

# PRIMER



## SELECTED OFFENSES AGAINST THE PERSON (MURDER, ASSAULT, KIDNAPPING) AND VICAR

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*Prepared by the Office of General Counsel, U.S. Sentencing Commission*

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## I. INTRODUCTION

The purpose of this primer is to provide a general overview of federal statutes, sentencing guideline issues, and case law relating to the sentencing of selected crimes against the person as well as Violent Crimes in Aid of Racketeering (VICAR) offenses. As a preliminary matter, this primer discusses select statutes and guidelines for murder, assault, and kidnapping offenses. Given the similarity in conduct that can underlie these offenses, several of these guidelines share similar specific offense characteristics and case law that may be relevant across guidelines. This primer also discusses the statute and guideline for VICAR offenses. Because the VICAR guideline frequently calls for the application of the guideline for an underlying substantive offense (such as murder, assault, or kidnapping), its calculation requires understanding how to calculate the guidelines for those offenses as well. Finally, although this primer examines some of the issues and cases related to the sentencing of these offenses, it is not intended to be comprehensive or a substitute for independent research and primary authority.

## II. SELECTED OFFENSES AGAINST THE PERSON

This section discusses the statutory scheme, guidelines, and relevant case law pertaining to selected offenses from *Guidelines Manual*, Chapter Two, Part A (Offenses Against the Person): murder, assault, and kidnapping.

### A. MURDER

This section discusses the statutory scheme and guidelines for first and second degree murder offenses.

#### 1. *Murder: The Statutory Scheme*

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Section 1111, title 18, United States Code, proscribes two types of federal homicide: first degree murder and second degree murder. Section 1111 further establishes statutory penalties for murder and defines certain terms used in the statute.

##### a. **Subsection (a): First and second degree murder definitions**

Section 1111(a) provides that murder is “the unlawful killing of a human being with malice aforethought.”<sup>1</sup>

**First degree murder** is defined as “[e]very murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or

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<sup>1</sup> 18 U.S.C. § 1111(a).

committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery; or perpetrated as part of a pattern or practice of assault or torture against a child or children; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed.”<sup>2</sup>

**Second degree murder** is defined as “[a]ny other murder” not included in the above list.<sup>3</sup>

**b. Subsection (b): Statutory penalties<sup>4</sup>**

Section 1111(b) specifies that the federal murder statute applies to murder committed in the “special maritime and territorial jurisdiction of the United States.”<sup>5</sup> First degree murder is punishable by death or life imprisonment.<sup>6</sup> Second degree murder is punishable by imprisonment for any term of years or for life.<sup>7</sup>

**c. Subsection (c): Definitions**

Section 1111(c) defines several terms from subsection (a), including “serious bodily injury” and “torture.”<sup>8</sup>

“**Serious bodily injury**,” defined by reference to 18 U.S.C. § 1365, is “bodily injury” involving a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.<sup>9</sup>

“**Bodily injury**,” also defined in section 1365, is a cut, abrasion, bruise, burn, or disfigurement; physical pain; illness; impairment of the function of a bodily member, organ, or mental faculty; or any other injury to the body, no matter how temporary.<sup>10</sup>

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> The guideline range for every offense must follow the boundaries of any applicable statutory minimum or maximum sentences. *See* U.S. SENTENCING COMMISSION, *Guidelines Manual*, §5G1.1 (2018) [hereinafter USSG].

<sup>5</sup> 18 U.S.C. § 1111(b).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> 18 U.S.C. § 1111(c). Section 1111(c) also defines “assault,” “child,” “child abuse,” and “pattern or practice of assault or torture.” *Id.*

<sup>9</sup> *Id.* (citing 18 U.S.C. § 1365).

<sup>10</sup> *Id.*

## 2. **Murder: The Sentencing Guidelines**

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First and second degree murder offenses are referenced in Appendix A to the “Homicide” section of Chapter Two, Part A (Offenses Against the Person) of the *Guidelines Manual*.<sup>11</sup>

### a. **Section 2A1.1 (First Degree Murder)**

The guideline applicable to first degree murder is §2A1.1.<sup>12</sup> Section 2A1.1 provides a base offense level of 43.<sup>13</sup> The guideline has no specific offense characteristics but provides several application notes to assist in its application.

Application Note 1 explains when §2A1.1 should be applied.<sup>14</sup> First, §2A1.1 applies in cases where there is a premeditated killing.<sup>15</sup> Second, §2A1.1 applies where death resulted from the commission of certain felonies.<sup>16</sup> Because §2A1.1 applies to such felony murders, the killing itself need not be committed with malice aforethought.<sup>17</sup> Moreover, §2A1.1 may be applied as a reference from another guideline, such as kidnapping (§2A4.1(c)(1)) or VICAR (§2E1.3(a)(2)).<sup>18</sup> As a result, through a reference from another guideline, §2A1.1 may be applied based on a murder that the defendant was not charged

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<sup>11</sup> The applicable guideline for an offense is found by looking up the offense of conviction (or an offense stipulated to in a plea agreement, if such a stipulation exists) in Appendix A of the *Guidelines Manual*. See USSG §1B1.2 (Applicable Guidelines); USSG App. A.

<sup>12</sup> USSG §2A1.1.

<sup>13</sup> USSG §2A1.1(a). The base offense level, any specific offense characteristics, cross references in Chapter Two, and adjustments in Chapter Three, are to be determined on the basis of relevant conduct. See USSG §1B1.3 (Relevant Conduct). Thus, while the applicable Chapter Two offense guideline section is determined by looking up the statute of conviction in Appendix A, relevant conduct is important to the application of many subsections.

<sup>14</sup> USSG §2A1.1, comment. (n.1).

<sup>15</sup> *Id.* Although 18 U.S.C. § 1111(a) is the primary statutory provision corresponding to §2A1.1, the guideline also lists several other statutes implicating its application, such as 18 U.S.C. §§ 1841(a)(2)(C), 1992(a)(7), 2113(e), 2118(c)(2), 2199, 2282(A), 2291, 2332b(a)(1), 2340A, and 21 U.S.C. § 848(e). The full list of corresponding statutes is found in Appendix A (Statutory Index).

<sup>16</sup> *Id.*

<sup>17</sup> See *United States v. Pearson*, 203 F.3d 1243, 1275–76 (10th Cir. 2000) (holding that §2A1.1 was correctly applied where a victim was accidentally killed during the commission of a Hobbs Act robbery and explaining that “the commission of the robbery constitutes the ‘malice aforethought’ required for § 1111(a) felony murder.”).

<sup>18</sup> The guidelines for kidnapping and VICAR, including their cross references, are discussed below in this primer. See *infra* Parts II.C.2 and III.B.

with or convicted of as long as the murder is relevant conduct under §1B1.3.<sup>19</sup>

Application Note 2 discusses when a sentence of life imprisonment is appropriate and when a downward departure may be warranted.<sup>20</sup> For a premeditated killing, subsection (A) of Application Note 2 provides that a sentence of life imprisonment should be imposed (if a sentence of death is not imposed).<sup>21</sup> Furthermore, a downward departure would not be appropriate unless the government files a motion for downward departure based on the defendant's substantial assistance under 18 U.S.C. § 3553(e).<sup>22</sup>

For a felony murder where the defendant did not cause the death intentionally or knowingly, subsection (B) of Application Note 2 provides that a downward departure may be appropriate.<sup>23</sup> Whether a downward departure is warranted, and the extent of such a departure, is based on case-specific factors outlined in the Application Note, such as the defendant's state of mind, degree of risk inherent in the defendant's conduct, and the nature of the underlying felony offense.<sup>24</sup> Application Note 2 does, however, caution against imposing a departure below the minimum guideline sentence for second degree murder from §2A1.2 or a departure below what the guideline would be for the underlying felony offense in the absence of death.<sup>25</sup>

### **b. Section 2A1.2 (Second Degree Murder)**

The guideline applicable to second degree murder is §2A1.2.<sup>26</sup> Section 2A1.2(a) provides a base offense level of 38.<sup>27</sup> This guideline has no specific offense characteristics. Like the first degree murder guideline, the second degree murder base offense level may be applied through a reference or specific offense characteristic from another offense

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<sup>19</sup> See, e.g., *United States v. Jackson*, 782 F.3d 1006, 1013–14 (8th Cir. 2015) (holding that it did not violate the Fifth or Sixth Amendment to apply §2A1.1 from a §2D1.1 cross reference based on a murder that was proven only by a preponderance at sentencing); see also USSG §1B1.3.

<sup>20</sup> USSG §2A1.1, comment. (n.2).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* Under USSG §1B1.1, departures are applied after the grouping of multiple counts. USSG §1B1.1(a). However, one court has held that a departure applied under Application Note 2 applies to the murder guideline calculation prior to grouping any other counts of conviction in the calculation. See *United States v. Nguyen*, 255 F.3d 1335, 1345 (11th Cir. 2001) (rejecting defendant's argument that his downward departure under §2A1.1's Application Note should have applied only after grouping).

<sup>24</sup> USSG §2A1.1, comment. (n.2(B)).

<sup>25</sup> *Id.*

<sup>26</sup> USSG §2A1.2.

<sup>27</sup> USSG §2A1.2(a).

guideline.<sup>28</sup> Applying a reference to §2A1.2 is appropriate where relevant conduct to the underlying offense includes a killing with malice aforethought, which has been held to be established through evidence of extreme recklessness and wanton disregard for human life.<sup>29</sup>

Application Note 1 explains that an upward departure “may be” appropriate if the defendant’s conduct was “exceptionally heinous, cruel, brutal, or degrading to the victim,” citing to and mirroring similar language in the upward departure provision at §5K2.8 (Extreme Conduct).<sup>30</sup> The “extreme conduct” departure focuses on the defendant’s conduct, not the victim’s characteristics, and thus has been held to apply even when a victim is dead or unconscious when the defendant engages in the conduct.<sup>31</sup>

At least one circuit has rejected applying the departure based on conduct already considered by the guidelines in setting different offense levels for first degree and second degree murder.<sup>32</sup> Given that second degree murder is regarded as inherently heinous, whether a defendant’s conduct is outside the heartland of conduct contemplated by §2A1.2 may entail comparison with factual determinations made in other cases. Appellate courts afford deference to the district court’s departure decisions.<sup>33</sup>

## B. ASSAULT

This section discusses the statutory scheme and guidelines pertaining to assault offenses, including assault with intent to commit murder, aggravated assault, and assault.

<sup>28</sup> For example, §2A1.2 could be applied through guidelines for kidnapping, VICAR, transporting an illegal alien, or unlawful firearm possession. *See* USSG §§2A4.1(b)(7); 2A4.1(c); 2E1.3(a)(2); 2L1.1(c); 2K2.1(c)(1)(B).

<sup>29</sup> *United States v. Lemus-Gonzalez*, 563 F.3d 88, 92 (5th Cir. 2009) (applying the second degree murder guideline through §2L1.1(c)’s directive to apply “the appropriate homicide guideline” where the transportation of unlawful immigrants resulted in death); *United States v. Ashford*, 718 F.3d 377, 384 (4th Cir. 2013) (applying the second degree murder guideline through §2K2.1(c)’s directive to substitute the offense level for any criminal offense the defendant committed in connection with illegal possession of the firearm).

<sup>30</sup> USSG §2A1.2, comment. (n.1); USSG §5K2.8.

<sup>31</sup> *United States v. Hanson*, 264 F.3d 988, 998–99 (10th Cir. 2001) (holding that an “extreme conduct” upward departure under §5K2.8 may be applied to the defendant’s second degree murder guideline regardless of whether the victim was dead or unconscious when the extreme conduct occurred); *United States v. Quintero*, 21 F.3d 885, 893–94 (9th Cir. 1994) (affirming an “extreme conduct” departure where a defendant burned and decapitated the victim’s body after she had died).

<sup>32</sup> *Hanson*, 264 F.3d at 994–97 (rejecting that an “extreme conduct” departure could apply to a second degree murder based on the defendant’s premeditation and commission of the murder to perpetrate a robbery, which are central distinctions between the degrees of murder).

<sup>33</sup> *See United States v. Paster*, 173 F.3d 206, 217 (3d Cir. 1999) (holding a district court did not abuse its discretion in determining that the defendant’s conduct was more heinous than the heartland of second degree murders where the defendant stabbed the victim sixteen times with a butcher knife).

## **1. Assault: The Statutory Scheme**

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Section 113, title 18, United States Code, proscribes assault offenses committed within the maritime and territorial jurisdiction of the United States and provides their statutory penalties and relevant definitions.

### **a. Subsection (a): Statutory penalties**

Similar to the federal murder statute, section 113(a) provides that the federal assault statute applies to assaults committed within the “special maritime and territorial jurisdiction of the United States.”<sup>34</sup> Subsection (a) lists the statutory maximum terms of imprisonment for assault offenses of varying degrees of seriousness, including:

- (i) Assault with intent to commit murder (20-year maximum)
- (ii) Assault with intent to commit any felony except murder or sexual abuse offenses under §§ 2241 or 2242 (ten year maximum)
- (iii) Assault with a dangerous weapon with intent to do bodily harm (ten year maximum)
- (iv) Assault resulting in serious bodily injury (ten year maximum)
- (v) Assault of a spouse, intimate partner, or dating partner by strangling, suffocating, or attempting to do either (ten year maximum)
- (vi) Assault resulting in substantial bodily injury to a spouse, intimate partner, dating partner, or victim under the age of 16 years (five year maximum)
- (vii) Assault by striking, beating, or wounding (one year maximum)
- (viii) Simple assault (six month maximum);<sup>35</sup> simple assault with a victim under the age of 16 years (one year maximum)<sup>36</sup>

### **b. Subsection (b): Definitions**

Section 113(b) defines the following terms from subsection (a): “substantial bodily injury,” “serious bodily injury,” “spouse or intimate partner,” “dating partner,” “strangling,” and “suffocating.”<sup>37</sup>

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<sup>34</sup> 18 U.S.C. § 113(a). In addition to the general federal assault statute, several other statutes provide sentencing ranges for assaults on specific types of individuals. *E.g.*, 18 U.S.C. §§ 111 (assaults on certain federal officials), 112 (assaults on foreign officials), 115 (assaults on family members of federal officials).

<sup>35</sup> The guidelines do not apply to any count of conviction that is a Class B or C misdemeanor or an infraction. *See* USSG §§1B1.2(a), 1B1.9. A Class B misdemeanor is any offense for which the statutory maximum term of imprisonment is more than thirty days but less than six months. USSG §1B1.9, comment (n.1).

<sup>36</sup> 18 U.S.C. §113(a).

<sup>37</sup> As explained in the next section, these terms are similarly used in the specific offense characteristics of the assault guidelines. *See infra* Part II.B.2.

**“Substantial bodily injury”** is bodily injury which involves: (a) a temporary but substantial disfigurement; or (b) a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty.<sup>38</sup>

**“Serious bodily injury”** is defined identically to its definition in the federal murder statute, by reference to section 1365: bodily injury involving a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.<sup>39</sup>

By reference to 18 U.S.C. § 2266, **“spouse or intimate partner”** includes a spouse, former spouse, person who shares a child in common, person who cohabits or has cohabited as a spouse with the abuser, or person who has been in a social relationship of a romantic or intimate nature with the abuser.<sup>40</sup>

**“Dating partner”** is a person who has been in a social relationship of a romantic or intimate nature with the abuser, based on the length and type of relationship and frequency of interaction.<sup>41</sup>

**“Strangling”** is intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of a person by applying pressure to the throat or neck, regardless of resulting injury or intent to injure or kill.<sup>42</sup>

**“Suffocating”** is intentionally, knowingly, or recklessly impeding the normal breathing of a person by covering the mouth or nose, regardless of resulting injury or intent to injure or kill.<sup>43</sup>

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<sup>38</sup> 18 U.S.C. § 113(b).

<sup>39</sup> *Id.* (citing 18 U.S.C. § 1365).

<sup>40</sup> *Id.* (citing 18 U.S.C. § 2266). An “intimate partner” is evaluated based on the length of the relationship, the type of relationship, and the frequency of interaction between the individuals involved in the relationship. 18 U.S.C. § 2266(7)(A)(i)(II). It has been held to apply to non-cohabiting individuals who had been romantically involved for several years, had plans to get married, and visited each other every weekend. *United States v. LaVictor*, 848 F.3d 428 (6th Cir. 2017) (interpreting “intimate partner” in § 2266 in the context of a federal domestic assault offense).

<sup>41</sup> 18 U.S.C. § 113(b) (citing 18 U.S.C. § 2266).

<sup>42</sup> *Id.*; *see United States v. Vasquez*, 729 F. App’x 383 (6th Cir. 2018) (holding evidence was sufficient to convict the defendant of strangulation element under 18 U.S.C. § 113 where victim testified that the defendant had both hands around her neck, which affected her breathing).

<sup>43</sup> 18 U.S.C. § 113(b).

## **2. Assault: The Sentencing Guidelines**

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Assault with intent to commit murder, aggravated assault, and assault offenses are referenced in Appendix A to the “Assault” section of Chapter Two, Part A (Offenses Against the Person) of the *Guidelines Manual*.<sup>44</sup>

### **a. Section 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder)**

The guideline applicable to assault with the intent to commit murder and attempted murder is §2A2.1, which includes, among others, offenses under 18 U.S.C. §§ 113(a)(1) (assault with intent to commit murder) and 1113 (attempt to commit murder).

#### *i. Determining the base offense level*

Section 2A2.1(a) provides a base offense level of 33 if the object of the assault offense would have constituted first degree murder.<sup>45</sup> Otherwise, the base offense level is 27.<sup>46</sup>

#### *ii. Specific offense characteristics*

Section 2A2.1(b) provides two possible enhancements that may increase the total offense level.

#### **(a) Bodily injury enhancement**

Section 2A2.1(b)(1) provides a tiered enhancement based on the degree of injury sustained by the victim: (A) a 4-level enhancement if the victim sustained permanent or life-threatening bodily injury; (B) a 2-level enhancement if the victim sustained serious bodily injury; and (C) a 3-level enhancement if the degree of injury is between (A) and (B).<sup>47</sup>

Application Note 1 explains that the definitions of “permanent or life-threatening bodily injury” and “serious bodily injury” for purposes of the enhancement have the same meaning given to those terms in the Commentary to §1B1.1.<sup>48</sup>

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<sup>44</sup> See USSG App. A.

<sup>45</sup> USSG §2A2.1(a)(1).

<sup>46</sup> USSG §2A2.1(a)(2).

<sup>47</sup> USSG §2A2.1(b)(1).

<sup>48</sup> USSG §1B1.1, comment. (n.1). These definitions apply to other offenses detailed in this primer, including aggravated and simple assault, as well as kidnapping. Thus, case law interpreting these terms for any of the offenses in this primer are relevant to all the offenses, although the facts of cases within the same offense guideline may be more comparable and more readily analogized to each other.

**Permanent or life-threatening bodily injury** under subsection (A) is defined as “injury involving a substantial risk of death; loss or substantial impairment of the function of a bodily member, organ, or mental faculty that is likely to be permanent; or an obvious disfigurement that is likely to be permanent.”<sup>49</sup>

**Serious bodily injury** under subsection (B) is an “injury involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation.”<sup>50</sup> Serious bodily injury also includes offenses involving “conduct constituting criminal sexual abuse under 18 U.S.C. §§ 2241 or 2242 or any similar offense under state law.”<sup>51</sup> As discussed below, distinguishing the proper level of enhancement is a highly fact-specific inquiry.

Courts have held permanent or life-threatening bodily injury to be a disjunctive term that encompasses injuries that are temporary but life-threatening<sup>52</sup> or permanent and “substantial” but not necessarily “terribly severe.”<sup>53</sup> The distinction between “life-threatening” and “permanent” is well-illustrated by the application of the subsection (A) enhancement to a victim’s permanent facial scars.<sup>54</sup>

Serious bodily harm, by contrast, has been interpreted to encompass severe “but temporary or treatable injuries.”<sup>55</sup> The line between temporary and permanent does not, however, rest on hypothetical treatability. In considering whether to apply subsection (B) versus (A), a district court should rule based on the victim’s current medical information,

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<sup>49</sup> *Id.* The commentary provides the example of a kidnapping where there is a life-threatening denial of food or medical care. *Id.*

<sup>50</sup> *Id.* This differs from the statutory definition of “serious bodily injury” in 18 U.S.C. § 1365, which the federal assault statute incorporates. *See* 18 U.S.C. § 113. The statutory definition incorporates aspects of the guideline’s definition of “serious bodily injury” and “permanent or life-threatening bodily injury” as there is not a separate term for the latter. *See* 18 U.S.C. § 1365 (including as “serious bodily injury” bodily injury that carries a substantial risk of death); *United States v. Roy*, 408 F.3d 484, 494 (8th Cir. 2005) (explaining the difference between the statutory and guideline definitions of “serious bodily injury”).

<sup>51</sup> USSG §1B1.1, comment. (n.1).

<sup>52</sup> For example, an injury can be temporarily life-threatening but have no long-term physical effects on a victim. *See United States v. Sarratt*, 750 F. App’x 213 (4th Cir. 2019) (applying §2A2.1(b)(1)(A) where a victim was shot in the abdomen and successfully treated at a hospital).

<sup>53</sup> *See United States v. Price*, 149 F.3d 352, 354 (5th Cir. 1998) (affirming that “permanent or life-threatening bodily injury” under the aggravated assault guideline applied where there was 15 to 25% permanent loss of hand function).

<sup>54</sup> *See United States v. Phillips*, 239 F.3d 829, 848 (7th Cir. 2001) (noting in an aggravated assault case that the enhancement applied to facial scars that were a permanent disfigurement, even though they were less serious than impairments in other cases).

<sup>55</sup> *Price*, 149 F.3d at 354.

instead of speculating about future improvements. “[U]ncertainty does not preclude a finding of permanence.”<sup>56</sup> Applying subsection (C) for injuries falling between (B) and (A) may require even finer line-drawing decisions for district courts, though such decisions will be afforded the deference of clear error review.<sup>57</sup>

Courts applying the bodily injury enhancement to mental or emotional injuries have interpreted “bodily injury” to include harm to a victim’s mental processes and emotional well-being.<sup>58</sup> Since every murder attempt may inflict some psychological harm, courts must be careful to distinguish between different levels of mental harm—here, the language of the subsection (A) enhancement applies only if the impairment of the mental faculty is “likely to be permanent.”<sup>59</sup>

Based on the language of the guideline, several circuits have held that whether the bodily injury enhancement applies depends solely on the *results* of the criminal act, not on the defendant’s conduct, circumstances surrounding the crime, or nature of the crime attempted.<sup>60</sup> However, one circuit has suggested that life-threatening *circumstances* may warrant a “permanent or life-threatening bodily injury” enhancement even if the resulting physical injuries are not life-threatening or permanent.<sup>61</sup>

Application Note 2 provides that an upward departure may be warranted if the offense created a substantial risk of death or serious bodily injury to more than one

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<sup>56</sup> United States v. Webster, 500 F.3d 606, 608 (7th Cir. 2007) (“If an impairment has not been corrected by the time of sentencing, and will last for life unless surgically corrected in the future, then it should be treated as “permanent” under the Guidelines unless future correction would be a straightforward procedure”).

<sup>57</sup> United States v. Roy, 408 F.3d 484, 496 (8th Cir. 2005) (holding that it was not clear error to decide that the victim’s injuries were more serious than “serious bodily injury” but less serious than “permanent or life-threatening” where the defendant stabbed the victim’s abdominal wall which was “potentially life-threatening” and caused substantial immediate pain and left an abdominal scar).

<sup>58</sup> See United States v. Spinelli, 352 F.3d 48, 58 (2d Cir. 2003).

<sup>59</sup> *Id.* at 59 (holding there were insufficient factual findings to find impairment of a mental faculty and apply the §2A2.1(b)(1) enhancement where a victim was shot at several times and forced to enter a witness protection program, but remanding for additional inquiry into the nature, severity, and likely duration of her psychological injuries).

<sup>60</sup> See *id.* at 57; United States v. Dotson, 109 F.3d 486, 489 (8th Cir. 1997); United States v. Perkins, 89 F.3d 303, 308 (6th Cir. 1996). The Second Circuit noted that attempted murders are, by definition, life-threatening, so considering the defendant’s conduct or the intended result of his actions would subject every attempted murder to the 4-level enhancement, regardless of the injuries actually suffered by the victim. *Spinelli*, 352 F.3d at 57.

<sup>61</sup> United States v. Morgan, 238 F.3d 1180, 1188–89 (9th Cir. 2001) (stating the enhancement may apply where a victim’s injuries from being beaten were not severe on their own but the *circumstances* surrounding the injuries—leaving the victim in a remote area on a cold night—may have threatened his life).

person.<sup>62</sup>

### (b) Pecuniary value enhancement

Section 2A2.1(b)(2) provides a 4-level enhancement where the offense involved the offer or receipt of anything of pecuniary value in exchange for undertaking the murder.<sup>63</sup> This enhancement may be applied to murder-for-hire cases, such as a defendant who offers money for someone else to murder a victim<sup>64</sup> or a defendant who is paid money to murder someone.<sup>65</sup>

### b. Section 2A2.2 (Aggravated Assault)

The guideline applicable to aggravated assault, §2A2.2, covers, among others, offenses under several subsections of the federal assault statute: 18 U.S.C. § 113: (a)(2) (assault with intent to commit any felony except murder); (a)(3) (assault with a dangerous weapon with intent to do bodily harm); (a)(6) (assault resulting in serious bodily injury); and (a)(8) (assault of a spouse, intimate partner, or dating partner by strangling or suffocating).<sup>66</sup> It also covers assault offenses against specific individuals, such as assault against certain domestic or foreign officials under 18 U.S.C. §§ 111 and 112.<sup>67</sup>

The guideline commentary defines “aggravated assault” as a “felonious assault that involved (A) a dangerous weapon with intent to cause bodily injury (*i.e.*, not merely to frighten) with that weapon; (B) serious bodily injury; (C) strangling, suffocating, or attempting to strangle or suffocate; or (D) an intent to commit another felony.”<sup>68</sup> Thus, this guideline covers assaults that are more serious than other assaults because of the presence of an aggravating factor.<sup>69</sup> It also covers attempted manslaughter and assault with intent to commit manslaughter.<sup>70</sup>

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<sup>62</sup> See USSG §2A2.1, comment. (n.2).

<sup>63</sup> USSG §2A2.1(b)(2). This is similar to the §2A2.2(b)(5) enhancement in the aggravated assault guideline which covers assaults motivated by “payment or offer of money or other thing of value.” See *infra* Section II.B.2.b.

<sup>64</sup> United States v. Ivory, 532 F.3d 1095, 1104 (10th Cir. 2008).

<sup>65</sup> United States v. Castillo-Chavez, 555 F. App'x 389, 401 (5th Cir. 2014).

<sup>66</sup> USSG §2A2.2.

<sup>67</sup> *Id.*

<sup>68</sup> USSG §2A2.2, comment. (n.1).

<sup>69</sup> USSG §2A2.2, comment. (backg'd.).

<sup>70</sup> *Id.*

*i. Determining the base offense level*

Section 2A2.2(a) provides a base offense level of 14.<sup>71</sup>

*ii. Specific offense characteristics*

Section 2A2.2(b) provides seven possible enhancements that may increase the total offense level.<sup>72</sup>

*(a) More than minimal planning enhancement*

Section 2A2.2(b)(1) provides a 2-level enhancement if the assault involved “more than minimal planning.”<sup>73</sup>

Application Note 2 states that subsection (b)(1) applies where there is “more planning than is typical for commission of the offense in a simple form” or where “significant affirmative steps were taken to conceal the offense” (other than obstruction-of-justice conduct to which §3C1.1 applies).<sup>74</sup> To illustrate, Application Note 2 provides that while a defendant’s waiting to commit the offense when no witnesses are present would not qualify for the enhancement, his luring of the victim to a specific location or wearing of a ski mask to prevent identification would.<sup>75</sup>

In drawing the line between planning that is and is not “more than minimal,” courts focus on whether there was planning, coordination, or concealment<sup>76</sup> or whether the offense was committed on the spur of the moment.<sup>77</sup> However, the scheme need not be particularly sophisticated or elaborate to qualify.<sup>78</sup>

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<sup>71</sup> USSG §2A2.2(a).

<sup>72</sup> USSG §2A2.2(b).

<sup>73</sup> USSG §2A2.2(b)(1).

<sup>74</sup> USSG §2A2.2, comment. (n.2).

<sup>75</sup> *Id.*

<sup>76</sup> *United States v. Foster*, 898 F.2d 25, 27 (4th Cir. 1990) (applying the §2A2.2(b)(1) enhancement where the defendant bought materials to make a bomb, assembled the bomb, placed it in the victim’s car, and concealed the bomb with clothes).

<sup>77</sup> In *United States v. Tapia*, 59 F.3d 1137 (11th Cir. 1995), the district court had applied the §2A2.2(b)(1) enhancement where the defendant called someone to ascertain whether another inmate would be testifying against him and then attacked the inmate. The Eleventh Circuit reversed, noting that the phone call was made immediately before the attack, that the defendant had not taken steps to have the inmate placed in the cell with him, and that there was no evidence of concealment. *Id.* at 1144.

<sup>78</sup> *United States v. Simpson*, 760 F. App’x 931, 935 (11th Cir. 2019) (applying the §2A2.2(b)(1) enhancement where there was coordination between the two co-defendants to lure the victim to an apartment, even though the scheme was “not particularly ‘sophisticated’ or ‘elaborate’ ”).

(b) Dangerous weapon enhancement

Section 2A2.2(b)(2) provides a graduated enhancement based on the involvement of a weapon in the assault: (A) 5 levels if a firearm was discharged, (B) 4 levels if a dangerous weapon (including a firearm) was otherwise used, (C) 3 levels if a dangerous weapon (including a firearm) was brandished or its use was threatened.<sup>79</sup> Application Note 3 states that both the base offense level and subsection (b)(2) properly apply when a case involves a dangerous weapon with the intent to cause bodily injury.<sup>80</sup> In such a case, the base offense level and the weapon enhancement account for different aspects of the offense even if they are based on the same conduct regarding the weapon.<sup>81</sup>

Application Note 1 of §1B1.1 defines the terms “firearm,”<sup>82</sup> “otherwise used,”<sup>83</sup> “brandished,”<sup>84</sup> and “dangerous weapon.” Courts have distinguished “otherwise used” and “brandished” by explaining that a person may “brandish” a weapon to alert the victim that he has the general ability to do violence and that violence is immediately available, while specifically pointing the weapon at the body of the victim is to “otherwise use” it.<sup>85</sup>

“**Dangerous weapon**” is defined as: (i) an instrument capable of inflicting death or serious bodily injury; or (ii) an object that is not an instrument capable of inflicting death or serious bodily injury but (I) closely resembles such an instrument; or (II) was used in a

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<sup>79</sup> USSG §2A2.2(b)(2).

<sup>80</sup> USSG §2A2.2, comment. (n.3).

<sup>81</sup> USSG §2A2.2, comment. (backg’d.). In adding Application Note 3, the Sentencing Commission resolved a circuit split over whether the enhancement for use of a dangerous weapon during an aggravated assault that was only aggravated due to that same weapon constituted impermissible double-counting. *See* USSG App. C, amend. 614 (effective Nov. 1, 2001). Amendment 614 clarified that it is permissible to apply both enhancements. *See also* United States v. Duke, 870 F.3d 397 (6th Cir. 2017) (providing overview of the history of the dangerous weapon enhancement’s double counting issue).

<sup>82</sup> “Firearm” means: (i) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (ii) the frame or receiver of any such weapon; (iii) any firearm muffler or silencer; or (iv) any destructive device. USSG §1B1.1, comment. (n.1).

<sup>83</sup> “Otherwise used” means the conduct did not amount to the discharge of a firearm but was more than brandishing, displaying, or possessing a firearm or other dangerous weapon. *Id.*

<sup>84</sup> “Brandished” means all or part of the weapon was displayed, or the weapon’s presence was otherwise made known to another person, to intimidate the person, regardless of whether the weapon was directly visible to that person (though the weapon must be present). *Id.*

<sup>85</sup> *See, e.g.,* United States v. Bell, 947 F.3d 49, 61–62 (3d Cir. 2020) (holding the defendant “otherwise used” a dangerous weapon where he pointed a toy gun at the victim, ordered him to the ground and struck him with it, because those actions go beyond brandishing) (citing United States v. Johnson, 199 F.3d 123, 127 (3d Cir. 1999)); United States v. Williams, 520 F.3d 414, 423 (5th Cir. 2008) (holding the defendant “otherwise used” a shank during an assault when he pulled it out, pointed it, and swung it at the victim, and thus did more than just display the shank or make its presence known).

manner that created the impression that it was such an instrument.<sup>86</sup> An object need not *actually* cause serious bodily injury to be “capable of” doing so.<sup>87</sup>

The definition of dangerous weapon can include an instrument not ordinarily used as a weapon, such as a car, chair, or ice pick, as long as it was involved in the offense with the intent to commit bodily injury.<sup>88</sup> Thus, courts have held shoes,<sup>89</sup> a plastic water pitcher,<sup>90</sup> and firewood<sup>91</sup> to count as dangerous weapons where they were employed with the intent to cause bodily injury. Indeed, courts have found that nearly anything can count as a dangerous weapon under the proper circumstances.<sup>92</sup>

The intent to injure requirement ensures that the object is being used *in its capacity* as a weapon.<sup>93</sup> Whether there was intent to cause bodily injury is measured objectively from the reasonable victim’s perspective.<sup>94</sup> Appellate courts deferentially review a lower court’s finding that a defendant acted with intent to cause bodily injury for purposes of

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<sup>86</sup> USSG §1B1.1, comment. (n.1). Guidelines for other offenses also cite to the same §1B1.1 definition of “dangerous weapon” and thus case law interpreting its use in those contexts is relevant to other guidelines. *See, e.g.*, USSG §2B3.1(b)(2)(E) (robbery with a dangerous weapon).

<sup>87</sup> *United States v. Tolbert*, 668 F.3d 798, 801–03 (6th Cir. 2012) (holding that it was not conjecture to conclude that an object was capable of causing serious bodily harm and qualified as a “dangerous weapon” even though no such harm actually occurred).

<sup>88</sup> USSG §2A2.2, comment. (n.1).

<sup>89</sup> *Compare* *United States v. Velasco*, 855 F.3d 691 (5th Cir. 2017) (affirming the enhancement where a defendant stomped on a victim’s head with shoes); *United States v. Serrata*, 425 F.3d 886, 910 (10th Cir. 2005) (holding the same), *with* *United States v. Nunez-Granados*, 546 F. App’x 483 (5th Cir. 2013) (holding the enhancement did not apply because the defendant kicked the victim with the intent to escape, not to cause injury).

<sup>90</sup> *Tolbert*, 668 F.3d at 803 (holding that a water pitcher was a “dangerous weapon” based on its characteristics like hardness, size, shape, and weight; the circumstances in which it was used to strike the victim’s head; and the common experience that the object was capable of inflicting harm, even though no such harm actually resulted).

<sup>91</sup> *United States v. Tisnolthtos*, 115 F.3d 759, 763 (10th Cir. 1997).

<sup>92</sup> *See* *United States v. Dayea*, 32 F.3d 1377, 1379 (9th Cir. 1994) (noting that objects as disparate as walking sticks, leather straps, rakes, sneakers, rubber boots, dogs, rings, concrete curbs, clothes irons, and stink bombs can count as dangerous weapons).

<sup>93</sup> *Id.* at 1380 (holding the enhancement did not apply where an intoxicated defendant caused a drunk-driving accident with his car without intent to injure). The Ninth Circuit expressed concern that with only a capability requirement but no intent-to-injure requirement, the enhancement may also apply to a situation where a defendant merely used a car to drive to a place where he assaults the victim with his hands through a separate means—there, his hands. *Id.*

<sup>94</sup> *Velasco*, 855 F.3d at 694 (holding that it was reasonable from the victim’s perspective to conclude the defendant intended to do him serious bodily harm in kicking his head).

§2A2.2, applying a clear error standard.<sup>95</sup>

Whether there was a *threat* to use a weapon (for purposes of the 3-level enhancement) is similarly focused on the victim’s perspective—thus it does not require the actual presence or defendant’s possession of a weapon.<sup>96</sup>

### (c) Bodily injury enhancement

Section 2A2.2(b)(3) provides a graduated enhancement based on the degree of bodily injury suffered by the victim: (A) a 3-level enhancement for bodily injury; (B) a 5-level enhancement for serious bodily injury; (C) a 7-level enhancement for permanent or life-threatening bodily injury; (D) a 4-level enhancement for injury between the degrees in (A) and (B); and (E) a 6-level enhancement for injury between the degrees in (B) and (C).<sup>97</sup> However, the cumulative adjustments from applying this enhancement and the preceding weapon enhancement in §2A2.2(b)(2) cannot exceed 10 levels.<sup>98</sup>

At least one court has held the “victim” must be the object of the aggravated assault.<sup>99</sup>

USSG §1B1.1. defines “bodily injury,” “serious bodily injury,” and “permanent or life-threatening bodily injury.”<sup>100</sup> Thus, “serious bodily injury” and “permanent or life-threatening bodily injury” have the same meaning provided in this primer’s section on the bodily injury enhancement in §2A2.1 and case law interpreting the terms are relevant across guidelines.<sup>101</sup>

**“Bodily injury”** means “any significant injury; *e.g.*, an injury that is painful and

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<sup>95</sup> United States v. Brown, 934 F.3d 1278, 1305–06 (11th Cir. 2019); United States v. White, 354 F.3d 841, 844 (8th Cir. 2004); United States v. Morris, 131 F.3d 1136, 1138 (5th Cir. 1997).

<sup>96</sup> United States v. Chee, 110 F.3d 1489, 1493–94 (9th Cir. 1997) (noting that while few cases address the “threat of weapon use,” the plain language of the guidelines does not require a weapon actually be present and that requiring its presence would create a redundancy with the “brandished” clause).

<sup>97</sup> USSG §2A2.2(b)(3).

<sup>98</sup> *Id.*

<sup>99</sup> United States v. Moore, 958 F.2d 646, 651 (5th Cir. 1992) (reversing a bodily injury enhancement in a sentence for assaulting a federal officer with a deadly weapon under 18 U.S.C. § 111 where the defendant fired shots at both a federal and city officer but only the city officer was injured).

<sup>100</sup> USSG §1B1.1, comment. (n.1).

<sup>101</sup> See *supra* Part II.B.2.a. For ease of reference, “serious bodily injury” means injury involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation. “Permanent or life-threatening bodily injury” means injury involving a substantial risk of death; loss or substantial impairment of the function of a bodily member, organ, or mental faculty that is likely to be permanent; or an obvious disfigurement that is likely to be permanent. USSG §1B1.1, comment. (n.1).

obvious, or is of a type for which medical attention ordinarily would be sought.<sup>102</sup> The term “significant injury” is “open-ended” and cannot be exactly defined.<sup>103</sup> In contrast to the more severe factual scenarios cited herein for “serious bodily injury” and “permanent or life-threatening bodily injury,” “bodily injury” may encompass injuries like scratches and eye pain,<sup>104</sup> swelling and pain from a slap in the face,<sup>105</sup> being hit on the ground without evidence of needing medical treatment,<sup>106</sup> and cuts and bruises from being hit with hands and bare feet.<sup>107</sup> Being grazed by a bullet that causes lingering pain after medical treatment but does not require surgery or hospitalization may fall between “bodily injury” and “serious bodily injury.”<sup>108</sup>

Determining the proper degree of enhancement cannot rest solely on the mechanical terms used to describe the injury—for example, a “laceration” may range from trivial to life-threatening depending on context, including whether the victim lost a lot of blood or suffered from hemophilia.<sup>109</sup> Thus, no type of injury in a specific case can *categorically* be characterized as a particular degree of injury.<sup>110</sup>

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<sup>102</sup> USSG §1B1.1, comment. (n.1).

<sup>103</sup> See *United States v. Lancaster*, 6 F.3d 208, 209–10 (4th Cir. 1993) (stating that “significant injury” is a factually-specific inquiry that accounts for both articulable and intangible factors best assessed by the district court).

<sup>104</sup> *United States v. Steele*, 550 F.3d 693, 703–04 (8th Cir. 2008) (holding that a “bodily injury” enhancement applied where the defendant jammed his thumbs into the victim’s eyes and the victim sought medical attention, because the resulting eye pain and scratches were “painful and obvious” injuries).

<sup>105</sup> *United States v. Greene*, 964 F.2d 911, 911–12 (9th Cir. 1992) (holding that the victim suffered “bodily injury” because pain from several slaps on the face lasted for a week and the injury was “obvious” given that the victim’s cheek was red and swollen).

<sup>106</sup> *United States v. Egbert*, 562 F.3d 1092, 1101–02 (10th Cir. 2009) (stating there was insufficient evidence to uphold a “serious bodily injury” enhancement as opposed to a “bodily injury” enhancement where the victim was thrown and hit in a brief altercation but there was no evidence of the severity of his injuries, including whether he needed medical treatment). The court noted cases upholding “serious bodily injury” enhancements involve “substantially more evidence of serious injury requiring medical treatment.” *Id.*

<sup>107</sup> *United States v. LeCompte*, 108 F.3d 948, 951 (8th Cir. 1997) (holding that the victim sustained “bodily injury” from the defendant’s fists and feet where she received injuries that were “painful, obvious and required medical attention.”).

<sup>108</sup> See *United States v. Mays*, No. 19-1620, 2020 WL 4248461, at \*2 (8th Cir. July 24, 2020) (holding that a robbery victim sustained an injury falling between “bodily injury” and “serious bodily injury” where her injuries from a bullet graze required medical treatment and resulted in lingering pain but did not require surgery or hospitalization).

<sup>109</sup> *United States v. Tavares*, 93 F.3d 10, 16 (1st Cir. 1996) (remanding for further findings where a district court applied the aggravated assault guideline based on the victim’s laceration being a “serious bodily injury” but applied a 3-level enhancement for an injury falling between “bodily injury” and “serious bodily injury”).

<sup>110</sup> *Id.*

#### (d) Strangling or suffocating enhancement

Section 2A2.2(b)(4) provides a 3-level enhancement if the offense involved strangling, suffocating, or attempting to do either to a spouse, intimate partner, or dating partner.<sup>111</sup> However, the guideline requires that the cumulative adjustments from the weapon enhancement, bodily injury enhancement, and the strangling or suffocating enhancement do not exceed 12 levels.<sup>112</sup>

“Strangling” and “suffocating” as well as “spouse,” “intimate partner,” and “dating partner” have the same meanings provided in the federal assault statute at 18 U.S.C. § 113 (which also cites to § 2266).<sup>113</sup> Courts have held that an offense sentenced under §2A2.2 based on an aggravated assault that involved strangulation or suffocation may also receive the 3-level increase under (b)(3) for strangling, suffocating, or attempting to do either to a spouse, intimate partner, or dating partner.<sup>114</sup>

#### (e) Payment enhancement

Section 2A2.2(b)(5) provides a 2-level enhancement if the assault was motivated by a payment or an offer of money (or other thing of value).<sup>115</sup> This enhancement is intended to cover cases where the perpetrator of the assault was hired, paid, or offered something of

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<sup>111</sup> USSG §2A2.2(b)(4). A similar enhancement exists in the domestic violence guideline. *See* USSG §2A6.2(b).

<sup>112</sup> USSG §2A2.2(b)(4).

<sup>113</sup> *See supra* Part II.B.1. For ease of reference, “Strangling” is intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of a person by applying pressure to the throat or neck, regardless of resulting injury or intent to injure or kill. “Suffocating” is intentionally, knowingly, or recklessly impeding the normal breathing of a person by covering the mouth or nose, regardless of resulting injury or intent to injure or kill. “Spouse or intimate partner” is a spouse, former spouse, person who shares a child in common, person who cohabits or has cohabited with the abuser, or person who has been in a social relationship of a romantic or intimate nature with the abuser. “Dating partner” is a person who has been in a social relationship of a romantic or intimate nature with the abuser, based on the length and type of relationship and frequency of interaction. *See* USSG §2A2.2, comment. (n.1).

<sup>114</sup> *United States v. Harrington*, 946 F.3d 485, 487–89 (9th Cir. 2019) (holding that applying the strangulation enhancement to the defendant’s offense of assault of a spouse by strangulation is not impermissible double counting because §2A2.2’s base offense level is not specific to strangulation conduct and thus does not necessarily capture the extent of the harm captured by the enhancement); *see also* USSG §1B1.1, comment. (n.4) (noting that absent an instruction to the contrary, Chapter Two enhancements, Chapter Three Adjustments, and Chapter Four determinations are to be applied cumulatively and can be triggered by the same underlying conduct).

<sup>115</sup> USSG §2A2.2(b)(5). As discussed above, this is similar to the enhancement in §2A2.1(b)(2) (assault with intent to murder) for offenses involving the offer or receipt of anything of pecuniary value for undertaking the murder. *See supra* Part II.B.2.a; *see also* *United States v. Swallow*, 891 F.3d 1203, 1205 (9th Cir. 2018) (noting that the enhancements at §2A2.1(b)(2) and §2A2.2(b)(5) serve the same functions and both cover cases where an offense was committed for hire).

value for undertaking the assault—not cases where money played an indirect role in triggering the assault, such as an assault that was retribution for a robbery.<sup>116</sup>

(f) Court protection order enhancement

Section 2A2.2(b)(6) provides a 2-level enhancement if the offense involved the violation of a court protection order.<sup>117</sup> Section 1B1.1 states that “court protection order” means a “protection order” as defined by 18 U.S.C. § 2266(5)<sup>118</sup> and consistent with 18 U.S.C. § 2265(b).<sup>119</sup> A court does not have jurisdiction as required by the court protection order definition if the defendant was not properly served with the protection order in accordance with the law of that court.<sup>120</sup>

(g) Enhancement for convictions under 18 U.S.C. §§ 111(b) and 115

Section 2A2.2(b)(7) provides a 2-level enhancement if the defendant was convicted under 18 U.S.C. §§ 111(b) (assaulting certain federal officers) or 115 (influencing a federal official by threatening a family member).<sup>121</sup> Unlike other specific offense characteristics that are applied based on the relevant conduct principles in §1B1.3, this enhancement only applies if, as stated in the guideline, the defendant was actually *convicted* of the specified

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<sup>116</sup> *Swallow*, 891 F.3d at 1205–06 (reversing where the payment enhancement was applied to a defendant who engaged in an assault because he was encouraged by his wife who taunted him for letting the victim steal their money).

<sup>117</sup> USSG §2A2.2(b)(6); *see* *United States v. Banks*, 480 F. App'x 314, 316–19 (5th Cir. 2012) (vacating a sentence for assaulting a federal officer and holding the court protection order enhancement did not apply where the defendant's state protection order did not pertain to the officer).

<sup>118</sup> The term “protection order” includes “any injunction, restraining order, or any other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence, or contact or communication with or physical proximity to, another person, including any temporary or final order issued by a civil or criminal court whether obtained by filing an independent action or as a pendente lite order in another proceeding so long as any civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection.” 18 U.S.C. § 2266(5).

<sup>119</sup> A protection order issued by a state, tribal, or territorial court is consistent with 18 U.S.C. § 2265 if: (1) such court has jurisdiction over the parties and matter under the law of the state, Indian tribe, or territory; and (2) reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person's right to due process; in the case of *ex parte* orders, notice and opportunity to be heard must be provided within the time required by state, tribal, or territorial law and in any event within a reasonable time after the order is issued, sufficient to protect respondent's due process rights. *See* 18 U.S.C. § 2265(b).

<sup>120</sup> *See* *United States v. Thompson*, 921 F.3d 82, 87–88 (2d Cir. 2019) (holding a §2A6.2(b)(1)(A) enhancement based on a “court protection order” was incorrectly applied because the government failed to prove that the state court issuing the order properly served the defendant with the *ex parte* protection order).

<sup>121</sup> USSG §2A2.2(b)(7).

offenses.<sup>122</sup> If this enhancement applies, the commentary instructs that the Official Victim adjustment at §3A1.2 shall also be applied.<sup>123</sup>

**c. Section 2A2.3 (Assault)**

The guideline applicable to misdemeanor assault and battery and any felonious assaults not covered by the aggravated assault guideline is §2A2.3, including, among others, offenses under several subsections of the federal assault statute at 18 U.S.C. § 113: (a)(4) (assault by striking, beating, or wounding); (a)(5) (simple assault); and (a)(7) (assault resulting in substantial bodily injury to a spouse or intimate partner, a dating partner, or an individual under the age of 16 years).<sup>124</sup>

*i. Determining the base offense level*

Section 2A2.3(a) provides: (1) a base offense level of 7 if the offense involved physical contact, or if a dangerous weapon (including a firearm) was possessed and its use was threatened; or (2) a base offense level of 4 otherwise.<sup>125</sup>

Like the other assault guidelines, “dangerous weapon” has the same meaning given in §1B1.1’s commentary.<sup>126</sup> The guideline does not define “physical contact.”<sup>127</sup> However, one circuit has held that the term encompasses indirect physical contact, such as throwing an offensive liquid onto a victim.<sup>128</sup>

*ii. Specific offense characteristic: Bodily injury enhancement*

Section 2A2.3(b)(1), the only specific offense characteristic in the guideline,

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<sup>122</sup> *Id.*

<sup>123</sup> USSG §2A2.2, comment. (n.4). The §2A2.2(b)(7) enhancement was added in response to the 21st Century Department of Justice Appropriations Authorization Act, which increased the statutory maximum term of imprisonment for certain offenses against current or former officers or employees of the United States. *See* USSG App. C, amend. 663 (effective Nov. 1, 2004). The same amendment restructured the §3A1.2 (Official Victim) adjustment and increased the adjustment to six levels if the defendant’s offense guideline was from Chapter Two, Part A (Offenses Against the Person). *Id.*

<sup>124</sup> USSG §2A2.3, comment. (backg’d.).

<sup>125</sup> USSG §2A2.3(a).

<sup>126</sup> *See supra* Part II.B.2.b (defining “dangerous weapon” as “(i) an instrument capable of inflicting death or serious bodily injury; or (ii) an object that is not an instrument capable of inflicting death or serious bodily injury but (I) closely resembles such an instrument; or (II) was used in a manner that created the impression that it was such an instrument.”).

<sup>127</sup> The term “physical contact” is also used in §2A2.4 (obstructing officers).

<sup>128</sup> *United States v. Taliaferro*, 211 F.3d 412, 415–16 (7th Cir. 2000) (holding that “physical contact” under §2A2.4 includes throwing a cup of urine at a prison guard because the law of battery has long included indirect acts such as spitting).

provides: (A) a 2-level enhancement if the victim sustained bodily injury; or (B) a 4-level enhancement if the offense resulted in substantial bodily injury to a spouse, intimate partner, or dating partner, or an individual under the age of 16 years.<sup>129</sup>

“Bodily injury” has the same meaning given in §1B1.1’s commentary.<sup>130</sup> Thus, cases interpreting the term for aggravated assault offenses in §2A2.2 are relevant to assault offenses in §2A2.3.<sup>131</sup> “Spouse, intimate partner, or dating partner” have the meanings set forth in 18 U.S.C. § 2266.<sup>132</sup>

Citing to the definition in 18 U.S.C. § 113(b)(1), §2A2.3 defines “**substantial bodily injury**” as “bodily injury which involves (A) a temporary but substantial disfigurement; or (B) a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty.”<sup>133</sup>

### iii. Cross reference

Section 2A2.3(c) provides a cross reference to the aggravated assault guideline.<sup>134</sup> Thus, if the defendant’s conduct constituted aggravated assault, the guidelines instruct that §2A2.2 be applied.<sup>135</sup>

## C. KIDNAPPING

This section discusses the statutory scheme and guideline pertaining to kidnapping offenses.

### 1. Kidnapping: The Statutory Scheme

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Section 1201, title 18, United States Code, proscribes federal kidnapping offenses, providing jurisdictional limitations and statutory penalties for substantive and inchoate offenses.<sup>136</sup>

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<sup>129</sup> USSG §2A2.3(b)(1).

<sup>130</sup> USSG §2A2.3, comment. (n.1).

<sup>131</sup> See *supra* Part II.B.2.b (defining “bodily injury” as “any significant injury; *e.g.*, an injury that is painful and obvious, or is of a type for which medical attention ordinarily would be sought).

<sup>132</sup> 18 U.S.C. § 2266.

<sup>133</sup> USSG §2A2.3, comment. (n.1). “Substantial” bodily injury is necessarily less severe than §2A2.2’s “serious” bodily injury, because serious bodily injury is covered in a later cross-reference to §2A2.2 (discussed in Part II.C.2.a).

<sup>134</sup> USSG §2A2.3(c).

<sup>135</sup> *Id.*

<sup>136</sup> 18 U.S.C. § 1201.

**a. Subsection (a): Offense conduct, jurisdiction, and punishment**

Section 1201(a) provides that the federal kidnapping statute applies to whoever “unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise” any person who falls into certain jurisdictional categories.<sup>137</sup> These jurisdictional categories include situations where:

- (1) A victim is transported through interstate or foreign commerce;
- (2) Any of the above acts against the victim are done within the special maritime and territorial jurisdiction or special aircraft jurisdiction of the United States;
- (3) The victim is a foreign official, an internationally protected person, or an official guest;
- (4) The victim is a certain domestic officer or employee and any of the above acts are done while the victim is engaged in, or on account of, the performance of official duties.<sup>138</sup>

The penalty range for these acts is any term of years or life imprisonment.<sup>139</sup> If death of any person results, the penalty is life imprisonment or death.<sup>140</sup>

**b. Subsection (b): Interstate commerce presumption**

Section 1201(b) provides that if the victim has not been released within 24 hours, that creates a rebuttable presumption that the victim was transported in interstate or foreign commerce.<sup>141</sup>

**c. Subsection (c): Punishment for conspiracy**

Section 1201(c) provides that if two or more people conspire to violate subsection (a) and one or more of them do any overt act to effect the object of the conspiracy, the punishment for each person is any term of years or life imprisonment.<sup>142</sup>

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<sup>137</sup> 18 U.S.C. § 1201(a). Excluded from this list are cases where a minor is being acted on by a parent. *Id.* A “parent” does not include a person whose parental rights have been terminated by a final court order. 18 U.S.C. § 1201(h).

<sup>138</sup> 18 U.S.C. § 1201(a).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> 18 U.S.C. § 1201(b). However, the fact that such a presumption has not yet taken effect does not preclude a federal investigation before the 24-hour period has ended. *Id.*

<sup>142</sup> 18 U.S.C. § 1201(c).

**d. Subsection (d): Punishment for attempt**

Section 1201(d) provides that the punishment for an attempt to violate subsection (a) has a statutory maximum of 20 years.<sup>143</sup>

**e. Subsection (e): Extraterritorial jurisdiction**

Section 1201(e) provides that the United States can exercise jurisdiction over an internationally protected person outside the United States if: (1) the victim is a representative, officer, employee, or agent of the United States; (2) the offender is a national of the United States; or (3) the offender is found afterwards in the United States.<sup>144</sup>

**f. Subsection (g): Offenses involving children**

Section 1201(g) provides a 20-year mandatory minimum sentence for offenses involving child victims under the age of 18 years and non-relative adult offenders.<sup>145</sup>

**2. Kidnapping and §2A4.1 (Kidnapping, Abduction, Unlawful Restraint)**

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Kidnapping offenses are referenced in Appendix A to Chapter Two, Part A (Offenses Against the Person) of the *Guidelines Manual*, specifically to §2A4.1.<sup>146</sup> Section 2A4.1 covers, among other offenses, the federal kidnapping statute under 18 U.S.C. § 1201, hostage taking under 18 U.S.C. § 1203, and the kidnapping of specific types of individuals under statutes such as sections 115(b)(2) and 351(b).<sup>147</sup> Federal kidnapping offenses generally encompass three categories of conduct: limited duration kidnapping with an unharmed victim released, kidnapping that facilitates another offense (frequently, sexual assault), and kidnapping for ransom or political demand.<sup>148</sup>

**a. Determining the base offense level**

Section 2A4.1(a) provides a base offense level of 32.<sup>149</sup>

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<sup>143</sup> 18 U.S.C. § 1201(d).

<sup>144</sup> 18 U.S.C. § 1201(e).

<sup>145</sup> 18 U.S.C. § 1201(g).

<sup>146</sup> See USSG App. A.

<sup>147</sup> USSG §2A4.1.

<sup>148</sup> USSG §2A4.1, comment. (backg'd.).

<sup>149</sup> USSG §2A4.1(a).

## b. Specific offense characteristics

Section 2A4.1(b) provides seven possible enhancements that may increase the total offense level.<sup>150</sup>

### i. Ransom enhancement

Section 2A4.1(b)(1) provides a 6-level enhancement if a ransom demand or a demand against the government was made.<sup>151</sup>

As the *Guidelines Manual* does not define “ransom,” some courts have applied its ordinary meaning, which includes “the money, price, or consideration paid or demanded for redemption of a kidnapped person . . . a payment that releases from captivity.”<sup>152</sup> Based on its ordinary meaning, “ransom” has been applied to payment that the kidnapper believes is owed to him by the victim and to demands made to the victim instead of a third party.<sup>153</sup> However, the Seventh Circuit has held that the ransom enhancement must be made to a third party and does not apply to demands made solely to a captured party.<sup>154</sup> The Seventh Circuit rejected the ordinary meaning of “ransom” in *Black’s Law Dictionary* as overinclusive, stating that it would cover even situations like a simple mugging where, at some point during the attack, the defendant offered to let the victim go in exchange for her

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<sup>150</sup> USSG §2A4.1(b).

<sup>151</sup> USSG 2A4.1(b)(1).

<sup>152</sup> *United States v. Digiorgio*, 193 F.3d 1175, 1178 (11th Cir. 1999) (applying the plain meaning of “ransom” from *Black’s Law Dictionary*); *United States v. Escobar-Posado*, 112 F.3d 82, 83 (2d Cir. 1997) (applying the plain meaning of “ransom” from *Webster’s Third New International Dictionary*).

<sup>153</sup> *Digiorgio*, 193 F.3d at 1178 (holding that a ransom demand encompasses demanding money from a kidnapping victim who the defendant believes owes him that money because “[n]othing in [its ordinary meaning] excludes previously-owed money from qualifying as the ‘payment that releases from captivity’ ”); *Escobar-Posado*, 112 F.3d at 83 (upholding a ransom enhancement where the defendant demanded money owed to him from one released victim in exchange for the release of two other victims because “there is nothing in the word’s ordinary usage—a ‘consideration paid or demanded for the redemption of a captured person’—that precludes a ransom from consisting of a demand for a sum that the kidnapper believes is owed to him.”); *United States v. Fernandez*, 770 F.3d 340, 343 (5th Cir. 2014) (adopting a plain meaning definition of “ransom” to mean ‘a consideration paid or demanded for the release of someone or something from captivity’ and applying the ransom enhancement regardless of whether the money demanded was owed); *see also United States v. Sierra-Velasquez*, 310 F.3d 1217, 1221 (9th Cir. 2002) (agreeing with the Eleventh and Second Circuits that the ransom enhancement applies even if that money is already owed to the defendant but suggesting, in dicta, that the enhancement only applies where a demand is made to “a third party”).

<sup>154</sup> *United States v. Reynolds*, 714 F.3d 1039, 1044–46 (7th Cir. 2013) (stating that the language of §2A4.1(b)(1) presupposes the existence of a third party by including a “demand upon government” and that making a demand that reaches a third party has a greater risk of harm, warranting additional punishment, and heightened deterrence); *but see United States v. Romero*, 906 F.3d 196, 207 (1st Cir. 2018) (discussing *Reynolds*, *Digiorgio*, and *Escobar-Posado* in holding that the defendant could not establish that it was plain error to apply the ransom enhancement to a ransom demand that was only made to a kidnapped victim).

valuables.<sup>155</sup>

Although the enhancement is written in past tense—“was made”—at least one court has held that the enhancement can apply even if a ransom note was drafted but never delivered if it is “reasonably certain” that the demand would have been made if doing so had been feasible.<sup>156</sup>

*ii. Bodily injury enhancement*

Section 2A4.1(b)(2) provides a tiered enhancement based on the degree of injury sustained by the victim: (A) a 4-level enhancement if the victim sustained permanent or life-threatening bodily injury; (B) a 2-level enhancement if the victim sustained serious bodily injury; and (C) a 3-level enhancement if the degree of injury is between those in (A) and (B).<sup>157</sup>

These degrees of injury incorporate the definitions given in Application Note 1 of §1B1.1,<sup>158</sup> with one notable exception. For purposes of §2A4.1, “serious bodily injury” does not include “criminal sexual abuse” because that conduct is taken into account in a separate specific offense characteristic under subsection (b)(5).<sup>159</sup>

In the context of a kidnapping offense, permanent or life-threatening bodily injury may involve the denial of food or the denial of medical care that exacerbates injuries that may not otherwise have been life-threatening.<sup>160</sup> The disjunctive nature of the most severe degree of injury allows for permanent injuries that are not severe enough to threaten life.<sup>161</sup> Also, the lines between the different degrees of injury are “not sharp” and district

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<sup>155</sup> *Reynolds*, 714 F.3d at 1044.

<sup>156</sup> *United States v. Ferreira*, 275 F.3d 1020, 1028–30 (11th Cir. 2001) (applying the ransom enhancement where defendants made repeated phone calls to the object of the ransom demand and drafted and printed a ransom letter but were captured before it could be delivered, because Application Note 5 to §2A4.1 states that in the case of uncompleted crimes like attempts, the court should apply any adjustment that can be determined “with reasonable certainty.”).

<sup>157</sup> USSG §2A4.1(b)(2).

<sup>158</sup> USSG §2A4.1, comment. (n.1). Thus, case law regarding other bodily injury enhancements, as in the assault guidelines, is relevant to this enhancement except with respect to the criminal sexual abuse exclusion.

<sup>159</sup> *Id.*

<sup>160</sup> *See United States v. Brazier*, 933 F.3d 796, 802–03 (7th Cir. 2019) (holding that the permanent or life-threatening bodily injury enhancement was sufficiently supported by the district court’s factual findings that the kidnapping victim was denied medical care for a gunshot wound in his arm and was beaten).

<sup>161</sup> *See United States v. Torrealba*, 339 F.3d 1238, 1245–46 (11th Cir. 2003) (holding that the permanent or life-threatening bodily injury enhancement applied to a kidnapping victim who, according to her physician, suffered facial scarring and nerve damage that were “likely permanent,” and whose facial symmetry would “never be the same as it was prior to the attack”).

court holdings are deferentially reviewed for clear error.<sup>162</sup> Because serious bodily injury can be fulfilled through “extreme physical pain,” the victim need not seek medical care or suffer protracted impairment.<sup>163</sup>

At least one court has held that the “victim” must be the victim of the kidnapping and not a person who suffered collateral bodily injury during the kidnapping who was not himself abducted.<sup>164</sup>

### *iii. Dangerous weapon enhancement*

Section 2A4.1(b)(3) provides a 2-level enhancement if a dangerous weapon was used in connection with the kidnapping.<sup>165</sup> “**A dangerous weapon was used**” means that a firearm was discharged, or a firearm or dangerous weapon was otherwise used.<sup>166</sup> The terms “dangerous weapon,” “firearm,” and “otherwise used” have the meanings provided in §1B1.1.<sup>167</sup>

Under §1B1.1, “otherwise used” requires that the defendant did more than brandish the weapon.<sup>168</sup> Brandishing means that all or part of the weapon was displayed, or the presence of the weapon was otherwise made known to the other person to intimidate, regardless of whether the weapon was directly visible—thus, to do more than brandish a firearm without discharging it may require a type of display that conveys a more overt or specific threat of harm, such as using a firearm to intimidate and implicitly threaten to harm the person.<sup>169</sup> However, there does not necessarily have to be an explicit threat of harm, like pointing the weapon at the individual, since the context in which a kidnapping

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<sup>162</sup> See *Brazier*, 933 F.3d at 803 (noting that while the district court did not clearly err in applying the permanent or life-threatening enhancement to the defendant’s kidnapping guideline, it also may have been reasonable to apply the lesser enhancement for serious bodily injury or for injury between the two degrees).

<sup>163</sup> *United States v. Saint Louis*, 889 F.3d 145, 158 (4th Cir. 2018) (holding that the painful beatings received by a victim during her kidnapping amounted to serious bodily injury even though she never sought medical intervention or suffered protracted impairment of her eye).

<sup>164</sup> *United States v. Sickinger*, 179 F.3d 1091, 1093–94 (8th Cir. 1999) (reversing the application of the bodily injury enhancement to the kidnapping victim’s friend who was severely injured in the course of trying to prevent the kidnapping of the victim).

<sup>165</sup> USSG §2A4.1(b)(3).

<sup>166</sup> USSG §2A4.1, comment. (n.2).

<sup>167</sup> USSG §1B1.1, comment. (n.1). This is the same definition discussed in the assault guidelines. See *supra* Part II.B.2.b (defining “dangerous weapon,” “firearm,” “otherwise used,” and “brandished” under §1B1.1).

<sup>168</sup> *United States v. Bonilla-Guizar*, 729 F.3d 1179, 1187–88 (9th Cir. 2013) (holding that it was plain error to apply the dangerous weapon enhancement under §2A4.1(b)(3) where the district court operated under the legal misunderstanding that brandishing a firearm alone could support the enhancement).

<sup>169</sup> *United States v. Kruger*, 839 F.3d 572, 578–79 (7th Cir. 2016) (discussing other cases that have looked for conduct that creates a ‘personalized threat of harm’ to hold that there was more than brandishing of a weapon); *United States v. Hernandez*, 106 F.3d 737, 741 (7th Cir. 1997) (same).

occurs with the weapon may convey an implicit threat of harm to a specific individual.<sup>170</sup>

Likewise, the enhancement has been applied where a dangerous weapon was pressed against the victim's leg and also pointed at another party—an infant—to secure a kidnapping victim's cooperation.<sup>171</sup> And it has also been applied where the person in whom fear was sought to be instilled is not even at the same location as the weapon—specifically, where the defendant sent a photo of a kidnapped child, with someone pointing a firearm at his head, to the victim's mother as a threat to pay a ransom.<sup>172</sup> There, the DC Circuit explained that splitting the “use” of the gun between two people at different locations does not diminish the culpability of the “use” because the pointing of the gun at one person is used to instill fear in another person to coerce compliance.<sup>173</sup>

#### *iv. Victim release enhancement*

Section 2A4.1(b)(4) provides: (A) a 2-level enhancement if the victim was not released before 30 days had elapsed; and (B) a 1-level enhancement if the victim was not released before seven days had elapsed.<sup>174</sup>

This enhancement recognizes the increased suffering caused by lengthy kidnappings and provides an incentive to release the victim.<sup>175</sup> Based on those policy considerations, this enhancement has been applied in a kidnapping conspiracy case (in which co-defendants joined the conspiracy at different times in the hostage's capture) to mean that the 30 or seven days begin to run on the date the victim was taken hostage, not on the date the specific defendant became involved in the kidnapping.<sup>176</sup>

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<sup>170</sup> *Kruger*, 839 F.3d at 579 (holding that the defendant's actions leading up to and during the kidnapping plausibly created a specific threat of harm where the firearm was used to convey an implicit threat to harm the victim if he attempted to escape, even though the defendant never pointed the firearm or made explicit threats).

<sup>171</sup> *United States v. Coyle*, 309 F.3d 1071, 1075 (8th Cir. 2002) (holding that the defendant's holding of a knife against a mother's leg and pointing the knife at her baby to secure her cooperation during a kidnapping constituted “use” under §2A4.1(b)(3)).

<sup>172</sup> *United States v. Yelverton*, 197 F.3d 531, 533–35 (D.C. Cir. 1999) (holding that there was “use” of a dangerous weapon where the gun was deployed to make a direct threat to a mother about her son, who remained in custody at the time she received a photograph of him blindfolded with a gun pointed at him).

<sup>173</sup> *Id.* at 534–35.

<sup>174</sup> USSG §2A4.1(b)(4).

<sup>175</sup> USSG §2A4.1, comment. (backg'd.).

<sup>176</sup> *United States v. Lorenzo-Hernandez*, 279 F.3d 19, 24 (1st Cir. 2002) (applying the victim release enhancement to a defendant even though he allegedly joined a conspiracy five days before the victim was released and stating that the “guidelines speak to the *release date* of the victim, not to the length of time the defendant is involved in the kidnapping” in order to create incentives to release kidnapping victims) (emphasis in original).

Whether a victim was actually “released” may raise complicated factual disputes, given that the line between release and confinement may not always be clear. For example, courts have upheld the enhancement where a victim had access to a phone or transportation but failed to exercise that access,<sup>177</sup> or where a victim was occasionally left alone but still felt mentally or emotionally unable to flee.<sup>178</sup> One court has held that if a kidnapping victim is murdered during captivity and found after the 30 or seven days, that may also raise a factual dispute regarding when the victim was “released” for purposes of the enhancement.<sup>179</sup>

*v. Sexual exploitation enhancement*

Section 2A4.1(b)(5) provides a 6-level enhancement if the victim was sexually exploited.<sup>180</sup> “Sexually exploited” is defined to include acts prohibited by the statutes at 18 U.S.C. §§ 2241–2244, 2251, and 2421–2423.<sup>181</sup> Thus, applying the enhancement involves comparing the facts underlying the kidnapping offense with the relevant federal sexual abuse statute. The application of the enhancement is reviewed deferentially by the appellate court for clear error.<sup>182</sup>

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<sup>177</sup> See *United States v. Wiora*, 172 F.3d 877 (9th Cir. 1999) (remanding for an evidentiary hearing on whether the victim release enhancement should be applied because the defendant’s claims that the victim had access to a phone and rode in a taxi daily raised a “substantial factual dispute”).

<sup>178</sup> *United States v. Sickinger*, 179 F.3d 1091, 1093 (8th Cir. 1999) (holding, in the context of the now-defunct guideline reduction for releasing a kidnapping victim within 24 hours, that the victim was not “released” even if she was left alone at a store and could have escaped, because she was not in a physical, mental, or emotional position to do so given the defendant’s abusive behavior).

<sup>179</sup> *United States v. Gaddy*, 894 F.2d 1307, 1315 (11th Cir. 1990) (noting that where a victim was abducted, shot within 24 hours, and found after 30 days—and thus never released alive—the 30-day victim release enhancement applied).

<sup>180</sup> USSG §2A4.1(b)(5). The commentary explains that criminal sexual abuse is accounted for by the (b)(5) enhancement and excluded from the definition of “serious bodily injury” in (b)(2). USSG §2A4.1, comment. (n.1). The commentary was added in response to section 2 of the Carjacking Correction Act of 1996, which amended 18 U.S.C. § 2119(2) to include aggravated sexual abuse under 18 U.S.C. § 2241 and sexual abuse under 18 U.S.C. § 2242 within the statutory definition of “serious bodily injury.” USSG App. C, amend. 545 (effective Nov. 1, 1997); see also Carjacking Correction Act of 1996, Pub. L. No. 104–217, § 2, 110 Stat. 3020. To implement the legislation, the Commission broadened the definition of “serious bodily injury” in certain offense conduct guidelines to include sexual assault but amended Application Note 1 to §2A4.1 to state that criminal sexual abuse conduct within the kidnapping guideline is taken into account in (b)(5), not the “serious bodily injury” enhancement. *Id.*

<sup>181</sup> USSG §2A4.1, comment. (n.3). This includes aggravated sexual abuse (18 U.S.C. § 2241), sexual abuse (§ 2242), sexual abuse of a minor or ward (§ 2243), abusive sexual contact (§ 2244), sexual exploitation of children (§ 2251), and transportation for illegal sexual activity and related crimes (§§ 2421–2423).

<sup>182</sup> See *United States v. Hernandez-Orozco*, 151 F.3d 866, 870 (8th Cir. 1998) (holding it was not clear error to apply the sexual exploitation enhancement where a defendant’s sexual acts with the kidnapping victim were accomplished by putting the victim in fear, which is prohibited by 18 U.S.C. § 2242(1) citing the victim’s youth and detainment in a foreign country and threats made against her and her family).

vi. *Minor victim enhancement*

Section 2A4.1(b)(6) provides a 3-level enhancement if the victim was a minor who, in exchange for money or other consideration, was placed in the care or custody of another person (with no legal right to such care or custody of the victim).<sup>183</sup>

When Congress amended 18 U.S.C. § 1201 (the federal kidnapping statute) to require courts to take into account certain specific offense characteristics in cases involving victims under the age of 18 years, it directed the Commission to include these characteristics in the guidelines.<sup>184</sup> The language in §2A4.1(b)(6) specifying that the person receiving custody of the minor have “no legal right to such care or custody” thus parallels the section 1201(g)(1) enhancement<sup>185</sup> that requires a 20-year minimum sentence where a minor is kidnapped by someone who is not a family member and is “without legal custody.”<sup>186</sup>

The First Circuit has interpreted “care and custody of another person” to exclude placing the minor in the care of a co-conspirator who is expecting part of a ransom.<sup>187</sup> The court explained that the enhancement best fits two situations: one, a kidnap-for-hire in which a third party (such as a parent whose custodial rights have been terminated or a childless person who wants to raise a child) pays the kidnapper to abduct and give the minor to the third party; and two, a ransom-demanding kidnapper who pays a third party to keep the minor to make him or her harder to find.<sup>188</sup> However, this is a fact-specific inquiry that may result in a different decision based on subtle factual distinctions—for example, the Fifth Circuit found that the enhancement applied and that the First Circuit’s decision was inapplicable where the third party who was paid to care for the victims was not a charged co-conspirator and was not compensated with an expected share of the

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<sup>183</sup> USSG §2A4.1(b)(6).

<sup>184</sup> USSG §2A4.1, comment. (backg’d.); see Crime Control Act of 1990, Pub. L. No. 101-647, § 401, 104 Stat. 4789.

<sup>185</sup> See *supra* Part II.C.1 (discussing the provisions of 18 U.S.C. § 1201).

<sup>186</sup> See *United States v. Alvarez-Cuevas*, 415 F.3d 121, 125 (1st Cir. 2005) (discussing the legislative history of §2A4.1(b)(6) and § 1201(g)(1) and stating that the language in the enhancements shows that Congress was concerned about situations posing greater potential harm to a minor victim, such as a kidnap-for-hire by a parent whose custodial rights have been terminated).

<sup>187</sup> *Id.* at 125-27 (reversing minor victim enhancement because holding otherwise would mean applying the enhancement to every conspirator in a kidnapping where one or more of the conspirators who expect a share of the ransom money cares for the child in the interim, which would blur the distinction between that common kidnapping situation and a kidnap-for-hire situation, creating incentives to abandon care of the child).

<sup>188</sup> *Id.* at 126-27.

ransom.<sup>189</sup>

Whether care or custody was actually relinquished to the third party may be another issue of dispute.<sup>190</sup>

*vii. Enhancement for kidnapping in connection with another offense*

Section 2A4.1(b)(7) provides that if the victim was kidnapped, abducted, or unlawfully restrained during the commission of, or in connection with, another offense (or escape therefrom); or if another offense was committed during the kidnapping, abduction, or unlawful restraint, the offense level should be increased to:

(A) the offense level from the Chapter Two guideline for that other offense, if that guideline includes an adjustment for the kidnapping, abduction, or unlawful restraint, or otherwise takes that conduct into account; or

(B) in any other case, 4 plus the offense level from the guideline for that other offense, but no greater than level 43 in any event.<sup>191</sup>

Thus, subsection (A) applies if the offense level for “another offense” accounts for the kidnapping in an adjustment, and subsection (B) applies if the offense level does not include such an adjustment.<sup>192</sup> This enhancement applies only if the resulting offense level from (A) or (B) would be greater than the §2A4.1 offense level determined prior to this point.<sup>193</sup> “Another offense” can be a federal, state, or local offense.<sup>194</sup>

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<sup>189</sup> United States v. Cedillo-Narvaez, 761 F.3d 397, 405 (5th Cir. 2014) (holding that there was no plain error in applying the minor victim enhancement under the unambiguous plain language of the enhancement and factually distinguishing the case from *Alvarez-Cuevas*).

<sup>190</sup> See United States v. Matthews, 225 F. Supp. 2d 893, 897 (N.D. Ill. 2002) (stating that the minor victim enhancement did not apply where the third party only watched the minor victim for brief periods of time, which does not constitute placing the victim in the care or custody of another person, and no money or other consideration was exchanged).

<sup>191</sup> USSG §2A4.1(b)(7).

<sup>192</sup> *Id.* For example, if the kidnapping occurred during the commission of a robbery and the robbery guideline at §2B3.1 yields a higher offense level than §2A4.1, the robbery guideline should be applied. See, e.g., United States v. Ortega-Reyes, 105 F.3d 1260, 1262 (9th Cir. 1997) (holding that the robbery guideline was properly applied through §2A4.1(b)(7) where the defendant kidnapped the victims during an uncharged robbery and the robbery guideline yielded the higher offense level). And because the robbery guideline includes an adjustment for abduction, subsection (A) of (b)(7) would apply. See §2B3.1(b)(4)(A) (abduction adjustment).

<sup>193</sup> USSG §2A4.1(b)(7).

<sup>194</sup> See USSG §2A4.1, comment. (backg’d.); see also United States v. Anderson, 5 F.3d 795, 801–03 (5th Cir. 1993) (discussing the then-proposed amendment to §2A4.1 to clarify that “another offense” does not require federal jurisdiction and rejecting the defendant’s argument that his sexual abuse conduct could not be “another offense” because it did not constitute federal sexual abuse or aggravated sexual abuse); United

Consistent with relevant conduct rules governing liability for the acts of others in a jointly undertaken criminal activity, a conspirator to a kidnapping who does not personally commit “another offense” may still receive the enhancement.<sup>195</sup>

Considerations may arise involving the interaction of subsection (b)(7) with other provisions in §2A4.1, so it is important to apply each of the specific offense characteristics in order. For example, if a victim suffers sexual abuse during the kidnapping, the sexual exploitation enhancement in §2A4.1(b)(5) may be triggered.<sup>196</sup> But after applying the subsection (b)(5) enhancement, a court may also consider applying the subsection (b)(7) enhancement for that sexual abuse, triggering a different offense guideline altogether under the criminal sexual abuse guideline at §2A3.1.<sup>197</sup> If applying subsection (b)(7) yields an offense level higher than the §2A4.1 offense level calculated prior to its application, then subsection (b)(7) will supplant the calculations performed in subsections (b)(1) through (b)(6). The Ninth Circuit rejected the argument that applying the subsection (b)(7) enhancement for sexual abuse renders the sexual exploitation enhancement superfluous.<sup>198</sup>

### c. Cross reference

Section 2A4.1(c) provides a cross reference to §2A1.1 (First Degree Murder).<sup>199</sup> If the victim was killed under circumstances that would constitute murder under the federal murder statute at 18 U.S.C. § 1111 had the killing taken place in the territorial or maritime jurisdiction of the United States, the cross reference directs application of §2A1.1.<sup>200</sup>

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States v. Cree, 166 F.3d 1270, 1271–72 (8th Cir. 1999) (holding that “another offense” could include a sexual assault the defendant committed outside of a Native American territory and thus outside of federal jurisdiction).

<sup>195</sup> See United States v. Jackson, 978 F.2d 903, 914 (5th Cir. 1992) (holding the enhancement applied to a participant in the kidnapping of victims where a reasonable person in his situation would have known the other kidnappers were going to kill the victims who had witnessed them commit murder); USSG §1B1.3(a)(1)(B).

<sup>196</sup> See USSG §2A4.1(b)(5).

<sup>197</sup> See United States v. Michaud, 268 F.3d 728, 738–39 (9th Cir. 2001) (holding that where the defendant committed aggravated sexual abuse during a kidnapping, which qualified for the sexual exploitation enhancement, it was still proper to instead apply the higher §2A3.1 offense level that he unambiguously qualified for under §2A4.1(b)(7)(A)).

<sup>198</sup> *Id.* at 739 (citing to the unambiguous directive in §2A4.1(b)(7) requiring the application of §2A3.1 in that instance).

<sup>199</sup> USSG §2A4.1(c).

<sup>200</sup> *Id.*; USSG §2A1.1; see *supra* Part II.A (discussing 18 U.S.C. § 1111 and §2A1.1).

### III. VIOLENT CRIMES IN AID OF RACKETEERING (VICAR)

This section discusses the statutory scheme and guideline pertaining to VICAR offenses.

#### A. VICAR: THE STATUTORY SCHEME

Section 1959, title 18, United States Code, proscribes the offense of Violent Crimes in Aid of Racketeering and lists statutory penalties based on different underlying acts as well as relevant definitions.<sup>201</sup> Section 1959 was enacted in the Comprehensive Crime Control Act of 1984 to complement the Racketeer Influenced and Corrupt Organizations (RICO) statute at 18 U.S.C. § 1962 by enhancing liability through the prosecution of violent crimes committed by a defendant to maintain his position in an organized criminal enterprise.<sup>202</sup> Thus, as discussed below, section 1959 incorporates by reference several terms and definitions from the RICO statute.

##### 1. *Subsection (a): Offense Conduct and Punishment*

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Section 1959(a) sets forth two elements of the VICAR offense: an underlying crime element and a racketeering element.<sup>203</sup> It states that the federal VICAR statute applies to whoever: (i) murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon an individual, or threatens to commit a crime of violence against an individual in violation of state or federal law, or attempts or conspires to do so; and (ii) does so as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity.<sup>204</sup>

The Fourth Circuit has held that whether the defendant's conduct qualifies as one of the enumerated predicate offenses under (i) depends on whether it meets a generic definition of the offense.<sup>205</sup> The court held, however, that the state or federal offense

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<sup>201</sup> 18 U.S.C. § 1959.

<sup>202</sup> See *United States v. Concepcion*, 983 F.2d 369, 380–81 (2d Cir. 1992) (discussing the legislative history of § 1959 and citing S. Rep. No. 225, 98th Cong., 1st Sess. 307 (1983)); *United States v. Ayala*, 601 F.3d 256, 266 (4th Cir. 2010) (noting that VICAR is meant to address the particular danger posed by individuals willing to commit violent crimes to further their positions in a racketeering enterprise).

For a detailed overview of the RICO statute, refer to the Commission's Primer on RICO offenses at <https://www.ussc.gov/guidelines/primers/rico>.

<sup>203</sup> 18 U.S.C. § 1959(a).

<sup>204</sup> *Id.*

<sup>205</sup> See *United States v. Keene*, 955 F.3d 391, 398–99 (4th Cir. 2020) (holding that the VICAR statute requires that the defendant's conduct constituted one of the enumerated generic offenses while also violating state or federal law, but does not require that the elements of the state or federal law categorically match the

violated by the defendant's conduct need not itself qualify as one of the enumerated generic offenses.<sup>206</sup> Thus, the court explained that the VICAR statute requires only that a defendant's *conduct* constitutes one of the enumerated federal offenses ("murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States . . .") as well as a "violation of state or federal law."<sup>207</sup>

Subsection (a) also provides a list of penalties based on the different underlying crimes, including the inchoate versions of those crimes:

- (1) Murder: death or life imprisonment;
- (2) Kidnapping: imprisonment for any term of years or life imprisonment;
- (3) Maiming: imprisonment for not more than 30 years;
- (4) Assault with a dangerous weapon or assault resulting in serious bodily injury: imprisonment for not more than 20 years;
- (5) Threatening to commit a crime of violence: imprisonment for not more than five years;
- (6) Attempting or conspiring to commit murder or kidnapping: imprisonment for not more than ten years; and
- (7) Attempting or conspiring to commit a crime involving maiming, assault with a dangerous weapon, or assault resulting in serious bodily injury: imprisonment for not more than three years.<sup>208</sup>

## ***2. Subsection (b): Definitions***

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Section 1959(b) provides definitions of "racketeering activity" and "enterprise."<sup>209</sup>

"**Racketeering activity**" is defined by reference to mean any of a list of enumerated crimes in subsections (A) through (G) of section 1961 (the "Definitions" section of the RICO statute).<sup>210</sup> Racketeering activity under subsection (A) means "any act or threat involving" offenses like murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in

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generic offense); *see generally* Scheidler v. National Organization for Women, Inc., 537 U.S. 393, 410 (2003) (examining the Model Penal Code and state and federal statutes to identify the generic definition of an underlying predicate offense in the RICO statute).

<sup>206</sup> *Keene*, 955 F.3d at 398–99.

<sup>207</sup> *Id.* at 394.

<sup>208</sup> 18 U.S.C. § 1959(a).

<sup>209</sup> 18 U.S.C. § 1959(b).

<sup>210</sup> *Id.* A detailed description of the definitions in the RICO statute is also found in the Commission's Primer on RICO offenses at <https://www.ussc.gov/guidelines/primers/rico>.

section 102 of the Controlled Substances Act), which is chargeable under state law and punishable by imprisonment for more than one year.<sup>211</sup> Subsections (B), (C), (E), (F), and (G) include acts indictable under a list of federal statutes.<sup>212</sup> Subsection (D) includes offenses “involving” listed categories of federal offenses.<sup>213</sup>

“**Enterprise**” includes “any partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity, which is engaged in, or the activities of which affect, interstate or foreign commerce.”<sup>214</sup>

## **B. VICAR AND §2E1.3 (VIOLENT CRIMES IN AID OF RACKETEERING)**

VICAR offenses are referenced in Appendix A to Chapter Two, Part E (Offenses Involving Criminal Enterprises and Racketeering) of the *Guidelines Manual*, specifically to §2E1.3.<sup>215</sup> Section 2E1.3 covers VICAR offenses.<sup>216</sup> The guideline’s background commentary underscores its breadth, explaining that it covers conduct ranging from threats to murder and that the maximum term of imprisonment authorized by statute ranges from three years to life imprisonment, depending on the statutory penalty for the underlying offense.<sup>217</sup>

### **1. Determining the Base Offense Level**

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Section 2E1.3(a) provides two alternative base offense levels, instructing courts to apply whichever is greater.<sup>218</sup> There are no specific offense characteristics. Specifically, subsection (a) states that the base offense level is the greater of:

- (1) 12 (the “alternative minimum base offense level”); or
- (2) the offense level applicable to the underlying crime or racketeering activity.<sup>219</sup>

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<sup>211</sup> 18 U.S.C. § 1961.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> 18 U.S.C. § 1959(b).

<sup>215</sup> USSG App. A.

<sup>216</sup> USSG §2E1.3.

<sup>217</sup> USSG §2E1.3, comment. (backg’d.).

<sup>218</sup> USSG §2E1.3(a).

<sup>219</sup> *Id.*

## 2. Application Notes

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Two application notes provide guidance regarding when and how to apply the offense level corresponding to the underlying crime rather than the minimum base offense level of 12.

First, when the underlying conduct violates a state offense, Application Note 1 instructs that the conduct’s “most analogous federal offense” is to be used to determine which guideline to apply and to calculate the offense level.<sup>220</sup> To identify the federal offense that is “most analogous” to the state offense, courts may consider the substance of the conduct criminalized and the severity of the offense and need not find an exact match.<sup>221</sup>

Second, Application Note 2 makes clear that the minimum base offense level of 12 is only applied when it is *higher* than the offense level that would apply to the underlying crime.<sup>222</sup> This ensures that the base offense level for the VICAR offense will always be *at least 12*, even if the underlying crime has a lower offense level. However, the offense level applicable to the underlying crime or racketeering activity will frequently be higher than the minimum base offense level of 12 as the guideline for the underlying violent offense will often fall under Chapter Two, Part A, yielding an offense level higher than 12.<sup>223</sup>

The circuit courts are split regarding how to determine the guideline that applies to the underlying crime. The term “underlying crime or racketeering activity” is similar to terms used in other guidelines in Chapter Two, Part E.<sup>224</sup> Courts have disagreed as to whether the “underlying” criminal conduct in such a term can be based on any conduct proven to be relevant conduct under §1B1.3(a). The First, Seventh, and Eighth Circuits hold

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<sup>220</sup> USSG §2E1.3, comment. (n.1). The term “most analogous federal offense” is similarly used in other Chapter Two, Part E offenses. *See* §2E1.1, comment. (n.2); §2E1.2, comment. (n.2); §2E1.4, comment. (n.1).

<sup>221</sup> *See, e.g.,* United States v. Langley, 919 F.2d 926, 930–32 (5th Cir. 1990) (holding, in a §2E1.2 case where the underlying “unlawful activity” involved promoting prostitution under Texas law, that the “most analogous federal offense” was a Mann Act violation, which punishes similar conduct and is a felony like the Texas offense); United States v. Lisyansky, 806 F.3d 706, 709–10 (2d Cir. 2015) (affirming, in a §2E1.4 case, the use of the guideline at §2A1.5 for conspiracy or solicitation to commit murder where it was more analogous to the defendant’s underlying New York state offense).

In *Langley*, the Fifth Circuit noted that a federal offense can still be “analogous” to a state offense even if it requires an additional federalizing element (there, the proof of transportation of people for the purpose of prostitution). 919 F.2d at 930.

<sup>222</sup> USSG §2E1.3, comment. (n.2).

<sup>223</sup> *See, e.g.,* United States v. Martinez, 136 F.3d 972, 978–79 (4th Cir. 1998) (holding that where the district court found the crime underlying the defendant’s VICAR offense to be conspiracy to commit murder, the applicable offense level was 32 under §2A1.5, rather than 12 under §2E1.3 as the defendant argued).

<sup>224</sup> *See* USSG §§2E1.1(a)(2) (“underlying racketeering activity”), 2E1.2(a)(2) (“underlying crime of violence or other unlawful activity”), 2E1.4(a)(2) (“underlying unlawful conduct”).

that the applicable offense guideline can be based on relevant conduct.<sup>225</sup> The Second Circuit has held, however, that the district court must determine the applicable offense guideline for the underlying racketeering crime based on the defendant's charging document.<sup>226</sup> In that case, the court found that because the underlying crime charged in the VICAR information was assault with a dangerous weapon, the district court must use the aggravated assault guideline at §2A2.2, even if it found as a factual matter that the defendant had committed assault with intent to murder under §2A2.1.<sup>227</sup>

#### IV. GUIDELINE APPLICATION CONSIDERATIONS

In some cases, federal murder, assault, and VICAR offenses may qualify as predicate offenses for certain sentencing enhancements or statutes of conviction, including §4B1.1 (career offender guideline); 18 U.S.C. § 924(c) (using or carrying a firearm during and in relation to a crime of violence or possessing a firearm in furtherance of such an offense); and 18 U.S.C. § 924(e) (Armed Career Criminal Act (ACCA)).<sup>228</sup> To determine whether an

<sup>225</sup> *United States v. Carrozza*, 4 F.3d 70, 75–77 (1st Cir. 1993) (holding that “underlying racketeering activity” in §2E1.1(a)(2) includes relevant conduct under §1B1.3 because the RICO guideline does not explicitly instruct against the general rule that relevant conduct includes uncharged conduct); *United States v. Masters*, 978 F.2d 281, 284–85 (7th Cir. 1992) (noting that §2E1.1(a)(2) speaks of the underlying “activity” not the underlying “conviction” in its base offense level instruction); *United States v. Smith*, 232 F.3d 650, 651 (8th Cir. 2000) (holding that relevant conduct rules under §1B1.3 mean that “underlying unlawful conduct” in §2E1.4(a)(2) does not require the conduct to be charged in the indictment).

The Fourth Circuit also held, in an unpublished case that cited *Carrozza*, that relevant conduct rules are to be used to determine the applicable base offense level under §2E1.3. *United States v. Medina-Castellanos*, 359 F. App'x 404, 407 (4th Cir. 2010); *see also Martinez*, 136 F.3d at 978–79 (holding that the defendant's base offense level under §2E1.3 was properly based on a murder for which he was acquitted).

<sup>226</sup> *United States v. McCall*, 915 F.2d 811, 814–15 (2d Cir. 1990) (holding, in a VICAR case, that the “underlying crime or racketeering activity” in §2E1.3 means the underlying crime charged in the indictment and thus the district court should have selected the guideline section based on the defendant's offense of conviction, rather than his actual conduct).

<sup>227</sup> *Id.*

<sup>228</sup> *See* USSG §4B1.1; 18 U.S.C. § 924(c); 18 U.S.C. § 924(e). Additionally, the VICAR statute includes, as an underlying crime, threatening to commit a “crime of violence.” 18 U.S.C. § 1959(a)(4). Section 1959 incorporates by reference the definition of a “crime of violence” in 18 U.S.C. § 16(a) that is materially identical to the definition of “crime of violence” in section 924(c)(3)(A). *See Leocal v. Ashcroft*, 543 U.S. 1, 6 (explaining that in section 16, Congress provided a general definition of the term ‘crime of violence’ to be used throughout the Comprehensive Crime Control Act of 1984, including in section 1959's prohibition against threats to commit crimes of violence in aid of racketeering activity).

Some courts have held federal kidnapping under 18 U.S.C. § 1201(a) is not a predicate offense under statutes requiring “physical force,” though no court has published a decision on whether federal kidnapping qualifies as generic kidnapping under §4B1.2. *See United States v. Walker*, 934 F.3d 375, 379 (4th Cir. 2019) (holding under plain error review that federal kidnapping is not a crime of violence under 18 U.S.C. § 924(c)(3)(A) because it does not require physical force); *United States v. Jenkins*, 849 F.3d 390, 393–94 (7th Cir. 2017) (holding that federal kidnapping is not a crime of violence under § 924(c)(3)(A) because it does not require physical force), *judgment vacated on other grounds. See also United States v. Gillis*, 938 F.3d 1181,

offense qualifies as a predicate offense under one of these provisions, courts employ a technical framework for comparing the defendant's offense to the relevant provision called the categorical approach.<sup>229</sup> For more detail on how to apply the categorical approach, refer to the Commission's Primer on the Categorical Approach.<sup>230</sup>

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1210 (11th Cir. 2019) (holding that federal kidnapping is not a predicate for soliciting a crime involving physical force under 18 U.S.C. § 373, which uses wording similar to the crime of violence definition in section 924(c)(3)(A)).

<sup>229</sup> See *Descamps v. United States*, 570 U.S. 254, 257–64 (2013); *Mathis v. United States*, 136 S. Ct. 2243, 2248–49 (2016).

<sup>230</sup> For a detailed overview of how to apply the categorical approach, see the Commission's Primer on the Categorical Approach at <https://www.ussc.gov/guidelines/primers/categorical-approach>.