 135, at 252 (stating that double counting can result in lesser crimes being enhanced in an unbalanced fashion). As an alternative example under the robbery guideline, the abduction and weaponry enhancements together enhance the crime ten levels while causing a life-threatening bodily injury only enhances it by six levels. *Id.*
156. *See supra* notes 139−49 and accompanying text.
157. *See* O'Hear, *supra* note 135, at 252.
158. *See supra* Part III.
159. *See supra* Part III.
160. *See supra* Part V.
161. *See supra* Part V.
162. *See supra* Part V.

Various approaches to the application of the abduction enhancement have emerged among the federal circuits,[163] but the issue of double counting illuminates the most appropriate outcome in the search for a unified approach.[164] To avoid the danger of double counting, the abduction enhancement must be distinguished from other similar enhancements.[165] Therefore, the circuit split should be resolved in favor of limiting the application of the abduction enhancement to situations involving the forced movement of victims by the defendant from, to, or in between separate and distinct structures.[166] This is the only consistent theory of application of the abduction enhancement that will decrease disparity of sentencing and increase predictability among cases of robbery involving abduction.[167]

163. *See supra* Part IV.
164. *See supra* Part VI.
165. *See supra* Section VI.C.
166. *See supra* Section VI.C.
167. *See supra* Part VI.