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I. INTRODUCTION

This primer provides a general overview of the statutes, guidelines, and case law applicable to selected crimes against the person (murder, assault, and kidnapping) and Violent Crimes in Aid of Racketeering (VICAR) offenses. Given the similarity in conduct that often underlies these offenses, the associated guidelines share similar specific offense characteristics, and applicable case law may be relevant across guidelines. Although the primer identifies some of the key cases and concepts, it is not a comprehensive compilation of authority nor intended to be a substitute for independent research and analysis of primary sources.

II. SELECTED OFFENSES AGAINST THE PERSON

This section of the primer discusses the statutes, guidelines, and relevant case law pertaining to certain murder, assault, and kidnapping offenses covered by Chapter Two, Part A (Offenses Against the Person) of the *Guidelines Manual*.

A. MURDER

1. *The Murder Statute: 18 U.S.C. § 1111*

Section 1111 of Title 18, United States Code, proscribes first and second degree murder when either is committed “[w]ithin the special maritime and territorial jurisdiction of the United States”¹ or, as provided in section 1114, against “any officer or employee of the United States” engaged in the performance of official duties.² Section 1111(a) defines murder as “the unlawful killing of a human being with malice aforethought.”³

“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 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

¹ 18 U.S.C. § 1111(b); *see id.* § 7 (defining “special and maritime territorial jurisdiction”).

² *Id.* § 1114 (penalizing, “as provided under section 1111,” the killing of “any officer or employee of the United States or of any agency in any branch of the United States Government (including any member of the uniformed services) while such officer or employee is engaged in or on account of the performance of official duties, or any person assisting such an officer or employee in the performance of such duties or on account of that assistance”); *see, e.g.*, *United States v. Peltier*, 446 F.3d 911, 914 (8th Cir. 2006) (alternative holding) (section 1114 “incorporate[s] the punishment prescribed in § 1111(b)” for murder of a federal officer, but not the jurisdictional imitations).

³ 18 U.S.C. § 1111(a).

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.”⁴

Section 1111(c) defines several terms used in the definition of first degree murder, including child abuse,⁵ torture,⁶ and “pattern or practice of assault or torture.”⁷ First degree murder is punishable by death or life imprisonment.⁸

“Second degree murder” is defined as “[a]ny other murder” (*i.e.*, “unlawful killing of a human being with malice aforethought”) not defined as first degree murder.⁹ Second degree murder is punishable by imprisonment for any term of years or for life.¹⁰

2. Applicable Guidelines: Sections 2A1.1 and 2A1.2

The guidelines instruct users to determine the applicable Chapter Two guideline by referring to Appendix A (Statutory Index) for the offense of conviction (*i.e.*, the offense conduct charged in the indictment or information of which the defendant was convicted).¹¹ For murder in violation of 18 U.S.C. § 1111(a), Appendix A specifies the offense guidelines at §2A1.1 (First Degree Murder) and §2A1.2 (Second Degree Murder), both found in Subpart 1 (Homicide) of Chapter Two, Part A of the *Guidelines Manual*.¹²

⁴ *Id.*

⁵ *Id.* § 1111(c)(3) (defining “child abuse” as “intentionally or knowingly causing death or serious bodily injury to a child”). “Serious bodily injury” in turn is defined in 18 U.S.C. § 1365(h)(3) as 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.”

⁶ *Id.* § 1111(c)(6) (defining “torture” by reference to 18 U.S.C. § 2340(1), which provides that torture means an act “specifically intended to inflict severe physical or mental pain or suffering”).

⁷ *Id.* § 1111(c)(4) (defining “pattern or practice of assault or torture” as “assault or torture engaged in on at least two occasions”).

⁸ *Id.* § 1111(b). The guideline range for every offense must follow the boundaries of any applicable statutory minimum or maximum sentences. *See* U.S. SENT’G COMM’N, *Guidelines Manual*, §5G1.1 (2018) [hereinafter USSG].

⁹ 18 U.S.C. § 1111(a).

¹⁰ *Id.* § 1111(b).

¹¹ USSG §1B1.2(a) (explaining how to determine the applicable guideline).

¹² Several other statutes likewise are referenced to §2A1.1, including 18 U.S.C. §§ 1841(a)(2)(C), 1992(a)(7), 2113(e), 2118(c)(2), 2199, 2282A, 2291, 2332b(a)(1), 2340A, and 21 U.S.C. § 848(e). *See* USSG App. A.

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

Section 2A1.1 provides a base offense level of 43.¹³ There are no specific offense characteristics.

Section 2A1.1 applies to: (i) premeditated killings¹⁴; (ii) the commission of certain felonies resulting in death (“felony murder”), as outlined by statute¹⁵ and set forth in cross references from other guidelines, such as §2A4.1 (Kidnapping, Abduction, Unlawful Restraint)¹⁶ and §2B3.1 (Robbery)¹⁷; and (iii) offenses where the applicable guideline requires the offense level to be calculated using the underlying crime, such as §2E1.3 (Violent Crimes in Aid of Racketeering Activity), where the underlying crime would meet the definition of first degree murder.¹⁸ With respect to felony murders covered by §2A1.1, the killing itself need not be committed with malice aforethought.¹⁹

A cross reference to §2A1.1 may apply based on an uncharged murder or a murder that does not result in a conviction as long as the murder qualifies as relevant conduct to the underlying offense under §1B1.3.²⁰ Relevant conduct includes “all acts and omissions

¹³ USSG §2A1.1(a).

¹⁴ USSG §2A1.1, comment. (n.1).

¹⁵ See, e.g., 18 U.S.C. § 1111(a) (including as first degree murder any murder “committed in the perpetration of, or attempt to perpetrate,” a enumerated felony).

¹⁶ USSG §2A1.1, comment. (n.1) (citing USSG §2A4.1(c)(1)); see, e.g., *United States v. Barraza*, 982 F.3d 1106, 1114–15 & n.4 (8th Cir. 2020) (affirming application of §2A1.1 to juvenile defendant pursuant to §2A4.1(c) cross reference “for cases in which kidnapping resulting in death would qualify as first-degree murder” and holding that jury findings were not required to apply the cross reference), *petition for cert. filed*, No. 21–5149 (U.S. July 21, 2021).

¹⁷ USSG §2B3.1(c)(1).

¹⁸ USSG §2A1.1, comment. (n.1) (citing USSG §2E1.3(a)(2) (instructing the court to apply “the offense level applicable to the underlying crime or racketeering activity” when greater than 12)). The guidelines for kidnapping and VICAR, including their cross references, are discussed below in Parts II.C.2 and III.B, respectively.

¹⁹ See *United States v. Pearson*, 203 F.3d 1243, 1275–76 (10th Cir. 2000) (district court correctly applied §2A1.1 to an accidental killing that occurred during the commission of a Hobbs Act robbery, explaining that “the commission of the robbery constitutes the ‘malice aforethought’ required for § 1111(a) felony murder.”).

²⁰ Base offense levels, 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. Thus, while the applicable Chapter Two offense guideline section is determined by the statute of conviction, relevant conduct applies to many guideline provisions. See, e.g., *United States v. Shavers*, 955 F.3d 685, 699 (8th Cir. 2020) (affirming application of murder cross reference in drug guideline where evidence supported “the district court’s finding, by the preponderance of the evidence, that [defendant] was the one who killed [victim] during the course of, and in furtherance of, a drug deal, even if the jury acquitted [defendant] on the firearm charge”); *United States v. Jackson*, 782 F.3d 1006, 1013–14 (8th Cir. 2015) (no violation of 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); *United States v. Asprilla*, 821 F. App’x 944, 951 (11th Cir. 2020) (per curiam) (“In applying the felony-murder cross reference, a district court is not limited to considering the crime with which the defendant was charged and convicted.”).

committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant” and, “in the case of a jointly undertaken criminal activity,” all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity.²¹

Under §2A1.1, a sentence of life imprisonment is appropriate in cases involving premeditated killing, and a downward departure from a term of life imprisonment is appropriate only where the government so moves based on a defendant’s substantial assistance.²² In contrast, in felony murder cases where the defendant did not intentionally or knowingly cause death, a downward departure may be warranted.²³ The court should consider case-specific factors, including the defendant’s state of mind, the riskiness of the defendant’s conduct, and the nature of the underlying offense in determining the extent of a departure.²⁴ Further, Application Note 2(B) recommends against departing below the minimum sentence under the second degree murder guideline, §2A1.2, or below what the guideline for the underlying offense would provide in the absence of death.²⁵

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

Section 2A1.2 provides a base offense level of 38.²⁶ There are no specific offense characteristics.

Like the first degree murder guideline, §2A1.2 may be applied through a cross reference or specific offense characteristic from another offense guideline.²⁷ Applying a cross reference to §2A1.2 is appropriate where a killing with malice aforethought qualifies

²¹ USSG §1B1.3(a)(1); *see also* United States v. Carrozza, 4 F.3d 70, 74–77 (1st Cir. 1993) (“[R]elevant conduct in a RICO case includes all conduct reasonably foreseeable to the particular defendant in furtherance of the RICO enterprise to which he belongs.”).

²² USSG §2A1.1, comment. (n.2(A)) (citing 18 U.S.C. § 3553(e)); *see also* 18 U.S.C. § 1111(b) (imposing a mandatory sentence of death or life imprisonment for first degree murder). A sentence of death also may be imposed for certain statutes referenced to §2A1.1 under the specific provisions in those statutes. USSG §2A1.1, comment. (n.3).

²³ USSG §2A1.1, comment. (n.2(B)). Under USSG §1B1.1, departures are applied after the grouping of multiple counts. USSG §1B1.1(a)(4), (b). However, at least one court has held that a departure applies to the murder guideline calculation prior to grouping any other counts of conviction. *See* United States v. Nguyen, 255 F.3d 1335, 1344–45 (11th Cir. 2001) (rejecting defendant’s argument that his downward departure under Application Note 2 to §2A1.1 should have applied only after grouping).

²⁴ USSG §2A1.1, comment. (n.2(B)).

²⁵ *Id.*

²⁶ USSG §2A1.2(a).

²⁷ 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), 2E1.3(a)(2), 2L1.1(c), 2K2.1(c)(1)(B).

as relevant conduct to the underlying offense.²⁸ Malice aforethought may be established with evidence of extreme recklessness and wanton disregard for human life.²⁹

An upward departure from §2A1.2's base offense level may be warranted where "the defendant's conduct was exceptionally heinous, cruel, brutal, or degrading to the victim."³⁰ The extreme conduct departure focuses on the defendant's conduct, not the victim's characteristics, and thus may apply even when a victim is dead or unconscious at the time of the defendant's conduct.³¹

At least one circuit has rejected applying the extreme conduct departure based on conduct already incorporated into the different offense levels for first degree versus second degree murder.³² Further, second degree murder is considered to be inherently heinous, and whether a defendant's conduct is outside the heartland of conduct contemplated by §2A1.2 often entails a factual comparison with other cases.³³

B. ASSAULT

1. The Assault Statute: 18 U.S.C. § 113

Similar to the federal murder statute, 18 U.S.C. § 113 proscribes assault offenses committed within the maritime and territorial jurisdiction of the United States and provides their statutory penalties and applicable definitions.³⁴

²⁸ See, e.g., *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 offense committed in connection with illegal possession of the firearm where defendant's conduct, threatening to kill and then shooting the victim, "warranted an inference of malice"); *United States v. Lemus-Gonzalez*, 563 F.3d 88, 92–93 (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 resulting in death evinced extreme recklessness and wanton disregard for life).

²⁹ See cases cited *supra* note 28.

³⁰ USSG §2A1.2, comment. (n.1) (citing USSG §5K2.8 (Extreme Conduct)).

³¹ *United States v. Hanson*, 264 F.3d 988, 998–99 (10th Cir. 2001) (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); see also *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).

³² *Hanson*, 264 F.3d at 994–97 (rejecting argument 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, characteristics which are central distinctions between the degrees of murder).

³³ See, e.g., *United States v. Paster*, 173 F.3d 206, 217–18 (3d Cir. 1999) (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).

³⁴ In addition to the general federal assault statute, several other statutes address assault against specific types of individuals. *E.g.*, 18 U.S.C. §§ 111 (assault on federal officials), 112 (assault on foreign officials), 115 (assault on family members of federal officials).

Section 113(a) lists the statutory maximum terms of imprisonment for assault offenses of varying degrees of seriousness, including:

- (1) Assault with intent to commit murder or sexual abuse offenses under sections 2241 or 2242 (20-year maximum);
- (2) Assault with intent to commit any felony except murder or sexual abuse offenses under sections 2241 or 2242 (10-year maximum);
- (3) Assault with a dangerous weapon with intent to do bodily harm (10-year maximum);
- (4) Assault by striking, beating, or wounding (1-year maximum);
- (5) Simple assault (6-month maximum)³⁵ and simple assault with a victim under the age of 16 years (1-year maximum);
- (6) Assault resulting in serious bodily injury (10-year maximum);
- (7) Assault resulting in substantial bodily injury to a spouse, intimate partner, dating partner, or victim under the age of 16 years (5-year maximum); and
- (8) Assault of a spouse, intimate partner, or dating partner by strangling, suffocating, or attempting to do either (10-year maximum).³⁶

Section 113(b) defines several terms used in subsection (a), including substantial bodily injury³⁷; serious bodily injury³⁸; spouse, intimate partner, and dating

³⁵ 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 not more than than six months. USSG §1B1.9, comment. (n.1).

³⁶ 18 U.S.C. § 113(a).

³⁷ *Id.* § 113(b)(1) (“substantial bodily injury” is bodily injury involving “(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”).

³⁸ *Id.* § 113(b)(2) (as with the federal murder statute, “serious bodily injury” is defined by reference to section 1365 as 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).

partner³⁹; strangling⁴⁰; and suffocating.⁴¹

2. Applicable Guidelines: Sections 2A2.1, 2A2.2, and 2A2.3

The above assault offenses are sentenced under Subpart 2 (Assault) of Chapter Two, Part A of the *Guidelines Manual*. Violations of section 113(a)(1) are referenced to §2A2.1; violations of section 113(a)(2), (3), (6), and (8) are referenced to §2A2.2; and violations of section 113(a)(4), (5), and (7) are referenced to §2A2.3.⁴² Each of these guidelines is addressed below.

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

For assault with the intent to commit murder in violation of 18 U.S.C. § 113(a)(1) and attempted murder in violation of 18 U.S.C. § 1113, among other similar offenses,⁴³ Appendix A specifies the offense guideline at §2A2.1. Section 2A2.1(a)(1) provides a base

³⁹ *Id.* § 113(b)(3). All three terms are defined by reference to section 2266. A spouse or intimate partner is a spouse, former spouse, person who shares a child in common, person who cohabits or has cohabited as a spouse, or person who has been in a social relationship of a romantic or intimate nature. *Id.* § 2266(7)(A)(i). The statute requires courts to determine whether a person is an “intimate partner” based on “the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.” *Id.* § 2266(7)(A)(i)(II); *see, e.g.*, *United States v. LaVictor*, 848 F.3d 428, 458 (6th Cir. 2017) (non-cohabiting individuals who had been romantically involved for several years, had plans to get married, and visited each other every weekend were “intimate partners”). Similarly, a “dating partner” is a person who “has been in a social relationship of a romantic or intimate nature,” based on the length and type of relationship and frequency of interaction. 18 U.S.C. § 2266(10).

⁴⁰ 18 U.S.C. § 113(b)(4) (“[S]trangling’ means 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 whether that conduct results in any visible injury or whether there is any intent to kill or protractedly injure the victim[.]”).

⁴¹ *Id.* § 113(b)(5) (“[S]uffocating’ means intentionally, knowingly, or recklessly impeding the normal breathing of a person by covering the mouth of the person, the nose of the person, or both, regardless of whether that conduct results in any visible injury or whether there is any intent to kill or protractedly injure the victim.”).

⁴² USSG App. A; *see also* *United States v. Sandoval*, 959 F.3d 1243, 1247 (10th Cir.) (explaining that the assault guidelines and base offense levels reflect the statutory “differentiat[ion] based on a defendant’s mental state” and “other criteria”), *cert. denied*, 141 S. Ct. 931 (2020).

⁴³ For example, Appendix A likewise directs the application of §2A2.1 for attempted murder in violation of a number of other statutes, such as 18 U.S.C. § 1114, which prohibits the attempted murder of an officer or employee of the United States engaged in or on account of the performance of official duties, and 18 U.S.C. § 1512(a), which prohibits attempted murder with intent to tamper with a witness or official proceedings.

offense level of 33 if the object of the offense would have constituted first degree murder.⁴⁴ Otherwise, §2A2.1(a)(2) provides a base offense level of 27.⁴⁵

Section 2A2.1(b) provides two possible enhancements that may increase the total offense level: (1) an enhancement based on the severity of the victim's injury and (2) an enhancement based on the receipt of anything of pecuniary value.

i. Bodily injury enhancement

Section 2A2.1(b)(1) provides a tiered enhancement based on the severity of the victim's injury:

- (A) For "permanent or life-threatening bodily injury," a 4-level increase applies;
- (B) For "serious bodily injury," a 2-level applies; and
- (C) If the severity of the injury falls between the severity specified in (A) and (B), a 3-level increase applies.⁴⁶

"Permanent or life-threatening bodily injury" and "serious bodily injury" are defined by reference to §1B1.1, Application Note 1.⁴⁷

⁴⁴ USSG §2A2.1(a)(1); *see also, e.g.*, United States v. Alston, 843 F. App'x 512, 513–15 (4th Cir. 2021) (per curiam) (affirming the application of §2A2.1(a)(1) for a defendant convicted of being a felon in possession of ammunition where the defendant arranged a lookout and then fired a gun while running at two individuals "in a confined space," demonstrating the premeditation and malice required for attempted first degree murder; the cross reference in §2K2.1(c)(1)(A) (Unlawful Possession of Firearms) referred to §2X1.1(c)(1) (Attempt, Solicitation, or Conspiracy), which in turn directed the court to apply §2A2.1(a)(1) as "an attempt" that is expressly covered by the attempted murder guideline); United States v. Moreno Ornelas, 814 F. App'x 313, 315 (9th Cir. 2020) ("The district court correctly interpreted the attempted first-degree murder guideline by distinguishing the requisite elements of 'intent to kill' and 'premeditation.' . . . Sufficient evidence supports the finding that Moreno contemplated the attempted killing, given Moreno's conduct leading up to the physical altercation (including his initial refusal to comply with the officer's orders); the length of the altercation; Moreno's dominant position during the altercation; the timing and the number of shots fired; the officer yelling 'no, no' when the second and third shots were fired towards him; and Moreno's statements suggesting that he was thinking about the consequences of his action.").

⁴⁵ USSG §2A2.1(a)(2); *see also, e.g.*, United States v. Caston, 851 Fed. App'x. 557, 564 (6th Cir. 2021) (affirming the application of §2A2.1(a)(2) for a defendant convicted of being a felon in possession of ammunition where the defendant fired three shots at a victim in a car, demonstrating the " 'malicious intent' required for attempted murder"; §2A2.1(a)(2) applied by virtue of the same cross references in §2K2.1(c)(1)(A) and §2X1.1(c)(1) that applied in *Alston*).

⁴⁶ USSG §2A2.1(b)(1).

⁴⁷ USSG §2A2.1, comment. (n.1). These definitions also apply to other offenses detailed in this primer, including aggravated and simple assault, as well as kidnapping. Cases interpreting these terms may be relevant to all the offenses in this primer, *see, e.g.*, United States v. Spinelli, 352 F.3d 48, 57 (2d Cir. 2003) (citing cases applying bodily injury enhancement in §2B3.1 to elucidate enhancement in §2A2.1), although the facts of cases within the same offense guideline may be more readily analogized to each other.

“Permanent or life-threatening bodily injury” is an “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.”⁴⁸

“Serious bodily injury” 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.”⁴⁹ Serious bodily injury also is “deemed to have occurred” when an “offense involve[s] conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.”⁵⁰

Determining the proper enhancement is a highly fact-specific inquiry. The 4-level enhancement for “permanent or life-threatening bodily injuries” encompasses, on the one hand, injuries that are permanent and “substantial” (but not necessarily “terribly severe”),⁵¹ and, on the other hand, injuries that are temporary but life-threatening.⁵² To determine whether an injury is “likely to be permanent,”⁵³ the court should consider the

⁴⁸ USSG §1B1.1, comment. (n.1(K)).

⁴⁹ USSG §1B1.1, comment. (n.1(M)). As a disjunctive list, “the Guideline applies where the victim suffered any one of [the listed] ailments.” *United States v. Flores*, 974 F.3d 763, 765 (6th Cir. 2020). The guidelines’ definition of “serious bodily injury” differs from the statutory definition in 18 U.S.C. § 1365, which the federal assault statute incorporates. *See* 18 U.S.C. § 113(b)(2); *supra* note 38; *see also, e.g.*, *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”).

⁵⁰ USSG §1B1.1, comment. (n.1(M)). Sections 2241 and 2242 criminalize, among other things, causing another person to engage in a sexual act by force, 18 U.S.C. § 2241(a), or threats of force, *see id.* § 2242(1). *See also id.* §§ 2241(a) (prohibiting sexual acts by threats of “death, serious bodily injury, or kidnapping”); 2242(2); (prohibiting engaging in a sexual act with an incapacitated victim), 2241(b) (prohibiting the incapacitation and then engaging in a sexual act with a victim); 2241(c) (prohibiting engaging in a sexual act with certain minors).

⁵¹ *See, e.g.*, *United States v. Price*, 149 F.3d 352, 354 (5th Cir. 1998) (affirming that “permanent or life-threatening bodily injury” enhancement applied under the aggravated assault guideline where the victim suffered a 15 to 25% permanent loss of hand function); *see also, e.g.*, *United States v. Brazier*, 933 F.3d 796, 802–03 & n.4 (7th Cir. 2019) (affirming the district court’s finding of life-threatening injury where the defendants shot the victim in the arm, beat the victim in the head, kicked him, poured alcohol in his gunshot wound, and, even though they thought the victim might be dying, dumped him in an alley; in *dictum*, the court held that the record also would have supported a finding of permanent injury because, ten months after the offense, the victim “still could not use or straighten his arm”).

⁵² For example, an injury may be immediately life-threatening but have no long-term effects on a victim. *See, e.g.*, *United States v. Bryant*, 913 F.3d 783, 787 (8th Cir. 2019) (finding “no error in the court’s conclusion that [the victim] faced a substantial risk of death when she was strangled to the point of unconsciousness, which qualifies as a life-threatening bodily injury sufficient to warrant the enhancement,” even though the victim fully recovered because “injuries resulting in a substantial risk of death need not be permanent”); *United States v. Sarratt*, 750 F. App’x 213, 214 (4th Cir. 2019) (per curiam) (applying §2A2.1(b)(1)(A) where a victim was shot in the abdomen and successfully treated at a hospital).

⁵³ USSG §1B1.1, comment. (n.1(K)).

victim's current medical prognosis. That prognosis need not remove all uncertainty concerning the victim's future treatability,⁵⁴ but must rest on "more than the generalized and subjective impression of the victim" that the injury is permanent.⁵⁵ For example, a victim who suffers permanent facial scars satisfies the definition of permanent bodily injury and warrants the enhancement, even though the injury may not be serious.⁵⁶

The 2-level enhancement for serious bodily injury, in contrast, applies where a victim suffers severe "but temporary or treatable injuries."⁵⁷ The 3-level enhancement requires sentencing courts to draw fine lines between serious injuries and injuries that are permanent or life-threatening.⁵⁸

Courts have interpreted "bodily injury" to include harm to a victim's mental and emotional health.⁵⁹ Because nearly all attempted murders inflict at least some psychological harm, courts recognize the need to carefully distinguish among the levels of mental harm⁶⁰—for example, the 4-level enhancement in subdivision (A) applies only if the impairment of the mental faculty is "likely to be permanent," so the district court must

⁵⁴ See, e.g., *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.").

⁵⁵ *United States v. Guang*, 511 F.3d 110, 125 (2d Cir. 2007).

⁵⁶ See, e.g., *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).

⁵⁷ *United States v. Price*, 149 F.3d 352, 354 (5th Cir. 1998); see, e.g., *United States v. Flores*, 974 F.3d 763, 765–66 (6th Cir. 2020) (affirming application of serious bodily injury enhancement where victim suffered extreme pain from deep stab wounds and needed "significant medical intervention" to close the wounds and treat "his extensive blood loss" and explaining that either condition (extreme pain or medical intervention) would have sufficed).

⁵⁸ See, e.g., *United States v. Roy*, 408 F.3d 484, 496 (8th Cir. 2005) (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 a scar); *United States v. James*, 798 F. App'x 302, 307–08 (10th Cir. 2020) (affirming district court's finding that the victim's injuries "fell somewhere between serious and permanent or life-threatening" where the victim's facial puncture wounds and scarring "approach[ed] permanent injuries").

⁵⁹ See, e.g., *United States v. Urbina-Robles*, 817 F.3d 838, 847 (1st Cir. 2016) (district court did not clearly err in finding serious bodily injury where the victims "continued to receive psychological and psychiatric treatment since the night of the crime" and where one victim, a surgeon, was "diagnosed with depression, anxiety, panic attacks, and insomnia" and became "unable to perform surgeries as a result of the mental impact of the crime."); *United States v. Spinelli*, 352 F.3d 48, 58 (2d Cir. 2003) ("There is no question that emotional or psychological injuries can be 'permanent or life-threatening,' and that they may, in some instances, cause the 'loss or substantial impairment of the function of a . . . mental faculty.'").

⁶⁰ See *Spinelli*, 352 F.3d at 59 ("Since virtually every murder attempt is likely to inflict some psychological damage upon its victim, it is not surprising that the Guidelines draw distinctions between various degrees of psychic harm.").

consider “evidence as to the nature, severity, and likely duration of [the victim’s psychological] injuries” to determine whether and which enhancement applies.⁶¹

The applicability of a bodily injury enhancement turns on the results of the criminal act (*i.e.*, the extent of the victim’s injuries), not the nature or severity of the defendant’s conduct,⁶² though some courts have expressly allowed consideration of how the circumstances of a particular offense may exacerbate a victim’s risk of death.⁶³ Further, an upward departure may be warranted where an offense creates “a substantial risk of death or serious bodily injury” to multiple people.⁶⁴

ii. Pecuniary value enhancement

Section 2A2.1(b)(2) provides for a 4-level increase where an offense involves the offer or receipt of anything of pecuniary value in exchange for undertaking the murder.⁶⁵ This enhancement may be applied in murder-for-hire cases, such as where a defendant offers money for someone else to murder a victim⁶⁶ or where a defendant is paid money to murder someone.⁶⁷

⁶¹ *Id.* at 59–60 (remanding for further proceedings regarding the victim’s psychological injuries and the applicability of the §2A2.1(b)(1) enhancement where the victim was shot at several times and forced to enter a witness protection program).

⁶² *See, e.g., id.* at 57 (“[T]he sentencing enhancements at issue are directed at the injurious *results* of a defendant’s crime, not his conduct.”); *United States v. Dotson*, 109 F.3d 486, 489 (8th Cir. 1997) (same); *United States v. Perkins*, 89 F.3d 303, 308 (6th Cir. 1996) (same).

⁶³ *Compare, e.g., United States v. Morgan*, 238 F.3d 1180, 1188–89 (9th Cir. 2001) (explaining that carjacking during which the defendant locked the victim “in the trunk of a car in freezing weather for many hours,” denied the victim “the essentials of life,” and then dumped the defendant “in a ditch in a remote area on a freezing night” could constitute a life-threatening injury and remanding case to consider whether the defendant’s “maltreatment” of the defendant was “life-threatening”), *and United States v. Williams*, 258 F.3d 669, 674 (7th Cir. 2001) (citing *Morgan* and holding that evidence supported serious bodily injury enhancement where the victim “was left alone in an icy ditch, tied up with duct tape, to fend for herself while she was in” a bloody beaten state; the court observed that the application note defining life-threatening injury “does not speak in certainties; it speaks of risk, and [the victim] undoubtedly faced life-threatening risk”), *with Spinelli*, 352 F.2d at 57 n.5 (suggesting that *Morgan* involved “a somewhat different approach” in determining whether the serious bodily injury enhancement is warranted, in part due to the “considerable resemblance [of the offense in *Morgan*] to the kidnapping example described” in the commentary).

⁶⁴ USSG §2A2.1, comment. (n.2).

⁶⁵ USSG §2A2.1(b)(2). This enhancement parallels 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* Part II.B.2.b.v.

⁶⁶ *See, e.g., United States v. Ivory*, 532 F.3d 1095, 1103–04 (10th Cir. 2008) (affirming application of enhancement where defendants were “complicit in” an offer to pay for murder).

⁶⁷ *See, e.g., United States v. Castillo-Chavez*, 555 F. App’x 389, 401 (5th Cir. 2014) (per curiam) (affirming application of enhancement where defendant was a hired assassin for a cartel).

b. Section 2A2.2 (Aggravated Assault)

Appendix A specifies the offense guideline at §2A2.2 for certain offenses covered by the federal assault statute, 18 U.S.C. § 113, including assault with intent to commit a felony other than murder or sexual abuse⁶⁸; assault with a dangerous weapon with intent to do bodily harm⁶⁹; assault resulting in serious bodily injury⁷⁰; and assault of a spouse, intimate partner, or dating partner by strangling or suffocating⁷¹; as well as assault offenses committed against specific individuals, such as certain domestic or foreign officials.⁷²

As used in the guideline, an “aggravated assault” is defined 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.”⁷³ Thus, §2A2.2 applies to assaults made more severe by one or more aggravating factors.⁷⁴ It also covers attempted manslaughter and assault with intent to commit manslaughter.⁷⁵

Section 2A2.2(a) provides a base offense level of 14.⁷⁶ Section 2A2.2(b) provides seven enhancements that may increase the total offense level: (1) a 2-level increase if the assault involved more than minimal planning; (2) tiered increases for use of a firearm or dangerous weapon; (3) tiered increases based on the degree of the victim’s bodily injury; (4) a 3-level increase for strangling or suffocating a spouse or intimate partner, or attempting to do so; (5) a 2-level increase if the assault was motivated by payment; (6) a 2-level increase for violations of a protective order; and (7) a 2-level increase for convictions under certain statutes that prohibit assault against public officials and their families.⁷⁷

i. More than minimal planning enhancement

Section 2A2.2(b)(1) provides for a 2-level increase for assaults involving “more than

⁶⁸ 18 U.S.C. § 113(a)(2).

⁶⁹ *Id.* § 113(a)(3).

⁷⁰ *Id.* § 113(a)(6).

⁷¹ *Id.* § 113(a)(8).

⁷² 18 U.S.C. §§ 111, 112.

⁷³ USSG §2A2.2, comment. (n.1).

⁷⁴ USSG §2A2.2, comment. (backg’d.).

⁷⁵ *Id.*

⁷⁶ USSG §2A2.2(a).

⁷⁷ USSG §2A2.2(b). As discussed below, the maximum combined enhancement under §2A2.2(b)(2) and (3) (for dangerous weapon and bodily injury, respectively) is ten and the maximum combined enhancement under §2A2.2(b)(2), (3), and (4) (for strangling or suffocating an intimate partner) is 12. USSG §2A2.2(b)(3), (b)(4).

minimal planning.”⁷⁸ As used in the guideline, a defendant engages in “more than minimal planning” when he plans more “than is typical for commission of the offense in a simple form” or takes “significant affirmative steps . . . to conceal the offense,” other than conduct to which the adjustment for obstruction of justice, §3C1.1, would apply.⁷⁹ To illustrate, while a defendant who merely waited to ensure that there would be no witnesses before committing an offense would not qualify for the enhancement, a defendant who lures a victim to a specific location or wears a ski mask to prevent identification would qualify.⁸⁰

To evaluate whether the enhancement is warranted, courts generally look at the extent of any planning, coordination, or concealment or whether the offense was instead committed at the spur of the moment.⁸¹ The conduct need not be sophisticated or elaborate to qualify.⁸²

ii. Dangerous weapon enhancement

Section 2A2.2(b)(2) provides a tiered enhancement based on the degree of involvement of a dangerous weapon in the offense:

- (A) If a firearm was discharged, a 5-level increase applies;
- (B) If a dangerous weapon, including a firearm, was “otherwise used,” a 4-level increase applies; and
- (C) If a dangerous weapon, including a firearm, was brandished or its use was threatened, a 3-level increase applies.⁸³

⁷⁸ USSG §2A2.2(b)(1).

⁷⁹ USSG §2A2.2, comment. (n.2); *see also* USSG §3C1.1 (“If (1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction . . . increase the offense level by 2 levels.”).

⁸⁰ USSG §2A2.2, comment. (n.2).

⁸¹ *Compare, e.g.,* 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, all of which did “not describe an offense committed on the spur of the moment”), *with* United States v. Tapia, 59 F.3d 1137, 1144 (11th Cir. 1995) (§2A2.2(b)(1) enhancement did not apply where the defendant called someone to ascertain whether another inmate would be testifying against him and then attacked the inmate, but made the phone call immediately before the attack, did not take any steps to have the inmate placed in the cell with him, and did not try to conceal the offense).

⁸² *See, e.g.,* United States v. Coombs, 823 F. App’x 613, 618 (10th Cir. 2020) (affirming the §2A2.2(b)(1) enhancement over the defendant’s argument that his attack on a woman in a restroom stall was “spontaneous” where the defendant waited in another bathroom stall, battered his way into the woman’s stall, and wrapped his face in toilet paper in an attempt to conceal his identity); United States v. Simpson, 760 F. App’x 931, 935 (11th Cir. 2019) (affirming the §2A2.2(b)(1) enhancement where there was coordination between the two codefendants to lure the victim to an apartment, even though the scheme was “not particularly ‘sophisticated’ or ‘elaborate’”).

⁸³ USSG §2A2.2(b)(2).

In assault cases involving a dangerous weapon with the intent to cause bodily injury (one of the guideline definitions of aggravated assault), the base offense level and the weapon enhancement account for different aspects of the offense and both should be applied, even where both are based on the same conduct regarding the weapon.⁸⁴

The terms “firearm,”⁸⁵ “dangerous weapon,”⁸⁶ “otherwise used,”⁸⁷ and “brandished”⁸⁸ are defined by reference to §1B1.1, Application Note 1.⁸⁹ While a defendant may “brandish” a weapon to alert a victim that he has the immediate ability to do violence, the “otherwise used” enhancement applies in more directly threatening situations, such as where a defendant points the weapon at the victim.⁹⁰ An object need not actually cause

⁸⁴ USSG §2A2.2, comment. (n.3 & backg’d.). Application Note 3 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, 404–05 (6th Cir. 2017) (providing overview of the history of the dangerous weapon enhancement’s double counting issue).

⁸⁵ “‘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(H)).

⁸⁶ “‘Dangerous weapon’ means: (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) the defendant used the object in a manner that created the impression that the object was such an instrument (*e.g.* a defendant wrapped a hand in a towel during a bank robbery to create the appearance of a gun).” USSG §1B1.1, comment. (n.1(E)); *see, e.g.*, United States v. Taylor, 961 F.3d 68, 71–72, 74–77 (2d Cir. 2020) (district court erred in applying dangerous weapon enhancement where the defendant acted as though he had a firearm by putting his hand near his waistband during several robberies and by holding his belt during another robbery; “[w]hile someone could conceal a hand within his or her pants to make the hand appear to be a weapon, using a hand to *hold* a belt is not using one’s hand to make the *hand* appear to be a weapon”). Other offense guidelines also reference the same §1B1.1 definition of “dangerous weapon.” *See, e.g.*, USSG §2B3.1(b)(2)(E) (robbery with a dangerous weapon).

⁸⁷ “‘Otherwise used’ means conduct that does not involve the discharge of a firearm but is more than brandishing, displaying, or possessing a firearm or other dangerous weapon. USSG §1B1.1, comment. (n.1(J)).

⁸⁸ “‘Brandished’ means to display all or part of a weapon or to otherwise make the weapon’s presence made known to intimidate another person. USSG §1B1.1, comment. (n.1(C)). The weapon need not be directly visible to the victim, though it must be present. *Id.*

⁸⁹ USSG §2A2.2, comment. (n.1).

⁹⁰ *See, e.g.*, United States v. Bell, 947 F.3d 49, 61–62 (3d Cir. 2020) (citing United States v. Johnson, 199 F.3d 123, 127 (3d Cir. 1999)) (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); United States v. Williams, 520 F.3d 414, 423 (5th Cir. 2008) (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); United States v. Yarmai, 842 F. App’x 799, 801–02 & n.2 (3d Cir. 2021) (affirming application of “otherwise used” enhancement where defendant held a “BB gun on its side with the muzzle facing the teller”; enhancement applies whenever a “weapon is pointed in a manner that is explicitly threatening” (quoting *Johnson*, 199 F.3d at 127)).

serious bodily injury to be “capable of” doing so and meet the definition of “dangerous weapon.”⁹¹

The definition of dangerous weapon also 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.⁹² Thus, shoes,⁹³ a plastic water pitcher,⁹⁴ and firewood⁹⁵ may count as dangerous weapons where they are 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,⁹⁶ as long as the object is used as a weapon.⁹⁷

The 3-level enhancement for threats to use a weapon is assessed from the victim’s perspective, and it does not require the actual presence or possession of a weapon.⁹⁸

⁹¹ See, e.g., *United States v. Tolbert*, 668 F.3d 798, 801–03 (6th Cir. 2012) (not conjecture to conclude that a plastic water pitcher was capable of causing serious bodily harm and qualified as a “dangerous weapon” even though no such harm actually occurred); see also, e.g., *United States v. Douglas*, 957 F.3d 602, 607 (5th Cir. 2020) (per curiam) (affirming application of dangerous weapon enhancement where defendant used a more-potent-than usual pepper spray, an expert testified that the spray could cause severe injuries when deployed close to the victim, two victims required hospital treatment, and one victim suffered extended impairment in one eye).

⁹² USSG §2A2.2, comment. (n.1).

⁹³ Compare *United States v. Swallow*, 891 F.3d 1203, 1205 (9th Cir. 2018) (“Although tennis shoes are not inherently dangerous, Swallow undoubtedly used his shoes to augment the force of the kicks and the stomp he delivered to the victim’s head; the shoes enabled Swallow to inflict greater harm than if he had delivered the kicks and stomp with his bare feet.”), and *United States v. Velasco*, 855 F.3d 691, 694 (5th Cir. 2017) (affirming the enhancement where a defendant stomped on a victim’s head with shoes), with *United States v. Nunez-Granados*, 546 F. App’x 483, 486–87 (5th Cir. 2013) (per curiam) (enhancement did not apply because the defendant kicked the victim with the intent to escape, not to cause injury).

⁹⁴ See, e.g., *Tolbert*, 668 F.3d at 803 (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).

⁹⁵ See, e.g., *United States v. Tisnolthtos*, 115 F.3d 759, 763 (10th Cir. 1997).

⁹⁶ See, e.g., *United States v. Milliron*, 984 F.3d 1188, 1196 (6th Cir. 2021) (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).

⁹⁷ See also, e.g., *United States v. Dayea*, 32 F.3d 1377, 1380 (9th Cir. 1994) (enhancement did not apply where an intoxicated defendant caused a drunk-driving accident with his car without intent to injure (*i.e.*, did not intend to use the car as a weapon) and expressing concern that, without an intent-to-injure requirement, the enhancement could apply where a defendant merely used a car to drive before assaulting a victim through a separate means (*e.g.*, his hands)).

⁹⁸ See, e.g., *United States v. Chee*, 110 F.3d 1489, 1493–94 (9th Cir. 1997) (while few cases address the “threat of weapon use,” the plain language of the guidelines does not require a weapon actually be present; requiring its presence would create a redundancy with the “brandished” clause).

iii. Bodily injury enhancement

Section 2A2.2(b)(3) provides a tiered enhancement based on the degree of bodily injury suffered by the victim:

- (A) For bodily injury, a 3-level increase applies;
- (B) For serious bodily injury, a 5-level increase applies;
- (C) For permanent or life-threatening bodily injury, a 7-level increase applies;
- (D) If the severity of the injury falls between the severity specified in (A) and (B), a 4-level increase applies; and
- (E) If the severity of the injury falls between the severity specified in (B) and (C), a 6-level increase applies.⁹⁹

The cumulative adjustments from applying the bodily injury enhancement in §2A2.2(b)(3) and the weapon enhancement in §2A2.2(b)(2) cannot exceed 10 levels.¹⁰⁰ The terms “serious bodily injury” and “permanent or life-threatening bodily injury” have the same meaning as used in the bodily injury enhancement to the assault with intent to commit murder guideline (§2A2.1, discussed in Part II.B.2.a.i).¹⁰¹

“Bodily injury” is defined 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.”¹⁰² The term “significant injury” is “open-ended” and not susceptible to a precise definition.¹⁰³ The bodily injury enhancement encompasses injuries such as scratches and eye pain,¹⁰⁴

⁹⁹ USSG §2A2.2(b)(3).

¹⁰⁰ *Id.* At least one court has held the “victim” must be the object of the aggravated assault for the bodily injury enhancement to apply. *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 where the defendant fired shots at both a federal and city officer but only the city officer was injured).

¹⁰¹ As set forth above, “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. USSG §1B1.1, comment. (n.1(M)). “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(K)).

¹⁰² USSG §1B1.1, comment. (n.1(B)).

¹⁰³ *See, e.g., United States v. Lancaster*, 6 F.3d 208, 209–10 (4th Cir. 1993) (per curiam) (whether an injury is “significant” is a fact-specific inquiry that accounts for both articulable and intangible factors best assessed by the district court).

¹⁰⁴ *See, e.g., United States v. Douglas*, 957 F.3d 602, 607–08 (5th Cir. 2020) (per curiam) (affirming bodily injury enhancement where defendant pepper sprayed victims at close range, requiring hospital treatment and leaving one victim with protracted impairment of one eye); *United States v. Steele*, 550 F.3d 693, 703–04 (8th Cir. 2008) (affirming application of bodily injury enhancement where the defendant jammed his thumbs into the victim’s eyes and the victim sought medical attention; the resulting eye pain and scratches were “painful and obvious” injuries).

swelling and pain from a slap in the face,¹⁰⁵ being hit while on the ground,¹⁰⁶ and cuts and bruises from being hit with hands and bare feet.¹⁰⁷

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 loses a lot of blood or suffers from hemophilia.¹⁰⁸ Further, a graze injury from a bullet that causes lingering pain after medical treatment but not surgery or hospitalization may fall between “bodily injury” and “serious bodily injury.”¹⁰⁹ Whether a particular injury warrants a particular enhancement must be assessed based on the facts of the victim’s injuries, treatment, and prognosis in each case.¹¹⁰

iv. Strangling or suffocating enhancement

Section 2A2.2(b)(4) provides for a 3-level increase for offenses involving strangling, suffocating, or attempted strangling or suffocating of a spouse, intimate partner, or dating partner.¹¹¹ The cumulative adjustments from the weapon enhancement, bodily injury enhancement, and the strangling or suffocating enhancement may not exceed 12 levels.¹¹²

“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.

¹⁰⁵ See, e.g., *United States v. Greene*, 964 F.2d 911, 911–12 (9th Cir. 1992) (per curiam) (affirming bodily injury enhancement where the victim was slapped on the face several times, suffered a red and swollen cheek, and suffered pain that lasted for a week).

¹⁰⁶ See, e.g., *United States v. Egbert*, 562 F.3d 1092, 1101–02 (10th Cir. 2009) (reversing serious bodily injury enhancement for lack of evidence regarding the victim’s injuries, such as whether the victim required medical treatment, but explaining that the evidence supported a finding of bodily injury).

¹⁰⁷ See, e.g., *United States v. LeCompte*, 108 F.3d 948, 951 (8th Cir. 1997) (affirming bodily injury enhancement where defendant struck the victim with his fists and feet, leaving the victim with injuries that were “painful, obvious and required medical attention”).

¹⁰⁸ See, e.g., *United States v. Tavares*, 93 F.3d 10, 16 (1st Cir. 1996) (“Depending on context, an inch long laceration requiring eight stitches might or might not constitute serious bodily injury. For example, if there was a great deal of blood loss, or the victim was a hemophiliac, such an injury might well be thought serious . . . [W]here on the sliding scale of severity a particular laceration falls is not a determination that can be made solely as a matter of law.”).

¹⁰⁹ See, e.g., *United States v. Mays*, 967 F.3d 748, 751–52 (8th Cir. 2020) (district court did not clearly err in finding that robbery victim’s injuries fell between “bodily injury” and “serious bodily injury” where she suffered injuries from a bullet graze that required medical treatment and resulted in lingering pain but did not require surgery or hospitalization).

¹¹⁰ See, e.g., *United States v. Markle*, 628 F.3d 58, 63 (2d Cir. 2010) (“Although determining whether an injury is ‘significant’ requires a fact-specific inquiry, injuries warranting medical attention generally are deemed ‘significant.’ ”); cases cited *infra* notes 103–109.

¹¹¹ USSG §2A2.2(b)(4). The domestic violence guideline provides a similar enhancement. See USSG §2A6.2(b).

¹¹² USSG §2A2.2(b)(4).

§ 113.¹¹³ Though strangling, suffocating, or attempting to do either serve as an enumerated basis for applying the aggravated assault guideline,¹¹⁴ the same conduct (when committed against an intimate partner or spouse) may warrant the 3-level enhancement under §2A2.2(b)(4).¹¹⁵

v. Payment enhancement

Section 2A2.2(b)(5) provides for a 2-level increase for assault “motivated by a payment or offer of money or other thing of value.”¹¹⁶ This enhancement applies to cases where the perpetrator of the assault was hired, paid, or offered something of value for undertaking the assault—not cases where money plays an indirect role in triggering the assault, such as where an assault is committed in retribution for a robbery.¹¹⁷

vi. Court protection order enhancement

Section 2A2.2(b)(6) provides for a 2-level increase for offenses involving the violation of a court protection order.¹¹⁸ Section 1B1.1 defines “court protection order” by reference to 18 U.S.C. § 2266(5), which provides in part that a protection order is any “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

¹¹³ See *supra* notes 39–41. As set forth above, “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. A “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. A “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) (citing 18 U.S.C. §§ 113, 2266).

¹¹⁴ USSG §2A2.2, comment. (backg’d).

¹¹⁵ See USSG §1B1.1, comment. (n.4(B)) (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); see, e.g., *United States v. Harrington*, 946 F.3d 485, 487–89 (9th Cir. 2019) (applying the strangulation enhancement to 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 harm covered by the enhancement).

¹¹⁶ USSG §2A2.2(b)(5). This enhancement is similar to the enhancement in §2A2.1(b)(2), discussed above, for offenses involving the offer or receipt of anything of pecuniary value for undertaking the murder. See *supra* Part II.B.2.a.ii; *United States v. Swallow*, 891 F.3d 1203, 1205 (9th Cir. 2018) (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).

¹¹⁷ *Swallow*, 891 F.3d at 1205–06 (reversing payment enhancement for a defendant who engaged in an assault because he was encouraged and taunted by his wife for letting the victim steal their money).

¹¹⁸ USSG §2A2.2(b)(6); see, e.g., *United States v. Banks*, 480 F. App’x 314, 316–19 (5th Cir. 2012) (per curiam) (vacating a sentence for assaulting a federal officer and holding that the enhancement did not apply where the defendant’s protection order did not pertain to the officer).

or physical proximity to, another person . . . 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.”¹¹⁹

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

Section 2A2.2(b)(7) provides for a 2-level increase for defendants convicted under 18 U.S.C. §§ 111(b) (assaulting certain federal officers) or 115 (influencing a federal official by threatening a family member).¹²⁰ Unlike other specific offense characteristics that are applied based on the relevant conduct principles set forth in §1B1.3, this enhancement applies only where the defendant actually was convicted of one of the specified offenses.¹²¹ If the enhancement applies, the official victim adjustment at §3A1.2 also must be applied.¹²²

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

The offense guideline at §2A2.3 covers misdemeanor assault and battery and any felonious assault not covered by the aggravated assault guideline,¹²³ including several offenses covered by the federal assault statute, such as assault by striking, beating, or wounding¹²⁴; simple assault¹²⁵; and assault resulting in substantial bodily injury to a spouse or intimate partner, a dating partner, or an individual under the age of 16 years.¹²⁶

¹¹⁹ 18 U.S.C. § 2266(5)(A); USSG §1B1.1, comment. (n.1(D)). The protection order also must be “consistent with 18 U.S.C. § 2265(b),” USSG §1B1.1, comment. (n.1(D)), such that (1) an issuing state, tribal, or territorial court must have 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 must be given to the person against whom the order is sought; 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 the respondent’s due process rights. 18 U.S.C. § 2265(b).

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. *See, e.g., United States v. Thompson*, 921 F.3d 82, 87–88 (2d Cir. 2019) (district court erred in applying the protection order enhancement under §2A6.2(b)(1)(A) where the government failed to prove that the state court properly served the defendant with the *ex parte* protection order).

¹²⁰ USSG §2A2.2(b)(7).

¹²¹ *Id.*

¹²² 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 Chapter Two, Part A (Offenses Against the Person) provided the applicable offense guideline. *Id.*

¹²³ USSG §2A2.3, comment. (backg’d.).

¹²⁴ 18 U.S.C. § 113(a)(4).

¹²⁵ *Id.* § 113(a)(5).

¹²⁶ *Id.* § 113(a)(7).

i. Base offense level

Section 2A2.3(a) specifies that the base offense level is

- (1) 7, if the offense involved physical contact, or if a dangerous weapon (including a firearm) was possessed and its use was threatened; or
- (2) 4, otherwise.¹²⁷

The guideline does not define “physical contact.”¹²⁸ One circuit has held that the term encompasses indirect physical contact, such as throwing an offensive liquid onto a victim.¹²⁹ Like the other assault guidelines, “dangerous weapon” is defined by reference to §1B1.1, Application Note 1.¹³⁰

ii. Bodily injury enhancement

Section 2A2.3(b)(1), the only specific offense characteristic in this guideline, provides for: (A) a 2-level increase if the victim sustained bodily injury; or (B) a 4-level increase 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.¹³¹

“Bodily injury” has the same meaning set forth in §1B1.1, Application Note 1.¹³² “Spouse, intimate partner, or dating partner” have the meanings set forth in 18 U.S.C. § 2266.¹³³

“Substantial bodily injury” is defined as “bodily injury which involves (A) a temporary but substantial disfigurement; or (B) a temporary but substantial loss or

¹²⁷ USSG §2A2.3(a).

¹²⁸ The term “physical contact” also is used in §2A2.4 (Obstructing or Impeding Officers).

¹²⁹ *United States v. Taliaferro*, 211 F.3d 412, 415–16 (7th Cir. 2000) (“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).

¹³⁰ USSG §2A2.3, comment. (n.1); USSG §1B1.1, comment. (n.1(E)) (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”).

¹³¹ USSG §2A2.3(b)(1).

¹³² USSG §2A2.3, comment. (n.1); USSG §1B1.1, comment. (n.1(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”).

¹³³ USSG §2A2.3, comment. (n.1); *see supra* note 39 (setting forth definitions from 18 U.S.C. § 2266(7), (10)).

impairment of the function of any bodily member, organ, or mental faculty.”¹³⁴ Substantial bodily injury is, by definition, less severe than serious bodily injury, used in §2A2.2.¹³⁵

iii. Cross reference

Where the defendant’s conduct constitutes aggravated assault, §2A2.3(c) directs the application of the aggravated assault guideline at §2A2.2.¹³⁶

C. KIDNAPPING

1. The Kidnapping Statute: 18 U.S.C. § 1201

18 U.S.C. § 1201 proscribes certain kidnapping offenses, providing jurisdictional constraints and statutory penalties for both completed and inchoate offenses.¹³⁷ Specifically, section 1201(a) outlines punishments for “[w]hoever unlawfully¹³⁸ seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise”¹³⁹ any person when:

- (1) The person is willfully transported through interstate or foreign commerce “or the offender travels in interstate or foreign commerce or uses the mail or any means, facility, or instrumentality of interstate or foreign commerce in committing or in furtherance of the commission of the offense”;¹⁴⁰
- (2) Any kidnapping act is done within the special maritime and territorial jurisdiction of the United States;

¹³⁴ USSG §2A2.3, comment. (n.1) (citing 18 U.S.C. § 113(b)(1)).

¹³⁵ Compare *id.* with USSG §1B1.1, comment. (n.1(M)) (defining “serious bodily injury” as an injury involving “extreme” pain or “protracted” impairment).

¹³⁶ USSG §2A2.3(c).

¹³⁷ 18 U.S.C. § 1201.

¹³⁸ See, e.g., *United States v. Safehouse*, 985 F.3d 225, 237 (3d Cir. 2021) (“[I]n a kidnapping case, to show that the defendant acted ‘unlawfully,’ the prosecution must prove that the victim did not consent to come along.”).

¹³⁹ See, e.g., *United States v. Small*, 988 F.3d 241, 250 (6th Cir. 2021) (requirement that the victim be “held for ‘ransom or reward or otherwise’ ” is “interpreted broadly” to apply “not only for reward, but for any other reason” as long as the defendant “hold[s] the victim for some purpose of his own”; in the instant case, the government satisfied this element with “ample evidence that the victim was seized and confined in order to enable the defendants to steal the victim’s possessions and escape without any interference or resistance”) (internal quotations omitted), *petition for cert. filed*, No. 20-8661 (U.S. June 21, 2021).

¹⁴⁰ 18 U.S.C. § 1201(a)(1); see, e.g., *Small*, 988 F.3d at 251 (explaining that, in 2006, Congress expanded the federal kidnapping statute “to reach kidnappings in which the defendant crosses state lines or channels or facilities of interstate commerce were used to commit the crime, even when the physical kidnapping occurred within the borders of a single state”).

- (3) Any kidnapping act is done within the special aircraft jurisdiction of the United States;
- (4) The person is a foreign official, an internationally protected person, or an official guest; or
- (5) The person 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.¹⁴¹

If a victim is not released within 24 hours, a rebuttable presumption that the victim was transported in interstate or foreign commerce applies.¹⁴² Further, 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.¹⁴³

The penalty range for any kidnapping act, or a conspiracy to commit a kidnapping act where at least one conspirator performs an overt act to effect the object of the conspiracy, is any term of years or life imprisonment.¹⁴⁴ Where death of any person results, the penalty is life imprisonment or death.¹⁴⁵ A 20-year mandatory minimum sentence applies to offenses involving non-related adult offenders and child victims under the age of 18 years.¹⁴⁶ A 20-year statutory maximum applies to attempted kidnappings.¹⁴⁷

2. Applicable Guideline: Section 2A4.1 (Kidnapping, Abduction, Unlawful Restraint)

The offense guideline at §2A4.1 (Kidnapping, Abduction, Unlawful Restraint) applies

¹⁴¹ 18 U.S.C. § 1201(a). Excluded from this list of kidnapping offenses are cases where a parent engages in the listed conduct with a child, *id.*, though a “parent” does not include a person whose parental rights have been terminated by a final court order, *id.* § 1201(h).

¹⁴² *Id.* § 1201(b).

¹⁴³ *Id.* § 1201(e).

¹⁴⁴ *Id.* § 1201(a), (c); *see, e.g., Small*, 988 F.3d at 252–53 (conspiracy to kidnap requires: (1) an “agreement to violate the law; (2) knowledge and intent to join the conspiracy; and (3) an overt act constituting actual participation in the conspiracy,” though the existence of the conspiracy and the “defendant’s knowledge of and participation in” the conspiracy “may be inferred from his conduct and established by circumstantial evidence”; affirming convictions where defendants “worked in concert to invade [victim’s] home, hold her at gunpoint, and tie her up in order to steal her valuables” such that it could “be inferred from defendants’ actions that both individuals realized the purpose and result of their actions”) (internal quotations omitted).

¹⁴⁵ 18 U.S.C. § 1201(a); *see, e.g., United States v. Ross*, 969 F.3d 829, 838 (8th Cir. 2020) (“the kidnapping statute requires a causal relationship between the kidnapping and the death,” which “means that the kidnapping is a but-for cause of the death”), *petition for cert. filed*, No. 20-7609 (U.S. Mar. 31, 2021).

¹⁴⁶ 18 U.S.C. § 1201(g).

¹⁴⁷ *Id.* § 1201(d).

to various kidnapping offenses, including those outlined above, hostage taking under 18 U.S.C. § 1203, and kidnapping of specific types of victims in violation of 18 U.S.C. §§ 115(b)(2) and 351(b).¹⁴⁸ Federal kidnapping offenses generally encompass three categories of conduct: limited duration kidnapping with an unharmed victim released; kidnapping that facilitates another offense (such as sexual assault); and kidnapping for ransom or political demand.¹⁴⁹

Section 2A4.1(a) provides a base offense level of 32.¹⁵⁰ Where a victim is 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 in §2A4.1(c) directs the application of §2A1.1 (First Degree Murder).¹⁵¹

Section 2A4.1(b) provides seven enhancements to the base offense level: (1) a 6-level increase if ransom was demanded; (2) a tiered increase based on the degree of the victim's bodily injury; (3) a 2-level increase for use of a dangerous weapon; (4) a tiered increase based on the time that passed before the victim was released; (5) a 6-level increase where the victim was sexually exploited; (6) a 3-level increase where the victim was a minor who was placed with another in exchange for money or other consideration; and (7) various increases if the kidnapping occurred in connection with another offense.¹⁵²

a. Ransom enhancement

Section 2A4.1(b)(1) provides for a 6-level increase “[i]f a ransom demand or a demand upon government was made.”¹⁵³ Because the guideline does not define “ransom,” several courts have looked to the original meaning of the term, which includes “the money, price, or consideration paid or demanded for redemption of a kidnapped person . . . ; a payment that releases from captivity.”¹⁵⁴ Based on its ordinary meaning, the Second, Ninth,

¹⁴⁸ See USSG App. A.

¹⁴⁹ USSG §2A4.1, comment. (backg'd.).

¹⁵⁰ USSG §2A4.1(a).

¹⁵¹ USSG §2A4.1(c); *see, e.g.*, *United States v. Barraza*, 982 F.3d 1106, 1114–15 & n.4 (8th Cir. 2020) (affirming application of §2A1.1 pursuant to §2A4.1(c) cross reference where defendant and a friend kidnapped and killed two victims and holding that jury finding of intent to kill was not required to apply the cross reference), *petition for cert. filed*, No. 21-5149 (U.S. July 21, 2021).

¹⁵² USSG §2A4.1(b).

¹⁵³ USSG §2A4.1(b)(1).

¹⁵⁴ *United States v. Digiorgio*, 193 F.3d 1175, 1178 (11th Cir. 1999) (per curiam) (alteration omitted) (applying the plain meaning of “ransom” from Black’s Law Dictionary); *see also, e.g.*, *United States v. Escobar-Posado*, 112 F.3d 82, 83 (2d Cir. 1997) (per curiam) (applying the plain meaning of “ransom” from Webster’s Third New International Dictionary).

and Eleventh Circuits have held that “ransom” includes payment that a kidnapper believes is owed to him by the victim and demands made to the victim instead of a third party.¹⁵⁵

On the other hand, the Seventh Circuit has held that the ransom demand must be made to a third party and not solely to a captured party.¹⁵⁶ The Seventh Circuit rejected the Black’s Law Dictionary definition of “ransom” as overinclusive, explaining that the definition would otherwise cover a “simple mugging” where the assailant offers to let a victim go in exchange for her valuables.¹⁵⁷

Although the enhancement is written in the past tense—applying whenever a ransom demand “was made”—at least one court has held that the enhancement can apply where a ransom note goes undelivered as long as it is “reasonably certain” that the demand would have been made if doing so had been feasible.¹⁵⁸

b. Bodily injury enhancement

Section 2A4.1(b)(2) provides a tiered enhancement based on the severity of the victim’s injury:

- (A) For “permanent or life-threatening bodily injury,” a 4-level increase applies;

¹⁵⁵ See *United States v. Fernandez*, 770 F.3d 340, 343 (5th Cir. 2014) (adopting a plain meaning definition of “ransom” as “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) (internal quotation omitted); *Digiorgio*, 193 F.3d at 1178 (a ransom demand encompasses demanding money from a kidnapping victim who the defendant believes owes him money because nothing 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”); 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 having no occasion to address whether the demand must be made to a third party).

¹⁵⁶ *United States v. Reynolds*, 714 F.3d 1039, 1044–46 (7th Cir. 2013) (language of §2A4.1(b)(1) presupposes the existence of a third party by including a “demand upon government”; 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, 207–08 (1st Cir. 2018) (discussing *Reynolds*, *Digiorgio*, and *Escobar-Posado* and holding that the defendant could not establish plain error based on *Reynolds* where a ransom demand was made to a kidnapping victim).

¹⁵⁷ *Reynolds*, 714 F.3d at 1044.

¹⁵⁸ *United States v. Ferreira*, 275 F.3d 1020, 1028–30 (11th Cir. 2001) (applying 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; for uncompleted crimes like attempts, the court should apply any adjustment that can be determined “with reasonable certainty” (citing USSG §2A4.1, comment. (n.5) (currently numbered as n.4))).

- (B) For “serious bodily injury,” a 2-level increase applies; and
- (C) If the severity of the injury falls between the severity specified in (A) and (B), a 3-level increase applies.¹⁵⁹

As with the assault guidelines, the degrees of injury are defined by reference to §1B1.1, Application Note 1, except that “serious bodily injury” as used in §2A4.1 excludes “criminal sexual abuse.”¹⁶⁰ Rather, criminal sexual abuse is addressed by the specific offense characteristic in subsection (b)(5).¹⁶¹

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.¹⁶² Further, an injury need not be life threatening to satisfy the 4-level enhancement; instead it can be a permanent injury.¹⁶³

Because serious bodily injury is defined to include injuries “involving extreme physical pain” or “protracted impairment,” the victim need not seek medical care or suffer a lasting injury to satisfy the 2-level enhancement.¹⁶⁴

As discussed above,¹⁶⁵ the lines between the different degrees of injury are “not sharp” and require case-by-case evaluation of the victim’s injuries and medical prognosis.¹⁶⁶ At least one court has limited the bodily injury enhancement to persons who

¹⁵⁹ USSG §2A4.1(b)(2).

¹⁶⁰ USSG §2A4.1, comment. (n.1).

¹⁶¹ *Id.*

¹⁶² See USSG §1B1.10, comment. (n.1(K)) (“In the case of a kidnapping, for example, maltreatment to a life-threatening degree (*e.g.*, by denial of food or medical care) would constitute life-threatening bodily injury.”); see, *e.g.*, *United States v. Brazier*, 933 F.3d 796, 802–03 (7th Cir. 2019) (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).

¹⁶³ See, *e.g.*, *United States v. Torrealba*, 339 F.3d 1238, 1245–46 (11th Cir. 2003) (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”).

¹⁶⁴ See, *e.g.*, *United States v. Saint Louis*, 889 F.3d 145, 158 (4th Cir. 2018) (painful beatings during kidnapping amounted to serious bodily injury even though the victim never sought medical intervention and did not suffer any protracted impairments).

¹⁶⁵ See discussion *supra* Part II.B.2.a.i.

¹⁶⁶ See, *e.g.*, *Brazier*, 933 F.3d at 803 (while the district court did not clearly err in applying the permanent or life-threatening injury enhancement, it also may have been reasonable to apply the lesser enhancements for serious bodily injury or for injury between the two degrees).

suffer injuries as victims of a kidnapping and not persons who suffer collateral bodily injury during the kidnapping.¹⁶⁷

c. Dangerous weapon enhancement

Section 2A4.1(b)(3) provides for a 2-level increase if a dangerous weapon was used in connection with the kidnapping.¹⁶⁸ The phrase “a dangerous weapon was used” means that a firearm was discharged, or a firearm or dangerous weapon was otherwise used.¹⁶⁹

The term “otherwise used” requires more than brandishing a weapon.¹⁷⁰ While brandishing means that at least part of a weapon is displayed, or the presence of a weapon is otherwise made known, “otherwise used” generally requires a more overt or specific threat of harm.¹⁷¹ However, an explicit threat of harm, like pointing a weapon at someone, is not necessarily a requirement, since the context in which a kidnapping occurs may convey an implicit threat of harm to a specific individual.¹⁷²

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.¹⁷³ It also has 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 a firearm pointed at the child’s

¹⁶⁷ *United States v. Sickinger*, 179 F.3d 1091, 1093–94 (8th Cir. 1999) (reversing 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).

¹⁶⁸ USSG §2A4.1(b)(3).

¹⁶⁹ USSG §2A4.1, comment. (n.2) (citing USSG §1B1.1, comment. (n.1) for definitions of “firearm” and “dangerous weapon”). These are the same definitions used in the assault guidelines, discussed above. *See* discussion *supra* Part II.B.2.b.ii.

¹⁷⁰ *See, e.g., United States v. Bonilla-Guizar*, 729 F.3d 1179, 1187–88 (9th Cir. 2013) (plain error to apply the dangerous weapon enhancement under §2A4.1(b)(3) based solely upon brandishing a firearm).

¹⁷¹ *See, e.g., 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 “distinguish mere brandishing of a weapon from other use”).

¹⁷² *See, e.g., id.* at 579 (defendant’s actions leading up to and during the kidnapping plausibly created a specific threat of harm where a 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).

¹⁷³ *See, e.g., United States v. Coyle*, 309 F.3d 1071, 1075 (8th Cir. 2002) (affirming application of §2A4.1(b)(3) enhancement based on 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).

head to threaten the victim's mother.¹⁷⁴ There, the court explained that the pointing of the gun at one person was used to instill fear in another person to coerce compliance.¹⁷⁵

d. Victim release enhancement

Section 2A4.1(b)(4) provides for: (A) a 2-level increase if the victim was not released within 30 days; and (B) a 1-level increase if the victim was not released within seven days.¹⁷⁶ This enhancement recognizes the increased suffering caused by lengthy kidnappings and provides an incentive to release the victim.¹⁷⁷ In a kidnapping conspiracy case (in which co-defendants joined the conspiracy at different times in the hostage's capture), one court defined the start date that triggers the seven- and 30-day clocks as the date the victim was taken hostage, rather than the date each specific defendant became involved in the kidnapping.¹⁷⁸

When a victim is actually "released" may raise complicated factual disputes because the line between release and confinement may not always be clear. For example, courts have held that the enhancement may apply where a victim has access to a phone or transportation but fails to use that access,¹⁷⁹ or where a victim is occasionally left alone but still is mentally or emotionally unable to flee.¹⁸⁰ One court has held that the enhancement may apply where a victim is murdered while in captivity and found after the enhancement time period.¹⁸¹

¹⁷⁴ United States v. Yelverton, 197 F.3d 531, 533–35 (D.C. Cir. 1999) (there was "use" of a dangerous weapon where a 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).

¹⁷⁵ *Id.*

¹⁷⁶ USSG §2A4.1(b)(4).

¹⁷⁷ USSG §2A4.1, comment. (backg'd.).

¹⁷⁸ United States v. Lorenzo-Hernandez, 279 F.3d 19, 24 (1st Cir. 2002) (applying the seven-day victim release enhancement to a defendant even though he allegedly joined a conspiracy five days before the victim was released; 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).

¹⁷⁹ *Cf., e.g.,* United States v. Wiora, 172 F.3d 877 (9th Cir. 1999) (unpublished table decision) (remanding for an evidentiary hearing on whether the victim release enhancement should be applied because the defendant's arguments regarding the victim's access to a phone and daily taxi trips raised a "substantial factual dispute").

¹⁸⁰ *Cf., e.g.,* United States v. Sickinger, 179 F.3d 1091, 1093 (8th Cir. 1999) (holding, in the context of a previous 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).

¹⁸¹ United States v. Gaddy, 894 F.2d 1307, 1315–16 (11th Cir. 1990) (the 30-day victim release enhancement applied that where a victim was abducted, shot within 24 hours, and found after 30 days—and thus never released alive).

e. Sexual exploitation enhancement

Section 2A4.1(b)(5) provides for a 6-level increase if a victim was sexually exploited.¹⁸² “Sexually exploited” is defined to include acts prohibited by 18 U.S.C. §§ 2241–44, 2251, and 2421–23.¹⁸³ Thus, applying the enhancement requires consulting the federal sexual abuse statutes and a case-by-case assessment of the underlying facts of the kidnapping offense.¹⁸⁴

f. Minor victim enhancement

Section 2A4.1(b)(6) provides for a 3-level increase where the victim is a minor who, in exchange for money or other consideration, was placed in the care or custody of another person who lacked any legal right to such care or custody.¹⁸⁵

As part of its amendments to the federal kidnapping statute, 18 U.S.C. § 1201, to require courts to account for certain specific offense characteristics in cases involving victims under the age of 18 years, Congress likewise directed the Sentencing Commission to include these characteristics in the guidelines.¹⁸⁶ The requirement in §2A4.1(b)(6) that the kidnapper have “no legal right to such care or custody” thus parallels 18 U.S.C. § 1201(g)(1), which requires a 20-year minimum sentence when a minor is kidnapped by someone who is not a family member and is without “legal custody.”¹⁸⁷

¹⁸² USSG §2A4.1(b)(5). The current Application Note 1 to §2A4.1, which provides that criminal sexual abuse should be taken into account under subsection (b)(5), 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 state that criminal sexual abuse conduct within the kidnapping guideline is taken into account in (b)(5) instead of the “serious bodily injury” enhancement. USSG App. C, amend. 545 (effective Nov. 1, 1997).

¹⁸³ 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).

¹⁸⁴ *See, e.g.,* United States v. Hernandez-Orozco, 151 F.3d 866, 870 (8th Cir. 1998) (not clear error to apply the sexual exploitation enhancement where a defendant’s sexual acts with the victim were accomplished by putting the victim in fear, in violation of 18 U.S.C. § 2242(1), in light of the victim’s age and detention).

¹⁸⁵ USSG §2A4.1(b)(6).

¹⁸⁶ USSG §2A4.1, comment. (backg’d.) (citing Crime Control Act of 1990, Pub. L. No. 101–647, § 401, 104 Stat. 4789).

¹⁸⁷ *See* United States v. Alvarez-Cuevas, 415 F.3d 121, 125–26 (1st Cir. 2005) (discussing the legislative history of §2A4.1(b)(6) and § 1201(g)(1) and explaining that the enhancements show that Congress was concerned that situations such as a kidnap-for-hire by a noncustodial parent may pose greater harm to a minor victim).

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.¹⁸⁸ The court explained that the enhancement best fits two situations: (1) 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 (2) a ransom-demanding kidnapper who pays a third party to keep the minor to make him or her harder to find.¹⁸⁹ However, the enhancement calls for a fact-specific inquiry that may turn on subtle factual distinctions. For example, the Fifth Circuit distinguished the First Circuit’s decision and upheld the application of the enhancement where a third party was paid to care for the victims but was not a charged co-conspirator and was not compensated with an expected share of the ransom.¹⁹⁰

Whether care or custody actually was relinquished to a third party similarly may require a fact-specific inquiry into considerations such as the extent and duration of the custody over the victim.¹⁹¹

g. Enhancement for kidnapping in connection with another offense

Under §2A4.1(b)(7), “[i]f the victim was kidnapped, abducted, or unlawfully restrained during the commission of, or in connection with, another offense or escape therefrom¹⁹²; or if another offense was committed during the kidnapping, abduction, or unlawful restraint,” the offense level must be increased to:

- (A) the offense level from the Chapter Two guideline for that other offense, if such guideline includes an adjustment for the

¹⁸⁸ *Id.* at 125–27 (reversing minor victim enhancement because holding otherwise would mean applying the enhancement to every conspirator in a kidnapping where any conspirator who expects a share of the ransom cares for the child in the interim, which would blur the distinction between that common kidnapping situation and a kidnap-for-hire situation and create incentives to abandon care of the child).

¹⁸⁹ *Id.*

¹⁹⁰ *United States v. Cedillo-Narvaez*, 761 F.3d 397, 405 (5th Cir. 2014) (finding no plain error in applying the minor victim enhancement under the unambiguous plain language of the enhancement and “under the specific factual circumstances of th[e] case”).

¹⁹¹ *See, e.g., United States v. Matthews*, 225 F. Supp. 2d 893, 897 (N.D. Ill. 2002) (enhancement did not apply where 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).

¹⁹² The term “another offense” includes federal, state, and local offenses. *See* USSG §2A4.1, comment. (backg’d.); *see also, e.g., United States v. Cree*, 166 F.3d 1270, 1271–72 (8th Cir. 1999) (per curiam) (“another offense” could include a sexual assault committed outside of Native American territory and thus outside of federal jurisdiction); *United States v. Anderson*, 5 F.3d 795, 801–03 (5th Cir. 1993) (clarifying 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).

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 43.¹⁹³

Thus, subsection (7)(A) applies if the offense level for “another offense” accounts for the kidnapping in an adjustment, and subsection (7)(B) applies if the offense level does not include such an adjustment. For example, §2A4.1(b)(7)(A) directs the application of the robbery guideline at §2B3.1 where a defendant commits a kidnapping during a robbery because the robbery guideline includes an adjustment for abduction.¹⁹⁴

Consistent with the 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” still may be subject to the enhancement.¹⁹⁵

The enhancement applies only if the resulting offense level from (A) or (B) would be greater than the §2A4.1 offense level.¹⁹⁶ The potential interaction of subsection (b)(7) with other provisions in §2A4.1 underscores the importance of applying each specific offense characteristics in order.¹⁹⁷ For example, if a victim suffers sexual abuse during the kidnapping, the sexual exploitation enhancement in §2A4.1(b)(5) may be triggered.¹⁹⁸ But after applying that enhancement, the court also may consider applying the §2A4.1(b)(7) enhancement for that sexual abuse, triggering a different offense guideline altogether under the criminal sexual abuse guideline at §2A3.1.¹⁹⁹ If applying §2A3.1 yields a greater offense level than otherwise calculated under §2A4.1, then §2A4.1(b)(7) supplants the enhancement calculations performed in §2A4.1(b)(1) through (6).

¹⁹³ USSG §2A4.1(b)(7).

¹⁹⁴ See USSG §2B3.1(b)(4)(A) (abduction adjustment); see, e.g., *United States v. Ortega-Reyes*, 105 F.3d 1260, 1262 (9th Cir. 1997) (robbery guideline was properly applied under §2A4.1(b)(7) where the defendant kidnapped the victims during an uncharged robbery and robbery guideline yielded the higher offense level).

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

¹⁹⁶ USSG §2A4.1(b)(7).

¹⁹⁷ See USSG §1B1.1(a)(2) (“Determine the base offense level and apply any appropriate specific offense characteristics, cross references, and special instructions contained in the particular guideline in Chapter Two in the order listed.”) (emphasis added). For a detailed overview of how to apply the provisions of the *Guidelines Manual*, see U.S. SENT’G COMM’N, FEDERAL SENTENCING: THE BASICS (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/202009_fed-sentencing-basics.pdf.

¹⁹⁸ See USSG §2A4.1(b)(5).

¹⁹⁹ See, e.g., *United States v. Michaud*, 268 F.3d 728, 738–39 (9th Cir. 2001) (where the defendant committed aggravated sexual abuse during a kidnapping, which qualified for the sexual exploitation enhancement, it was proper to instead apply the higher §2A3.1 offense level under the enhancement set forth in §2A4.1(b)(7)(A)).

III. VIOLENT CRIMES IN AID OF RACKETEERING (VICAR)

This section discusses the Violent Crimes in Aid of Racketeering (often called VICAR, and occasionally abbreviated as VCAR) statute, 18 U.S.C. § 1959, and guideline, §2E1.3.

A. THE VICAR STATUTE: 18 U.S.C. § 1959

Section 1959 of title 18 proscribes certain violent crimes when committed in aid of racketeering and provides statutory penalties based on different underlying acts.²⁰⁰ VICAR was enacted as part of the Comprehensive Crime Control Act of 1984 to complement the Racketeer Influenced and Corrupt Organizations (RICO) statute, 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.²⁰¹ As discussed below, section 1959 incorporates by reference several terms and definitions from the RICO statute.

1. Elements of a VICAR Offense

To obtain a conviction under VICAR, the government must prove:

- (1) the existence of a racketeering enterprise;
- (2) that the defendant committed or attempted or conspired to commit a violent crime; and
- (3) that the defendant acted in order to (A) obtain pecuniary gain, (B) gain entry into the enterprise, or (C) maintain or increase the defendant's position in the enterprise.²⁰²

²⁰⁰ 18 U.S.C. § 1959.

²⁰¹ See *United States v. Ayala*, 601 F.3d 256, 266 (4th Cir. 2010) (VICAR is meant to address the particular danger posed by individuals willing to commit violent crimes to further their positions in a racketeering enterprise); *United States v. Concepcion*, 983 F.2d 369, 380–81 (2d Cir. 1992) (discussing the legislative history of section 1959). For a detailed overview of the RICO statute and guideline, see U.S. SENT'G COMM'N, PRIMER ON RICO OFFENSES (RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS) (2021), https://www.ussc.gov/sites/default/files/pdf/training/primers/2021_Primer_RICO.pdf [hereinafter RICO PRIMER].

²⁰² 18 U.S.C. § 1959(a). Courts have phrased this multi-element test in different ways. See, e.g., *United States v. Rodriguez*, 971 F.3d 1005, 1009 (9th Cir. 2020) (“To support a VICAR conviction, the government must show: (1) that the criminal organization exists; (2) that the organization is a racketeering enterprise; (3) that the defendants committed or attempted or conspired to commit a violent crime; and (4) that they acted for the purpose of promoting their position in or gaining entrance to the racketeering enterprise.”) (internal quotation and brackets omitted); *United States v. Portillo*, 969 F.3d 144, 164 (5th Cir. 2020) (“In order to establish a violation of this statute, the government must prove: (1) an enterprise engaged in racketeering; (2) the activities affected interstate commerce; (3) a [violent crime]; and (4) the [violent crime] was committed for payment by the enterprise or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise.” (internal quotation omitted)), *cert. denied*, 141 S. Ct. 1275 (2021); see also, e.g., *United States v. Archer*, 977 F.3d 181, 189 (2d Cir. 2020) (second alteration in original) (VICAR “requires that one use or threaten violence for a least one of three possible purposes: (1) pecuniary gain, (2) ‘gaining entry’ into an ‘enterprise’ . . . , or (3) ‘maintaining or increasing [one’s] position’ in that enterprise” (quoting 18 U.S.C. § 1959(a))), *petition for cert. filed*, No. 20–1644 (U.S. May 26, 2021).

First, the government must demonstrate the existence of an enterprise engaged in racketeering activity. “Racketeering activity” is defined by reference to a list of enumerated crimes in the RICO statute.²⁰³ Such racketeering activity includes “any act or threat involving” certain offenses chargeable under state law and punishable by imprisonment for more than one year, such as murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical.²⁰⁴ These are commonly referred to as “predicate offenses.”²⁰⁵

The term “enterprise” includes two categories of associations. The first category encompasses “any partnership, corporation, association, or other legal entity.”²⁰⁶ The second category covers “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.”²⁰⁷ As the Supreme Court has explained in the analogous RICO context,²⁰⁸ each category describes a separate type of enterprise covered by the statute—those that are recognized as legal entities, and those that are not.²⁰⁹ Thus, the term “enterprise” includes both legitimate and illegitimate enterprises, and “nothing in the statutory definition of enterprise requires that the enterprise be defined solely by a criminal purpose” as long as it is engaged in racketeering activity.²¹⁰

Second, the government must show that the defendant committed (or attempted or conspired to commit) a violent crime. Specifically, VICAR applies to a defendant who “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” an individual in violation of state or federal law, or attempts or conspires to do so.²¹¹

The Fourth Circuit has held that the provision of state or federal law violated by the defendant need not itself “match” one of the enumerated generic offenses to serve as a

²⁰³ 18 U.S.C. § 1959(b)(1) (citing *id.* § 1961). For a detailed discussion of the definitions in the RICO statute, see RICO PRIMER, *supra* note 201, at 4–7.

²⁰⁴ *Id.* § 1961. Section 1961(1)(B), (C), (E), (F), and (G) include acts indictable under a list of federal statutes. Section 1961(1)(D) includes offenses “involving” listed categories of federal offenses.

²⁰⁵ See, e.g., *United States v. Keene*, 955 F.3d 391, 394 (4th Cir. 2020); *United States v. Houston*, 648 F.3d 806, 819–20 (9th Cir. 2011).

²⁰⁶ 18 U.S.C. § 1959(b)(2).

²⁰⁷ *Id.*

²⁰⁸ RICO uses a slightly broader definition of “enterprise.” *Cf.* 18 U.S.C. § 1961(4) (defining “enterprise” to include “any individual” in addition to the categories covered by VICAR). Courts “analyze VICAR enterprises under the same standard as RICO enterprises.” *United States v. Millan-Machuca*, 991 F.3d 7, 21 (1st Cir. 2021).

²⁰⁹ *Boyle v. United States*, 556 U.S. 938, 945 (2009).

²¹⁰ *Millan-Machuca*, 991 F.3d at 20 (“Indeed, the Supreme Court has recognized that RICO, and, thus, also VICAR, extends to ‘both legitimate and illegitimate enterprises.’” (quoting *United States v. Turkette*, 452 U.S. 576, 584–85 (1981))).

²¹¹ 18 U.S.C. § 1959(a).

predicate for VICAR.²¹² Rather, VICAR requires only that a defendant’s *conduct* constitute both a violation of state or federal law as well as one of the enumerated generic offenses (murder, kidnapping, maiming, assault with a dangerous weapon, assault resulting in serious bodily injury, threat to commit a crime of violence).²¹³

Finally, the defendant must have committed the crime of violence “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.”²¹⁴ Under VICAR, this “membership purpose” (*i.e.*, furthering the defendant’s role in the enterprise) need not be the sole or “but-for cause” of the defendant’s conduct.²¹⁵ Rather, the circuits have variously described this element as requiring that membership be a “substantial purpose,”²¹⁶ “animating purpose,”²¹⁷ or a “large part” of the reason for the defendant’s actions.²¹⁸

2. *Statutory Penalties*

VICAR provides statutory penalties that vary in severity based on the predicate crime:

- (1) Murder is punishable by death or life imprisonment, and kidnapping is punishable by imprisonment for any term of years or for life;
- (2) Maiming carries a maximum term of 30 years;

²¹² *United States v. Keene*, 955 F.3d 391, 398–99 (4th Cir. 2020); *cf.*, *e.g.*, *United States v. Savage*, 970 F.3d 217, 274 (3d Cir. 2020) (“the VICAR statute requires a predicate act that is chargeable under state or federal law”; “trial courts frequently instruct juries on the elements of the specific state or federal offense that is charged as the predicate act rather than outlining a ‘generic’ version of the crime”), *petition for cert. filed*, No. 20–1389 (U.S. Apr. 5, 2021). *See generally* *Scheidler v. Nat’l Org. 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).

²¹³ *Keene*, at 394, 398–99. Because the defendants were not charged with threatening to commit a “crime of violence,” the court declined to address whether that term may require application of the categorical approach. *Id.* at 396–97.

²¹⁴ 18 U.S.C. § 1959(a).

²¹⁵ *United States v. Rodriguez*, 971 F.3d 1005, 1010–11 (9th Cir. 2020); *see, e.g.*, *United States v. Millan-Machuca*, 991 F.3d 7, 22 (1st Cir. 2021) (VICAR “does not require that the government prove [that the membership purpose] was the *sole* purpose” for the defendant’s crime) (emphasis altered and quotation omitted).

²¹⁶ *Rodriguez*, 971 F.3d at 1010–11.

²¹⁷ *United States v. Tisdale*, 980 F.3d 1089, 1095 (6th Cir. 2020) (quoting *United States v. Ledbetter*, 929 F.3d 338, 358 (6th Cir. 2019)).

²¹⁸ *United States v. Brandao*, 539 F.3d 44, 56 (1st Cir. 2008).

- (3) Assault with a dangerous weapon or assault resulting in serious bodily injury carries a maximum term of 20 years;
- (4) Threatening to commit a crime of violence carries a maximum term of 5 years;
- (5) Attempting or conspiring to commit murder or kidnapping carries a maximum term of 10 years; and
- (6) Attempting or conspiring to commit a crime involving maiming, assault with a dangerous weapon, or assault resulting in serious bodily injury carries a maximum term of 3 years.²¹⁹

B. APPLICABLE GUIDELINE: SECTION 2E1.3 (VIOLENT CRIMES IN AID OF RACKETEERING)

The offense guideline at §2E1.3 covers violations of the VICAR statute, 18 U.S.C. § 1959.²²⁰ The text of the statute and the Background Commentary to §2E1.3 underscore the breadth of the guideline, which covers conduct ranging from threats of violence to murder, with maximum terms of imprisonment ranging from three years to life, depending on the underlying offense.²²¹

Section 2E1.3 instructs the court to apply the greater of two alternative base offense levels:

- (1) 12; or
- (2) the offense level applicable to the underlying crime or racketeering activity.²²²

There are no specific offense characteristics.

The minimum base offense level of 12 is applied only when it is higher than the offense level that would apply to the underlying crime.²²³ 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 guideline for the underlying violent offense often will yield an offense level higher than 12.²²⁴

²¹⁹ 18 U.S.C. § 1959(a). The statute likewise permits the imposition of a fine. *Id.*

²²⁰ See USSG App. A.

²²¹ 18 U.S.C. § 1959(a); USSG §2E1.3, comment. (backg'd.).

²²² USSG §2E1.3.

²²³ USSG §2E1.3, comment. (n.2).

²²⁴ See, e.g., *United States v. Martinez*, 136 F.3d 972, 978–79 (4th Cir. 1998) (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).

When a state offense serves as a VICAR predicate, the conduct’s “most analogous federal offense” must be used to determine which guideline to apply to calculate the offense level.²²⁵ 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.²²⁶

In determining the base offense level applicable to the underlying crime or racketeering activity, §1B1.3 directs the court to account for all relevant conduct—including conduct that is charged or uncharged,²²⁷ as well as acquitted conduct²²⁸—that qualifies as a predicate offense or racketeering activity under section 1959.²²⁹ Nonetheless, the courts of appeals have taken different approaches regarding how to determine the guideline that applies to the underlying crime.²³⁰ In particular, consistent with §1B1.3, the First, Seventh, and Eighth Circuits have held that the applicable offense guideline can be

²²⁵ USSG §2E1.3, comment. (n.1). The phrase “most analogous federal offense” is used similarly in other Chapter Two, Part E offenses. *See* USSG §§2E1.1, comment. (n.2); 2E1.2, comment. (n.2); 2E1.4, comment. (n.1).

²²⁶ *See, e.g.,* United States v. Lisiansky, 806 F.3d 706, 709–10 (2d Cir. 2015) (per curiam) (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); United States v. Langley, 919 F.2d 926, 930–32 (5th Cir. 1990) (in applying §2E1.2 where the underlying “unlawful activity” involved promoting prostitution under Texas law, the “most analogous federal offense” was a violation of the Mann Act, 18 U.S.C. § 2421, which punishes similar conduct and is a felony like the Texas offense). In *Langley*, the Fifth Circuit noted that a federal offense still can be “analogous” to a state offense even if it requires an additional “federalizing” jurisdictional element, such as the transportation of people for the purpose of prostitution. *Langley*, 919 F.2d at 931.

²²⁷ *Cf.* United States v. Flemmi, 245 F.3d 24, 30 n.4 (1st Cir. 2001) (citations omitted) (“To be sure, a sentencing judge may consider uncharged predicate acts in a RICO case, . . . but the judge nonetheless must stay below the maximum penalty allowed under the charges delineated in the indictment and submitted to the jury.”).

²²⁸ As explained in the Commentary to §1B1.3, this provision does not require that the defendant be convicted of multiple counts. USSG §1B1.3, comment. (backg’d) (“Conduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range.”); USSG §1B1.3, comment. (n.5(A)) (“[S]ubsection (a)(2) applies to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, had the defendant been convicted of multiple counts.”); *see also* United States v. Watts, 519 U.S. 148, 157 (1997) (per curiam) (sentencing court may consider conduct of which defendant has been acquitted, so long as that conduct has been proved by a preponderance of the evidence); United States v. Pica, 692 F.3d 79, 88–90 (2d Cir. 2012) (“A district court may treat acquitted conduct as relevant conduct at sentencing, provided that it finds by a preponderance of the evidence that the defendant committed the conduct.”); United States v. Mercado, 474 F.3d 654, 657 (9th Cir. 2007) (“[T]he constitutional propriety of a sentencing court’s consideration of conduct which underlay an acquitted charge existed before creation of the Guidelines and continues to exist today.”).

²²⁹ *See* 18 U.S.C. § 1959 (prohibiting certain enumerated offenses “in violation of the laws of any State or the United States” and defining “racketeering activity” by reference to section 1961).

²³⁰ The term “underlying crime or racketeering activity” is similar to terms used in other guidelines in Chapter Two, Part E (Offenses Involving Criminal Enterprises and Racketeering). *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”).

based on relevant conduct.²³¹ In contrast, the Second Circuit has held that the district court must determine the applicable offense guideline for the underlying racketeering crime based on the defendant's charging document.²³²

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), 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).²³³ To determine whether an offense qualifies as a

²³¹ United States v. Smith, 232 F.3d 650, 651 (8th Cir. 2000) (per curiam) (relevant conduct rules under §1B1.3 mean that the “underlying unlawful conduct” in §2E1.4(a)(2) need not be charged in the indictment); United States v. Carrozza, 4 F.3d 70, 75–77 (1st Cir. 1993) (“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)'s base offense level instruction refers to the underlying “activity” not the underlying “conviction”).

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 United States v. Martinez, 136 F.3d 972, 978–79 (4th Cir. 1998) (defendant's base offense level under §2E1.3 was properly based on a murder for which he was acquitted).

²³² United States v. McCall, 915 F.2d 811, 814–15 (2d Cir. 1990) (in a VICAR case, the “underlying crime or racketeering activity” in §2E1.3 means the underlying crime charged in the charging document; district court should have selected the guideline section based on the defendant's offense of conviction (assault with a dangerous weapon), rather than his actual conduct (which the court found would have constituted assault with intent to murder)).

In the analogous RICO context, the Eleventh Circuit has held that where a jury finds a defendant guilty of a RICO conspiracy but does not indicate which of the underlying offenses the defendant committed, the defendant's offense level is properly based on the underlying offenses that the court finds are proven beyond a reasonable doubt (rather than the usual preponderance of the evidence standard) as if the court were sitting as trier of fact. United States v. Nguyen, 255 F.3d 1335, 1341 (11th Cir. 2001).

²³³ See USSG §4B1.1; 18 U.S.C. § 924(c), (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 (2004) (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 that federal kidnapping under 18 U.S.C. § 1201(a) is not a predicate offense under statutes requiring “physical force.” See, e.g., 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) (federal kidnapping is not a crime of violence under § 924(c)(3)(A) because it does not require physical force), *vacated on other grounds*, 138 S. Ct. 1980 (2018); cf., e.g., United States v. Gillis, 938 F.3d 1181, 1210 (11th Cir. 2019) (federal kidnapping is not a predicate for soliciting a crime involving

predicate offense under one of these provisions, courts employ a technical framework called the categorical approach for comparing the defendant's offense to the relevant provision.²³⁴

physical force under 18 U.S.C. § 373, which uses wording similar to the crime of violence definition in section 924(c)(3)(A)).

²³⁴ See *Mathis v. United States*, 136 S. Ct. 2243, 2248–49 (2016); *Descamps v. United States*, 570 U.S. 254, 257–64 (2013). For more detail on how to apply the categorical approach, see U.S. SENT'G COMM'N, PRIMER ON CATEGORICAL APPROACH (2020), https://www.ussc.gov/sites/default/files/pdf/training/primers/2020_Primer_Categorical_Approach.pdf.