

DON'T GO DOWN THAT AISLE: CIRCUIT COURTS' PROBLEMATIC INTERPRETATION OF SENTENCING ENHANCEMENTS AND THE NEED FOR CHANGE

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I. INTRODUCTION

Defining behavior that constitutes movement seems mundane, but that determination becomes more complex when compounded with the term “different location.” Consider the following hypothetical: a bank robber enters a grocery store and orders an employee to accompany him from the pharmacy section to the front of the store to access a cash register. After stealing the contents of the register, the robber leaves the store and the employee behind and flees. When the robber is later captured, convicted, and sentenced, the duration of his sentence may hinge upon the court’s determination whether the robber’s commanded movement of the employee from one part of the store to another constituted movement to a “different location” and, thus, an abduction. Depending on what part of the country the crime occurred, the answer can be different. The issue confounding federal courts is the application of the abduction enhancement to robberies—a clear yet amendable test is needed to balance equitable sentencing with public safety.

To achieve uniformity and closer adherence to the United States Sentencing Commission (USSG or Sentencing Guidelines) regarding robberies, all district courts should adopt the following modified version of the Third Circuit’s *United States v. Reynos*¹ test: To apply the four-point abduction enhancement to a defendant’s sentence, there must be (1) use of actual or apparent force by the perpetrator to compel the victim to move, (2)

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1. 680 F.3d 283 (3rd Cir. 2012).

with the perpetrator accompanying the victim, (3) to a different location, (4) in furtherance of the crime of robbery or to facilitate the perpetrator's escape.

USSG section 2B3.1(b)(4)(A) states in pertinent part that a four-level enhancement should be imposed when “any person was abducted to facilitate commission of offense or to facilitate escape.”² The same section of the USSG defines “abduction” as forcing a victim to accompany the culprit to another location, with an illustration involving a bank robber removing a teller from the bank and into a getaway car.³ Although this depiction is akin to a stereotypical abduction in a robbery, courts have lackadaisically held that very different circumstances warrant the same enhancement.

This Note argues that all district courts should adopt a modified version of the Third Circuit's *Reynos* test to achieve uniformity and better adherence to sentencing guidelines. Part II explains the statutory interpretation of the USSG. Part III explores and identifies the various standards that different clusters of circuit courts have relied on to resolve this breed of cases. Part IV proposes a new standard, a clearer and widely encompassing test born from the approach the Third Circuit used in *Reynos*.⁴ The modified new test will address competing policy interests, resolve the ongoing circuit split in federal jurisprudence, and reinvigorate the Sentencing Guidelines' policy goals by maintaining clear divisions between sentence enhancements. Finally, Part V concludes.

II. SENTENCING GUIDELINE: PURPOSE AND PERFORMANCE

The Federal Sentencing Guidelines were created to serve as a framework to give judges “fair and consistent” sentencing ranges when sentencing individuals.⁵ Sentencing Guidelines are determined by two factors: (1) the defendant's conduct during the offense and (2) the defendant's prior criminal history.⁶ Sentencing enhancements are in the form of points that are added or deducted depending on the seriousness of

2. U.S. SENT'G COMM'N, GUIDELINES MANUAL §2B3.1(b)(4)(A) (Nov. 2023) [hereinafter USSG].

3. USSG §1B1.1, cmt. (n.1(A)).

4. *Reynos*, 680 F.3d at 286–87.

5. Janet Portman, *Federal Sentencing Guidelines*, CRIM. DEF. LAW. (Apr. 21, 2021), <https://www.criminaldefenselawyer.com/federal-sentencing-guidelines.cfm> [<https://perma.cc/347W-DC6V>].

6. *What Are Federal Sentencing Guidelines and How Will They Affect My Case?*, FRIEDMAN & NEMECEK (Apr. 17, 2019), <https://www.iannfriedman.com/blog/2019/april/what-are-federal-sentencing-guidelines-and-how-w/> [<https://perma.cc/3XL7-R47M>].

the crime and other mitigating factors.⁷ Each enhancement point added can lengthen the duration of a criminal defendant's incarceration, even beyond what the Sentencing Guidelines suggest.⁸ While these guidelines are advisory, they are still influential.⁹ However, these guidelines cause unfair and inconsistent results when different judges in various districts interpret ambiguous components of the guidelines, particularly with sentencing enhancements.

One such troublesome provision is section 2B3.1(b)(4)(A) of the USSG, which states that if someone was abducted to "facilitate commission of the offense or to facilitate escape," a severe four-point enhancement should be applied to the defendant's sentence.¹⁰ The confusion emanates from the federal courts' interpretation of "abduction." According to the Application Notes to an earlier section of the Sentencing Guidelines, "abduction" is defined as forcing a victim to accompany the defendant to a "different location."¹¹ The application notes attempt to elucidate by including the following example: "[A] bank robber's forcing a bank teller from the bank into a getaway car would constitute an abduction."¹² Unfortunately, real-world cases are not as "textbook" simple as the scenario provided by the Sentencing Guidelines. This resulted in a circuit split, and judges inconsistently interpreted and applied the abduction enhancement.

III. CIRCUIT COURTS' INTERPRETATIONS

A. Sixth, Seventh, and Eleventh Circuit Approach: Less Flexibility for Thresholds

The Sixth, Seventh, and Eleventh Circuits, on a case-by-case basis, have been less willing to apply the four-point abduction enhancement where the movement of individuals during the robbery occurred within the same building or structure.

The Sixth Circuit was recently faced with determining whether applying the abduction enhancement to a robbery was appropriate in *United States v. Hill*.¹³ In *Hill*, an armed robbery was carried out by two men at a cellular phone retailer. The defendant forced three employees and a

7. *See id.*

8. *See id.*

9. Portman, *supra* note 7.

10. USSG §2B3.1(b)(4)(A).

11. USSG §1B1.1, cmt. n.1(A).

12. *Id.*

13. 963 F.3d 528 (6th Cir. 2020).

customer to move from the sales floor to a back breakroom at gunpoint.¹⁴ After the victims were secured in the breakroom, the perpetrators robbed the store and escaped from a back exit.¹⁵ The *Hill* court first acknowledged the split in authority over whether movement from one room to another within the same structure constitutes “different locations.” To determine the intent of the Commission when the Sentencing Guidelines were crafted, the court began by referring to the dictionary definition of the phrase “different location.” This further perplexed the court.¹⁶ The court next examined the meaning of the phrase within the structure of the entire text of the Sentencing Guidelines and the definition attributed to the phrase by an ordinary English speaker.¹⁷ The *Hill* court ultimately concluded that “different location” should not include different areas within the same store; rather, it should refer to somewhere other than the initial robbery location.¹⁸

The Seventh Circuit in *United States v. Eubanks*¹⁹ decided against adopting a flexible approach to abduction enhancement. The court declined to apply the abduction enhancement to the sentence of a jewelry store robber who dragged an employee six feet from “the back room of the store to the front room,” causing “minor” injuries.²⁰ The court also warned that applying the enhancement in cases such as this would result in virtually any movement of individuals between rooms during a robbery “without any other aggravating circumstances,” triggering the abduction enhancement.²¹

The Eleventh Circuit addressed the abduction enhancement in *United States v. Whatley*,²² where the bank robber “herded” bank employees around but did so only within the confines of a single bank.²³ The court relied on the plain meaning of “different location” and decided that the defendant’s forcing employees to move within various parts of the same bank and never forcing them to leave the bank did not meet the ordinary meaning of “different location.”²⁴ Like its sister circuits, the *Whatley* court employed a case-by-case approach to determining the issue of the abduction enhancement.²⁵ After the court referenced different dictionary definitions

14. *Id.* at 530.

15. *Id.*

16. *Id.* at 532–33.

17. *Id.* at 533–38.

18. *Id.*

19. 593 F.3d 645 (7th Cir. 2010).

20. *Id.* at 648.

21. *Id.* at 654.

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

23. *Id.* at 1213.

24. *Id.* at 1222.

25. *See id.*

of “abducted,” it decided that an “ordinary observer” would not deem the defendant’s actions as constituting an abduction.²⁶

B. Third, Fourth, Fifth, and Tenth Circuits: Flexibility for Thresholds

The Third, Fourth, Fifth, and Tenth Circuit found that a “different location” could constitute movement within the same building sufficient for an abduction enhancement. These circuits either used a flexible case-by-case approach to the interpretation of “different location” or a three-part test to determine the applicability of the enhancement.²⁷ The willingness and ease with which the Tenth Circuit adopted and applied the Third Circuit’s test is a promising sign of the effectiveness of establishing a uniform test all federal circuit courts could utilize.

The Third Circuit in *Reynos* upheld an abduction enhancement for a perpetrator who kicked open a bathroom door and escorted pizza shop employees at gunpoint back to the register area.²⁸ The court laid out a test with three requirements to be met before a sentencing enhancement may be applied. *First*, the robbery victims must be forced to move from their current location under threat of force or actual use of force, where a reasonable person can infer they have no choice but to comply. *Second*, the victim must accompany the offender to the new location. *Third*, the movement must either further the crime or assist the offender with his escape.²⁹ The court used these three predicates to justify the four-point abduction enhancement the offender received for moving the employees from the bathroom to the register area within the same building.³⁰

The Fourth Circuit dealt with the abduction enhancement issue in *United States v. Osborne*.³¹ Relying on the contention that a victim does not need to be “moved a great distance” to apply the abduction enhancement, the *Osborne* court held that the perpetrator moving pharmacy employees from the pharmacy portion of a Walgreens to the front of the store constituted an abduction.³² The court adopted a sister circuit’s interpretation that “different location” requires a flexible case-by-case approach because it is susceptible to different interpretations under identical

26. *See id.* at 1222–23.

27. Compare *United States v. Buck*, 847 F.3d 267, 276–77 (5th Cir. 2017), with *United States v. Reynos*, 680 F.3d 283, 296 (3d Cir. 2012).

28. *Reynos*, 680 F.3d at 286.

29. *Id.* at 286–87.

30. *Id.* at 286.

31. 514 F.3d 377 (4th Cir. 2008).

32. *Id.* at 387–90.

facts.³³ The perpetrator infiltrating the separate pharmacy section of a Walgreens and shepherding its employees across a “maze of aisles” to the front of that same Walgreens store constituted an abduction under the flexible “different location” approach.³⁴

The Fifth Circuit addressed the abduction enhancement in *United States v. Hawkins*,³⁵ where the perpetrator was attempting to force the victims from one area of a parking lot, near a truck, to another part of the parking lot into a van.³⁶ The court, relying on *United States v. Elkins*,³⁷ concluded that the victims were abducted when the offender forced them to move to a different location, forty to fifty feet from the truck to the van.³⁸ The Fifth Circuit held that “different location” should be interpreted flexibly on a case-by-case basis.³⁹

The Fifth Circuit also decided *United States v. Buck*, relying on a similar approach as the Fourth Circuit in *Osborne*, again applying a flexible interpretation to the term “different location.”⁴⁰ The *Buck* court upheld the abduction enhancement for conspirators who forced employees to move from the front to the back of the T-Mobile store.⁴¹ Subsequently, the Fifth Circuit subscribed to the view that any different part within the same building constitutes a different location.⁴²

In *United States v. Archuleta*,⁴³ the Tenth Circuit approached the issue of abduction enhancements adopting the plain meaning of the statutory term “different location.”⁴⁴ The court then determined that the approach used by the *Reynos* court was the closest to the statutory term’s plain meaning and, therefore, adopted and applied the *Reynos* test.⁴⁵ In *Archuleta*, the

33. *Id.* at 389 (quoting *United States v. Hawkins*, 87 F.3d 722, 727–28 (5th Cir. 1996)).

34. *Osborne*, 514 F.3d at 389–90.

35. 87 F.3d 722, 727–28 (5th Cir. 1996).

36. *Id.* at 726.

37. 16 F.3d 952 (8th Cir. 1994) (finding that there was no doubt that the defendant abducted the victim, a bank teller, by forcing her at knifepoint from the bank lobby to the parking lot, which constituted a different location).

38. *Hawkins*, 87 F.3d at 726–28.

39. *Id.* at 725–28.

40. 847 F.3d 267, 276–77 (5th Cir. 2017).

41. *Id.* at 277.

42. Anthony Accurso, *Sixth Circuit Clarifies ‘Different Location’ in Robbery Guidelines Enhancement Commentary Requires More Than Herding Victims to Different Room*, Legal News (Oct. 15, 202), <https://www.criminallegalnews.org/news/2020/oct/15/sixth-circuit-clarifies-different-location-robbery-guidelines-enhancement-commentary-requires-more-herding-victims-different-room/> [https://perma.cc/G3M7-SPJ5].

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

44. *Id.* at 1287–89.

45. *Id.* at 1288–89.

abduction enhancement was applied to the sentence of a bank robber who escorted a bank manager and employee at gunpoint from the teller area to the vault area within the same bank.⁴⁶ Again, the Tenth Circuit decided that the movement of victims within rooms or sections of the same building constituted movement to a “different location.”⁴⁷

IV. A MODIFIED *REYNOS* TEST: SATISFYING POLICY GOALS AND FOSTERING EFFICIENCY

A. *Sentencing Guidelines’ Policy Goals*

The Sentencing Guidelines were created to facilitate a consistent and fair template for judges to refer to when sentencing criminal defendants.⁴⁸ The abduction enhancement during the commission of robberies levies a significant and severe four-point penalty enhancement to a defendant’s sentence.⁴⁹ With a significant enhancement to one’s sentence, courts must apply it consistently and fairly to defendants throughout the various jurisdictions in the United States. The most effective way to accomplish this goal is to establish a uniform test to limit ambiguity and clarify the factors the court should consider. This new test would apply the four-point abduction enhancement to a defendant’s sentence when there is a finding of (1) use of actual or apparent force by the perpetrator to compel the victim to move, (2) with the perpetrator accompanying the victim, (3) to a different location, (4) in furtherance of the crime of robbery or to facilitate his escape.

The circuit split among federal courts has been caused by the vague nature of the sentencing guidelines for robbery and its enhancements, evident by the various approaches many district courts have used to reach inconsistent results across jurisdictions.⁵⁰ These courts have attached

46. *Id.*

47. *See id.*

48. Portman, *supra* note 5.

49. USSG § 2B3.1(b)(4)(A).

50. *See supra* Part II; see also *Archuleta*, 865 F.3d at 1288–89 (finding that abduction requires proof that the victim was forced to move from their original place with such force that a reasonable person would not believe they could refuse movement within the same building, that the defendant accompany the victim to the new place, and that the relocation is in furtherance of the commission of the crime of the defendant’s escape); *United States v. Osborne*, 514 F.3d 377, 391 (4th Cir. 2008) (explaining that movement within the same building is sufficient for abduction, focusing on the fact that the defendant accompanied the victim from one part of the building to another area that was separated by a secured door); *United States v. Buck*, 847 F.3d 267, 276–77 (5th Cir. 2017) (finding that the forceful relocation of a victim from one part of a building to another is sufficient for abduction). *But see* *United States v. Eubanks*, 593 F.3d 645,

different meanings to the “ordinary” or “common” meaning of the phrase “different location.”⁵¹ Courts desperately need a uniform approach when dealing with stringent sentencing enhancements.

There are competing policy interests that need to be considered: maintaining public safety and the safety of robbery victims on the one hand and the desire for efficiency and uniformity in the federal criminal justice system on the other. Victim safety during a robbery is paramount, and robberies are often committed with force or threat of the use of force.⁵² Victims are frequently placed in situations where they are stripped of the liberty to refuse the demands of the robber.⁵³ They are often forced to move and accompany a perpetrator in order to facilitate the robbery or enable the criminal’s escape.⁵⁴ The Sentencing Guidelines aim to protect victims from prolonged periods of being alone with the perpetrator to avoid physical harm, including sexual assault.⁵⁵ For example, in *Hawkins*, one of the victims was dragged by his hair across the parking lot to a van; he was then shot in the stomach by a sawed-off shotgun when he refused the robber’s order to get into the van.⁵⁶ While this case is an extreme example

654 (7th Cir. 2010) (stating that movement from one room of the building to another room of the same building was not enough to constitute abduction given the small dimensions of the rooms); *United States v. Whatley*, 719 F.3d 1206 (11th Cir. 2013) (explaining that moving a victim from one part of a bank to another part of the same bank did not constitute abduction, analogizing abduction to kidnapping).

51. See *Archuleta*, 865 F.3d at 1288 (finding that movement to a new area within the same building constituted a “different location” within the definition of abduction); *Osborne*, 514 F.3d at 391 (stating that moving from a bank’s customer service area to its secured vault area may be sufficient to constitute abduction); *Buck*, 847 F.3d at 276–77 (explaining that movement from one part of a building to another part of the same building is sufficient for abduction). *But see Eubanks*, 593 F.3d at 654 (holding that moving a victim six feet from one room to another did not constitute abduction); *Whatley*, 719 F.3d at 1222–23 (explaining that movement from one part of a bank to another is not sufficient for abduction because an ordinary person would not have considered this conduct to be kidnapping).

52. *Fed. Robbery: Prevalence, Trends, and Factors in Sentencing*, U.S. SENT’G COMM’N (Aug. 2022), <https://www.uscc.gov/research/research-reports/federal-robbery-prevalence-trends-and-factors-sentencing> [<https://perma.cc/4P8X-8PPQ>].

53. See Richard T. Wright & Scott H. Decker, *Creating the Illusion of Impending Death*, HARRY FRANK GUGGENHEIM FOUND. (1997), <https://www.hfg.org/creating-the-illusion-of-impending-death-armed-robbers-in-action/> [<https://perma.cc/9D8N-855B>]; see also *Archuleta*, 865 F.3d at 1285 (explaining that to add a sentence enhancement for abduction, the victim must have been forced to move from their original position with such force that a reasonable person would believe that they did not have the “liberty to refuse”).

54. *United States v. Reynos*, 680 F.3d 283, 291 (3d Cir. 2012) (finding that the defendant forced the victim to move from the bathroom to the register area and used a victim to open the cash register at gunpoint, thus having forced the victim to a different location to facilitate the commission of the crime).

55. See *Osborne*, 514 F.3d at 387–90; see also USSG §1B1.1, cmt. n.1(A).

56. *United States v. Hawkins*, 87 F.3d 722, 726 (5th Cir. 1996).

of potential harm during robberies, the policy goal of public safety during robberies cannot easily be brushed aside.

However, the judicial system should strive to ensure consistency and uniformity across jurisdictions, and defendants in different parts of the nation should serve longer sentences than others who committed the same act. The Sentencing Guidelines aim to ensure that defendants are properly punished for the additional harm they cause during their crimes. For this reason, the Sentencing Guidelines include enhancements with different point penalties. In some robberies, offenders take individuals hostage, and the frequency of this conduct is reflected in a less stringent two-point penalty for physical restraint.⁵⁷ However, abductions are more serious than mere physical restraint, as they can be defined as kidnapping an individual during the commission of a robbery,⁵⁸ which is reflected by a more stringent four-point penalty.⁵⁹ Therefore, the lack of uniformity across federal jurisdictions, specifically by those courts employing the “flexible case-by-case” interpretation of the statutory term “different location,” has caused the line to be blurred about when to apply these distinct enhancements.⁶⁰ The competing policy interests of ensuring public safety against promoting and striving for uniformity and efficiency in the federal system need to be addressed using a test that gives credence to both but favors consistent sentencing. Judicial efficiency and sentencing uniformity should be slightly more favored because public safety is already addressed by the various enhancements in the Sentencing Guidelines, established to punish different harmful conduct done by criminals during the commission of their offenses.

B. *Reynos and Whatley as Templates*

The *Reynos* test is a useful launch point to tackling the issue of ambiguity and confusion caused by abduction enhancements. The *Reynos* test was crafted by the Third Circuit and was readily adopted and used by the Tenth Circuit.⁶¹ The original *Reynos* test had three elements: (1) the robbery victim being forced to move from their current location under threat of force; (2) the offender accompanying the victim to a different location; and (3) the purpose of the movement was to further the crime or

57. USSG §2B3.1(b)(4)(B); *United States v. Ziesel*, 38 F.4th 512, 517 (6th Cir. 2022).

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

59. U.S.S.G. §2B3.1(b)(4)(A).

60. *Whatley*, 719 F.3d at 1223.

61. *See Archuleta*, 865 F.3d 1288.

assist with a possible escape.⁶² Although the *Reynos* test was a step in the right direction, it yielded inaccurate results where movements within the same building were deemed abductions.⁶³

The *Reynos* court reached the wrong conclusion because its holding was inconsistent with the “ordinary meaning” the Eleventh Circuit gave to “different locations” when applying the same abduction enhancement in *Whatley*.⁶⁴ The *Whatley* court’s definition of “different location” came the closest to the term’s ordinary meaning and is more consistent with the example presented in the comment section of the Sentencing Guidelines.⁶⁵ The example presented in Comment 1 to section 1B1.1 of the Sentencing Guidelines involves the movement of victims beyond a building threshold into a vehicle outside the building; the Guidelines do not expound on a scenario where a victim is moved around within the same building.⁶⁶ Similar to the Sentencing Guidelines example, the *Whatley* court’s definition only encompasses movements extending beyond the threshold of a building and does not pertain to movements within rooms of the same building.⁶⁷

The *Whatley* court properly defined “different location” because its interpretation was consistent with the ordinary understanding of the term “abducted.”⁶⁸ The court referred to the Oxford English Dictionary, which defined “abducted” as “being led or carried away improperly, kidnapped.”⁶⁹ In *Whatley*, the perpetrator took the victims hostage by “herding” them around the building, but his actions did not constitute an abduction.⁷⁰ Although the culprit’s behavior fell short of the full four-point abduction enhancement, the court correctly ruled that it satisfied the separate two-point physical restraint enhancement.⁷¹ The court’s ruling in *Whatley* was

62. *Reynos*, 680 F.3d at 286–87.

63. *Id.*

64. Compare *Whatley*, 719 F.3d at 1222–23 (stating that movement from one part of a bank to another is not sufficient for abduction because an ordinary person would not have considered that conduct to be kidnapping), with *Reynos*, 680 F.3d at 291 (finding that the defendant abducted the victim when he forced the victim to move from the bathroom to the register area and used the victim to open the cash register at gunpoint to facilitate the commission of the crime).

65. Compare USSG §1B1.1, cmt. n.1(A) (providing the example that a “bank robber’s forcing a bank teller from the bank into a getaway car would constitute an abduction), with *Whatley*, 719 F.3d at 1222 (explaining that forcing a victim from one room or office in a bank to another room or office in the same bank does not constitute abduction).

66. USSG §1B1.1, cmt. n.1(A).

67. *Whatley*, 719 F.3d at 1222.

68. *Id.*

69. *Id.*

70. *Id.* at 1222–23.

71. *Id.* at 1223.

equitable and consistent with the intent of the Sentencing Commission because it duly enhanced the defendant's sentence for taking victims hostage during the robbery, but not by being overly stringent and applying the four-point abduction enhancement.

Although the *Whatley* court's approach and interpretation of the terms "abduction" and "different locations" yielded results consistent with the Sixth Circuit's in *Hill*, there are many other cases where diametrically opposed conclusions are reached. In *Hill*, the physical detainment of employees and customers in the backroom of the cellular phone store after movement from the sales floor was sufficient to incur the physical restraint enhancement but fell short of the abduction enhancement requirements.⁷² The parallel results yielded in *Hill* and *Whatley* promote consistency and uniformity in the federal judicial system. In contrast, the facts in *Reynos*, where the perpetrator broke a lock to the bathroom and forcibly moved employees to the cash register area of the store,⁷³ seem to be a minute variation of the facts in *Hill*,⁷⁴ but the *Reynos* court nonetheless determined that there was an abduction under those circumstances. An efficient judicial system must strive for uniformity and avoid the diametrically opposed results reached in *Reynos* and *Hill* for virtually identical conduct.

C. A New Test

All circuit courts should adopt a modified and fortified version of the *Reynos* test when deciding whether to levy abduction enhancements in robbery cases. The new test should consist of four elements: (1) the use of actual or apparent force by the perpetrator to get the victim to move, with the victim being aware he has no option to refuse;⁷⁵ (2) the perpetrator accompanying the victim;⁷⁶ (3) to a different location (relying on the *Whatley* court's ordinary meaning for different location);⁷⁷ and (4) done to consummate the crime of robbery being carried out or assisting in the perpetrator's escape.⁷⁸ While the test largely involves the same elements of

72. *United States v. Hill*, 963 F.3d 528, 530 (6th Cir. 2020).

73. *United States v. Reynos*, 680 F.3d 283, 291 (3d Cir. 2012).

74. *Compare Reynos*, 680 F.3d at 291 (finding that the defendant abducted the victim by forcing the victim to move from the bathroom to the register area because he forced the victim to a different location of the building to facilitate the commission of the crime by opening the cash register), *with Hill*, 963 F.3d at 536 (finding that the victims were not abducted when they were forced to move from the sales floor to the back room because the backroom of the same store was not at a "different location").

75. *Reynos*, 680 F.3d at 286–87.

76. *Id.* at 287.

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

78. *Reynos*, 680 F.3d at 287.

the original test, the modified version incorporates *Whatley*'s approach to the term "different location." A test format will be easily adopted and used by the other circuits, with the Third and Tenth Circuits being rough examples of courts applying a similar test before.⁷⁹ The Sentencing Guidelines themselves proffer an abduction illustration involving the movement of an individual from inside to the outside of a bank to help the robbers escape,⁸⁰ which is consistent with the logical conclusion resulting from the altered new test.

1. Use of Force

Under the first prong of the proposed new *Reynos* test, coercing the victim to move through actual or apparent force is a prerequisite for the application of the abduction enhancement. Even though the frequency of injuries caused by violence during robberies is not as high as one would imagine,⁸¹ the actual use of force is not solely determinative of the "use of force" element of the test. This element will be largely carried over from the first prong of the original *Reynos* tripartite test.⁸² Examples of actual physical force are exemplified by "shoving or dragging"⁸³ or striking a victim during a robbery to coerce compliance with the perpetrator's wishes and get them to move from their initial position. A case where physical force was used to facilitate the victim's movement was *Eubanks*, where a jewelry store employee was dragged about six feet across the store, causing "minor injuries."⁸⁴ However, "force" is not limited to only physical force; it also encompasses "physical, moral, and intellectual means" used to force a victim to acquiesce to the demands of his aggressor.⁸⁵ The victim must be in a position where a reasonable individual would not believe he is "at liberty to refuse."⁸⁶ In *Reynos* and *Archuleta*, brandishing a firearm and pointing it at the victims to strong-arm their compliance and expedite their movement sufficiently satisfied the test's force element.⁸⁷

79. *See id.*; *see also* United States v. Archuleta, 856 F.3d 1280 (10th Cir. 2017).

80. USSG §1B1.1, cmt. n.1(A).

81. *See Bank Crime Statistics Report*, FED. BUREAU INVESTIGATION (2019), <https://www.fbi.gov/file-repository/bank-crime-statistics-2019.pdf/view> (finding that injuries were caused in less than three percent of bank robberies).

82. *Reynos*, 680 F.3d at 287.

83. *Id.*

84. United States v. Eubanks, 593 F.3d 645, 648 (7th Cir. 2010).

85. *Reynos*, 680 F.3d at 287 (citing United States v. Cunningham, 201 F.3d 20, 28 (1st Cir. 2000) (holding that abduction can involve physical violence or threat of assault)).

86. United States v. Archuleta, 865 F.3d 1280, 1285 (12th Cir. 2017) (quoting *Reynos*, 680 F.3d at 286).

87. *Id.* at 1288; *see also Reynolds*, 680 F.3d at 288.

2. Accompaniment by Perpetrator

Under the test's second prong, the robber must accompany the victim from the victim's initial position to the new location. The "accompaniment" element of the new *Reynos* test also largely defers to and incorporates the approach used by the *Reynos* court.⁸⁸ In *Reynos*, the robber forced employees out of the bathroom and accompanied them to the cash register area of a pizza shop, where he pillaged the register, searched the person of one of the employees, and demanded whether there was more cash in the shop.⁸⁹ The behavior required to satisfy this element is relatively easy to identify: accompanying bank employees from the lobby and teller area to the vault area,⁹⁰ accompanying Walgreens employees from the pharmacy section to the front of the store,⁹¹ and accompanying T-Mobile employees from the front of the store to the back of the store.⁹² However, the accompaniment element is closely related to the next and most problematic element thus far, the "different location" element. At this point, the correlation between the proposed new test and the original *Reynos* test becomes untethered.

3. To a Different Location

Under the third prong of the modified *Reynos* test, the perpetrator must move the victim to a "different location." The term "different location" has been interpreted differently and has been given different meanings by various district and circuit courts. However, the *Whatley* court's definition and interpretation of the statutory term should be used under this test prong. Relying on the Oxford English Dictionary, the *Whatley* court equates its understanding of abduction as a kidnapping during a robbery.⁹³ This definition is also consistent with the Guidelines example where an individual is abducted because he is kidnapped after being removed from a bank.⁹⁴ The holding of the original *Reynos* court is inconsistent with this definition because the abduction enhancement would even apply to the forced movement of victims between aisles in a store.⁹⁵ "Kidnapping" is defined as "the act of leading someone away by force or fraudulent

88. *See Reynolds*, 680 F.3d at 288.

89. *Id.*

90. *Archuleta*, 865 F.3d at 1282.

91. *United States v. Osborne*, 514 F.3d 377, 391 (4th Cir. 2008).

92. *United States v. Buck*, 847 F.3d 267, 277 (5th Cir. 2017).

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

94. USSG §1B1.1, cmt. n.1(A).

95. *See* David J. Sandefer, *To Move or Not to Move? That Is the Metaphysical Question*, 85 U. CHI. L. REV. 1973, 1990 (2018).

persuasion,”⁹⁶ moving a victim between aisles in a store a few feet apart would not constitute “leading someone away.” An ordinary observer would not deem the forced movement of store employees between aisles to constitute an abduction or kidnapping, just as moving the bank employees around the bank, a greater distance than between aisles, was not an abduction or kidnapping in *Whatley*.⁹⁷

The *Whatley* approach for “different location” is more consistent with the requirements of the abduction enhancement and preserves an important distinction between the abduction and physical restraint enhancements.⁹⁸ If the *Reynos* approach was used to decide a fact pattern like *Hill*, the distinction between the different enhancements would be blurred, and the perpetrator’s sentence would have been unduly extended by receiving both enhancements. In *Hill*, the perpetrator moved hostages from the sales floor to the back breakroom and tied them with zip ties.⁹⁹ The court in *Hill* wisely applied only the physical restraint enhancement and not the abduction enhancement,¹⁰⁰ whereas *Reynos*’ holding would justify applying both enhancements to the perpetrator’s sentence. This is not to say that a perpetrator who robs a bank, for example, and ties his victims with zip ties can avoid the double enhancement if he later transports the victim to a getaway van outside the bank and drives off. Under this hypothetical, the perpetrator should be given both the four-point *and* the two-point enhancements to his sentence. The modified prong under the new *Reynos* test is more consistent with the terms of the Guidelines and avoids blurring the lines between the separate abduction and physical restraint enhancements.

4. To Consummate the Crime or Facilitate Escape

Under the fourth element of the modified *Reynos* test, the perpetrator must force the victim to move from his initial position to a different location to consummate the crime of robbery or to facilitate the perpetrator’s escape. This element was met in *Reynos* when the perpetrator forced pizza shop employees to move from their hiding spot in the bathroom to the cash register area so they could open the register for the perpetrator to steal.¹⁰¹ Most establishments, especially banks, have security measures that force perpetrators to coerce employees to cooperate, or else

96. *Whatley*, 719 F.3d at 1223.

97. *See id.*

98. *Id.*

99. *United States v. Hill*, 963 F.3d 528, 530 (6th Cir. 2020).

100. *See id.*

101. *United States v. Reynos*, 680 F.3d 283, 291 (3d Cir. 2012).

they would be unable to fulfill their criminal mandate.¹⁰² *Archuleta* is an example from the case law where the perpetrator had to move bank employees to the vault area to gain access to the vault to conduct the robbery.¹⁰³ In most cases, victims will be moved by perpetrators in order to carry out the robbery itself or be taken hostage and kidnapped in order to consummate their escape.¹⁰⁴

This prong is necessary and consistent with the Sentencing Guidelines' intention to protect victims from the risk of additional harm by being alone with the perpetrator or being kidnapped to facilitate one's escape.¹⁰⁵ As previously mentioned, the competing goals of public safety during robberies and the need for efficiency and uniformity in the judicial system must be addressed. While the third prong of the test, clarifying the definition of the statutory terms "different location" and "abduction," pertains to the latter goal, this element is tailored to address the former goal of ensuring public safety. Abductions have an increased penalty because they increase the chance of sexual assault and harm to the victim if the robber can isolate and move the victim around.¹⁰⁶ Although the Walgreens employees in *Osborne* were not moved to a "different location" under the definition used in the new test, the perpetrator's motive for moving them within the store in order to keep them close in case they needed to be used as hostages to facilitate an escape, was a factor in the *Osborne* court's application of the abduction enhancement.¹⁰⁷ The elevated risk of harm to the victims in *Osborne* was deemed to be the exact conduct the Sentencing Commission sought to punish by crafting the enhancements.¹⁰⁸ Ensuring public safety during robberies and the motive for abducting victims to facilitate an escape are paramount reasons to carry this prong over in its relative entirety from the original *Reynos* test.¹⁰⁹

V. CONCLUSION

For the sake of uniformity and closer adherence to the Sentencing Guidelines, all district courts should adopt the following modified version of the *Reynos* test: to apply the four-point abduction enhancement to a defendant's sentence, there must be (1) use of actual or apparent force by

102. See *United States v. Archuleta*, 865 F.3d 1280, 1289 (10th Cir. 2017).

103. *Id.* at 1282.

104. See *id.* at 1288.

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

106. *Id.* at 390 (citing *United States v. Saknikent*, 30 F.3d 1012, 1013 (8th Cir. 1994)).

107. *Id.* at 390.

108. See *id.*

109. See *United States v. Reynos*, 680 F.3d 283, 292 (3d Cir. 2012).

the perpetrator to compel the victim to move; (2) with the perpetrator accompanying the victim, (3) to a different location (with “different location” following the *Whatley* definition), (4) in furtherance of the crime of robbery or to facilitate the defendant’s escape. The Guidelines apportion varying point penalties through sentence enhancements for different acts committed during crimes it identifies as important to penalize. The modified *Reynos* test would not only ensure the lines between different enhancements for robberies would remain intact,¹¹⁰ but it would also resolve future confusion and inconsistent sentences by different circuit courts. The new *Reynos* test is a balanced approach to resolving the circuit split because it implements elements of a test used by one of the circuit courts, which placed little importance on property line thresholds and infuses it with the deduction and definition of a statutory term’s plain meaning of one of the circuit courts which does view movement over property lines as important. This new approach also produces a result society can stomach because it would never deem a victim’s movement from the toothbrush to the toothpaste section of a single store to constitute movement to a different location.¹¹¹

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

111. *Sandefur*, *supra* note 95, at 1990–91.