

Primer



Robbery Offenses



Prepared by the
Office of the General Counsel

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I. INTRODUCTION

This primer is intended to provide a general overview of statutes, sentencing guidelines, and relevant case law related to selected federal robbery offenses. Although the primer identifies issues and cases related to the sentencing of federal robbery offenses, it is not a comprehensive compilation of case law and is not intended to be a substitute for independent research and analysis of primary authority.

II. RELEVANT ROBBERY STATUTES

Chapters 95 and 103 of title 18 of the United States Code prohibit crimes involving robbery of property in the care, custody, or control of the United States or affecting interstate or foreign commerce by force or violence. This section discusses the following federal robbery offenses: Hobbs Act robbery (18 U.S.C. § 1951); bank robbery (18 U.S.C. § 2113); robbery of United States mail (18 U.S.C. § 2114); robbery of controlled substances (18 U.S.C. § 2118); and carjacking (18 U.S.C. § 2119).¹

A. 18 U.S.C. § 1951 (INTERFERENCE WITH COMMERCE BY THREATS OR VIOLENCE)

Section 1951(a) prohibits robbery or extortion affecting interstate or foreign commerce by violence or the threat of violence against any person or property in furtherance of a plan or purpose to do so.² In relevant part, section 1951(a) provides:

Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.³

A robbery under section 1951 is often referred to as a “Hobbs Act robbery” because section 1951 was enacted as part of the Hobbs Act.⁴

Section 1951(b)(1) defines the term “robbery” as “the unlawful taking or obtaining of personal property from the person or in the presence of another, against his [or her] will,

¹ Chapter 103 of title 18 of the United States Code also includes other robbery offenses, such as robbery within the special maritime or territorial jurisdiction of the United States (18 U.S.C. § 2111), robbery or attempted robbery of personal property belonging to the United States (18 U.S.C. § 2112), and robbery of a mail carrier service such as a car, railway, steamboat, or other vessel (18 U.S.C. § 2116). However, the statutes discussed in this primer are the robbery offenses most commonly prosecuted.

² 18 U.S.C. § 1951(a).

³ *Id.*

⁴ See Act of July 3, 1946, Pub. L. No. 79–486, 60 Stat. 420. While section 1951(a) addresses offenses involving both robbery and extortion, this primer focuses only on Hobbs Act robbery.

by means of actual or threatened force, or violence, or fear of injury.”⁵ The term “commerce” means “commerce within the District of Columbia, or any [t]erritory or [p]ossession of the United States; all commerce between [states, territories, possessions, or the District of Columbia]; all commerce between points within the same state through any place outside such state; and all other commerce over which the United States has jurisdiction.”⁶

Courts have held that the impact on commerce may be minimal, even *de minimis*, or just potential.⁷ The *de minimis* standard is based on the rationale that the Hobbs Act regulates activities which, if aggregated, would have a substantial effect on interstate commerce, and is satisfied even when the robbery involves only a small amount of money.⁸ Examples of a minimal or *de minimis* effect on commerce include (1) the robbery of \$538 from an Ohio pizza restaurant because it purchased flour from Minnesota, pizza sauce from California, and cheese from Wisconsin, (2) five robberies involving small sums of money because the victims sold goods originating from outside Tennessee, and (3) three robberies involving approximately \$50,000 because one of the victims, an Ohio check-cashing business, drew checks on banks operating across the country.⁹

Examples of the types of crimes that have been prosecuted under section 1951 include a defendant that acted as lookout as co-defendants robbed a house,¹⁰ defendants

⁵ 18 U.S.C. § 1951(b)(1).

⁶ *Id.* § 1951(b)(3).

⁷ See, e.g., *United States v. Tuan Ngoc Luong*, 965 F.3d 973, 982 (9th Cir. 2020) (Hobbs Act interstate-commerce element is satisfied by *de minimis* effect on interstate commerce (citations omitted)), *cert. denied*, 142 S. Ct. 336 (2021); *United States v. Hunter*, 932 F.3d 610, 622–23 (7th Cir. 2019) (same); *United States v. Lopez*, 860 F.3d 201, 214 (4th Cir. 2017) (section 1951(a) requires only a “minimal effect” on interstate commerce—including one “so minor as to be *de minimis*” (quoting *United States v. Taylor*, 754 F.3d 217, 222 (4th Cir. 2014))); *United States v. Parkes*, 497 F.3d 220, 230 (2d Cir. 2007) (because section 1951(a) prohibits robberies that affect interstate commerce “in any way or degree,” the effect on interstate commerce can be *de minimis*); *United States v. Watkins*, 509 F.3d 277, 280–81 (6th Cir. 2007) (“[T]he law of this circuit provides that a showing of a *de minimis* connection with interstate commerce satisfies the Hobbs Act where a robbery involves a business entity”).

⁸ See *United States v. Chandler*, 486 F. App’x 525, 531–32 (6th Cir. 2012) (robbery of \$450 from a McDonald’s restaurant that received food products originating in other states); *United States v. Baylor*, 517 F.3d 899, 903 (6th Cir. 2008) (involving the robbery of \$538 from a Little Caesar’s pizza restaurant that received food products from out of state).

⁹ See *Baylor*, 517 F.3d at 903 (robbery involving \$538); *United States v. Frazier*, 414 F. App’x 782, 782–83 (6th Cir. 2011) (five robberies, including \$2,400–2,700 from a restaurant, \$300 from a hotel, and the contents of a cash register from a dollar store); *Watkins*, 509 F.3d at 281 (three robberies involving approximately \$50,000).

¹⁰ *United States v. Walker*, 990 F.3d 316, 319 (3d Cir.), *petition for cert. filed*, No. 21–102 (U.S. July 26, 2021).

that robbed a cellular phone store,¹¹ jewelry store,¹² and sandwich shop,¹³ defendants who robbed the guard of an armored vehicle delivering cash to stores in a shopping center,¹⁴ and a defendant who robbed an unlicensed after-hours “speakeasy.”¹⁵

Section 1951(a) also prohibits attempt and conspiracy to commit Hobbs Act robbery.¹⁶ Attempted Hobbs Act robbery requires proof of the specific intent to commit the robbery and a substantial step taken towards that end.¹⁷ A substantial step is an overt act ordinarily needed to commit a particular crime and is more than mere preparation.¹⁸ Unlike attempted Hobbs Act robbery, some courts have held that a Hobbs Act conspiracy does not require proof of an overt act as section 1951(a) makes the conspiring itself a crime.¹⁹

Both attempts and conspiracy to commit a Hobbs Act robbery are punishable by the same maximum term of imprisonment of not more than 20 years as for a substantive Hobbs Act robbery.²⁰ In contrast to section 1951, some of the statutes discussed in this section do not address conspiracy and may be punishable under other statutes with penalties that differ from the substantive offenses.

¹¹ United States v. Bell, 947 F.3d 49, 53 (3d Cir. 2020).

¹² United States v. Ayala, 917 F.3d 752, 755 (3d Cir. 2019).

¹³ United States v. Robinson, 844 F.3d 137, 139 (3d Cir. 2016), *abrogation recognized on other grounds by* United States v. Collazo, 856 F. App’x 380, 382 (3d Cir. 2021).

¹⁴ United States v. Hodge, 870 F.3d 184, 791 (3d Cir. 2017).

¹⁵ United States v. Lewis, 802 F.3d 449, 451 (3d Cir. 2015) (en banc).

¹⁶ 18 U.S.C. § 1951(a).

¹⁷ See, e.g., United States v. Soto-Barraza, 947 F.3d 1111, 1120 (9th Cir.), *cert. denied*, 141 S. Ct. 599 (2020); United States v. Villegas, 655 F.3d 662, 668–69 (7th Cir. 2011); United States v. Barnes, 230 F.3d 311, 314–15 (7th Cir. 2000).

¹⁸ See, e.g., *Soto-Barraza*, 947 F.3d at 1120.

¹⁹ See, e.g., United States v. Jett, 908 F.3d 252, 265 (7th Cir. 2018) (“We therefore hold that an overt act is not an element of a Hobbs Act conspiracy”); United States v. Salahuddin, 765 F.3d 329, 338–40 (3d Cir. 2014) (proof of an overt act is not required for conviction of Hobbs Act conspiracy under § 1951(a)); United States v. Monserrate-Valentin, 729 F.3d 31, 46 (1st Cir. 2013) (Hobbs Act conspiracy does not require proof of an overt act); United States v. Pistone, 177 F.3d 957, 960 (11th Cir. 1999) (per curiam) (government not required to allege or prove an overt act for conspiracy under § 1951); United States v. Clemente, 22 F.3d 477, 480–81 (2d Cir. 1994) (proof of an overt act not required for a Hobbs Act conspiracy). *But see* United States v. Box, 50 F.3d 345, 349 (5th Cir. 1995) (proof of an overt act is required for conviction of a Hobbs Act conspiracy).

²⁰ 18 U.S.C. § 1951(a).

B. 18 U.S.C. § 2113 (BANK ROBBERY AND INCIDENTAL CRIMES)

Section 2113 prohibits bank robbery and armed bank robbery and attempts to commit such crimes.²¹ Section 2113(a) prohibits the robbery of financial institutions, such as banks, credit unions, or savings and loan associations.²² It also prohibits entering any such financial institution or a building housing such a business with the intent to commit any felony or theft.²³ The statute provides:

Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another [...] any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association [shall be punished].²⁴

A violation of section 2113(a) is punishable by a statutory maximum term of imprisonment of 20 years, a fine, or both.²⁵

Section 2113(a) also prohibits attempts to commit bank robbery, which are punishable by the same maximum term of imprisonment of 20 years.²⁶ Generally, a conviction for attempted bank robbery requires that an individual engage in conduct representing a “substantial step” to commit the offense that demonstrates the defendant’s criminal intent, such as traveling to a bank to review its layout (often referred to as “casing the bank”) or obtaining equipment to use in the robbery.²⁷

²¹ 18 U.S.C. § 2113.

²² *Id.* § 2113(a).

²³ *Id.*

²⁴ *Id.* While § 2113(a) addresses offenses involving both robbery and extortion, this primer focuses only on robbery.

²⁵ *Id.*

²⁶ *Id.*; *see, e.g.*, *United States v. Miles*, 760 F. App’x 86, 87–88 (3d Cir. 2019) (statutory maximum penalty is 20 years for bank robbery and attempted bank robbery under 18 U.S.C. § 2113(a)); *United States v. Wilson*, 10 F.3d 734, 736 (10th Cir. 1993) (“Pursuant to § 2113(a), the statutory maximum for attempted [bank] robbery is twenty years. The statute is absolutely clear.”).

²⁷ *See, e.g.*, *United States v. Taylor*, 979 F.3d 203, 207 (4th Cir. 2020) (to obtain an attempted Hobbs Act robbery conviction, the government must prove (1) the defendant had intent to commit Hobbs Act robbery, and (2) defendant took substantial step toward the completion of Hobbs Act robbery), *cert. granted*, 141 S. Ct. 2882 (2021); *United States v. Muratovic*, 719 F.3d 809, 815 (7th Cir. 2013) (attempted Hobbs Act convictions require specific intent to commit the robbery and a substantial step taken to do so); *United States v. Carlisle*, 118 F.3d 1271, 1273 (8th Cir. 1997) (defendant recruited help, cased the bank, acquired equipment to use in the robbery, constructed a fake bomb, had in his car a toy gun, demand note, sunglasses, a hat, and the fake bomb); *United States v. Green*, 115 F.3d 1479, 1487 (10th Cir. 1997) (rejecting argument that casing a bank and going to bank with firearms and masks was only “mere preparation” and did not constitute a substantial step towards the commission of a robbery).

Section 2113 does not make it unlawful to conspire to commit the prohibited acts. As a result, conspiracy to commit bank robbery and armed bank robbery is prosecuted under the general federal conspiracy statute at 18 U.S.C. § 371, which provides for a maximum term of imprisonment of five years.²⁸ Thus, substantive bank and armed bank robbery and attempts to do so are subject to section 2113(a)'s statutory term of imprisonment of up to 20 years, while conspiracy to commit the substantive offenses are subject to section 371's statutory maximum of five years.²⁹

To prove a conspiracy to commit bank robbery under section 371, the government must prove that (1) there was an agreement among the conspirators to commit an offense (*e.g.*, bank robbery), (2) the defendant voluntarily agreed to join the conspiracy, and (3) at least one member of the conspiracy committed an overt act to effect the object of the conspiracy.³⁰ The agreement does not need to be explicit and can be proven by either direct or circumstantial evidence suggesting an agreement existed,³¹ but the agreement must indicate that the conspirators were united in a common plan or purpose to accomplish the objects of the conspiracy.³²

²⁸ 18 U.S.C. § 371; *see, e.g.*, *United States v. Lasseque*, 806 F.3d 618, 620 (1st Cir. 2015) (defendant who conspired to commit a bank robbery was convicted under § 371); *United States v. Snype*, 441 F.3d 119, 125 (2d Cir. 2006) (defendant found guilty of conspiracy to commit bank robbery, in violation of §§ 371 and 2113, which is punishable by a maximum prison term of five years).

²⁹ 18 U.S.C. § 371; *see, e.g.*, *United States v. Buffington*, 815 F.2d 1292, 1296, 1302–04 (9th Cir. 1987) (defendants sentenced to five years imprisonment for conspiracy to commit bank robbery, in violation of § 371, but the convictions were subsequently reversed by the court due to lack of evidence of the defendants' intent to commit the offenses).

³⁰ *See United States v. Smith*, 950 F.3d 893, 895 (D.C. Cir. 2020) (citation omitted).

³¹ *See, e.g.*, *United States v. Erickson*, 999 F.3d 622, 629–30 (8th Cir.) (“Proving a conspiracy does not require evidence of ‘an express agreement’ ” (quoting *United States v. Adams*, 401 F.3d 886, 893–94 (8th Cir. 2005))), *cert. denied*, 142 S. Ct. 512 (2021); *United States v. Flores*, 945 F.3d 687, 712 (2d Cir. 2019) (“That agreement ‘may be tacit rather than explicit.’ ” (quoting *United States v. Zhou*, 428 F.3d 361, 370 (2d Cir. 2005))); *United States v. Feldman*, 936 F.3d 1288, 1305 (11th Cir. 2019) (“The existence of an agreement may ‘be proved by inferences from the conduct of the alleged participants or from circumstantial evidence of a scheme.’ ” (quoting *United States v. Azmat*, 805 F.3d 1018, 1035 (11th Cir. 2015))); *United States v. Tull-Abreau*, 921 F.3d 294, 305 (1st Cir. 2019) (“[S]uch an agreement can ‘be proven solely by circumstantial evidence,’ and second, an agreement can ‘be inferred from other evidence including a course of conduct[.]’ ” (quoting *United States v. Iwuala*, 789 F.3d 1, 9 (1st Cir. 2015)), *United States v. Moran*, 984 F.2d 1299, 1300 (1st Cir. 1993))); *United States v. Tinghui Xie*, 942 F.3d 228, 240 (5th Cir. 2019) (“A conspiracy ‘may be established by either direct or circumstantial evidence’ ” (quoting *United States v. Abadie*, 879 F.2d 1260, 1265 (5th Cir. 1989))).

³² *See, e.g.*, *United States v. Jett*, 908 F.3d 252, 273 (7th Cir. 2018) (“A conviction for a Hobbs Act conspiracy requires proof beyond a reasonable doubt that the conspiracy existed and that the defendant joined it with the intent to advance its objectives.”); *United States v. Gaskins*, 690 F.3d 569, 577 (D.C. Cir. 2012) (“[Defendant must have] knowingly entered into the [] conspiracy with the specific intent to further its objective”); *United States v. Wardell*, 591 F.3d 1279, 1287–88 (10th Cir. 2009) (“Relevant circumstantial evidence [may] include[]: the joint appearance of defendants at transactions and negotiations in furtherance of the conspiracy; the relationship among codefendants; mutual representation of defendants to third parties; and other evidence suggesting unity of purpose or common design and understanding among conspirators to accomplish the objects of the conspiracy.” (quotations and citations omitted)).

Section 2113(d) prohibits the use of a dangerous weapon, such as a firearm, in the commission of the offenses defined in section 2113(a).³³ Use of a dangerous weapon entails more than mere possession; the dangerous weapon must be actively used to make victims aware of it and instill fear of its possible use.³⁴ A violation of section 2113(d) is punishable by a fine, a term of imprisonment of not more than 25 years, or both.³⁵ Similar to section 2113(a), section 2113(d) prohibits attempts, but does not address conspiracies. As with unarmed bank robbery under section 2113(a), conspiracy to commit armed bank robbery under section 2113(d) must be prosecuted under the general federal conspiracy statute at section 371, which carries a maximum penalty of five years of imprisonment.³⁶

Section 2113(e) provides for increased penalties if the offender “kills any person” or abducts a person during the robbery or subsequent escape, or attempt to escape, when committing any offense defined in section 2113.³⁷ Courts have interpreted “kills”—rather than “intentionally kills” or “murders”—as reflecting congressional intent to punish for any homicide related to the commission of a bank robbery regardless of whether the killing

³³ 18 U.S.C. § 2113(d); *see, e.g.*, *McLaughlin v. United States*, 476 U.S. 16, 17–18 (1986) (unloaded gun is a “dangerous weapon” for purposes of § 2113(d) because “the display of a gun instills fear in the average citizen”); *United States v. Dixon*, 790 F.3d 758, 760 (7th Cir. 2015) (butane lighter with a long barrel did not qualify as a “dangerous weapon” for purposes of § 2113(d)).

³⁴ *See, e.g.*, *United States v. Henry*, 984 F.3d 1343, 1358 (9th Cir.) (section 2113(d) requires more than “mere possession,” but requires the robber make one or more victims aware he has a weapon (citations omitted)), *cert. denied*, 142 S. Ct. 376 (2021); *United States v. Bain*, 925 F.3d 1172, 1177–78 (9th Cir. 2019) (conviction under § 2113(d) requires the defendant to actively employ the weapon); *United States v. Whitfield*, 695 F.3d 288, 304 (4th Cir. 2012) (brandishing of weapons during a bank robbery threatens victims and bystanders alike and sufficient for a conviction under § 2113(d)); *McLaughlin*, 476 U.S. at 17–18.

³⁵ 18 U.S.C. § 2113(d); *see, e.g.*, *United States v. Davis*, 260 F.3d 965, 968 (8th Cir. 2001) (statutory maximum sentence is 25 years for attempted armed bank robbery under § 2113(a) and (d)).

³⁶ 18 U.S.C. § 371; *see, e.g.*, *United States v. Barr*, 458 F. App’x 115, 116 (3d Cir. 2011) (defendant pleaded guilty to conspiracy to commit armed bank robbery in violation of § 371 and armed bank robbery in violation of § 2113(d) among other offenses); *United States v. Bangsengthong*, 550 F.3d 681, 683 (7th Cir. 2008) (defendant pleaded guilty to two counts of armed bank robbery, punishable by a statutory maximum penalty of up to 25 years under 18 U.S.C. § 2113(d), and one count of conspiracy to commit armed bank robbery, punishable by a statutory maximum penalty of up to five years under § 371); *United States v. Archer*, 282 F. App’x 164, 166 (3d Cir. 2008) (defendants were charged with conspiracy to commit armed bank robbery in violation of § 371 and armed bank robbery in violation of § 2113(d), among other offenses); *United States v. Smith*, 221 F. App’x 921, 923 (11th Cir. 2007) (*per curiam*) (jury convicted defendant of conspiracy to commit armed bank robbery in violation of §§ 371 and 2113(d) and armed bank robbery in violation of § 2113(d)).

³⁷ 18 U.S.C. § 2113(e).

was intentional or not.³⁸ If a person is killed or abducted, the mandatory minimum term of imprisonment is ten years, and if death results, the penalty is death or life imprisonment.³⁹

C. 18 U.S.C. § 2114 (MAIL, MONEY, OR OTHER PROPERTY OF UNITED STATES)

Section 2114(a) prohibits the assault of any person in lawful possession of mail, money, or property of the United States with the intent to rob the person of such property.⁴⁰ In relevant part, section 2114(a) states:

A person who assaults any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal, or purloin such mail matter, money, or other property of the United States, or robs or attempts to rob any such person of mail matter, or of any money, or other property of the United States, shall, for the first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he wounds the person having custody of such mail, money, or other property of the United States, or puts his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense [shall be punished].⁴¹

Examples of the types of crimes that have been prosecuted under section 2114 include assaults on mail carriers to steal mail,⁴² robbing a postal clerk of money and a cell phone,⁴³ and robbing a Bureau of Alcohol, Tobacco, Firearms, and Explosives agent posing as a buyer of illegal firearms of the funds intended for that purpose.⁴⁴

³⁸ See, e.g., *United States v. Vance*, 764 F.3d 667, 675 (7th Cir. 2014) (section 2113(e) “duplicates the general federal felony-murder statute”); *United States v. Jackson*, 736 F.3d 953, 958 (10th Cir. 2013) (section 2113(e) operates the same as common law felony murder); *United States v. Allen*, 247 F.3d 741, 782–83 (8th Cir. 2001) (section 2113(e) does not require an additional finding of specific intent to kill, rather the statute is like common law felony murder), *judgment vacated on other grounds by* 536 U.S. 953 (2002); *United States v. Poindexter*, 44 F.3d 406, 408–09 (6th Cir. 1995) (“[T]he settled principles of construction direct us to conclude that the legislature did not intend to add an additional scienter requirement to the killing component of the crime.”), *superseded by statute on other grounds as recognized in* *United States v. Parks*, 583 F.3d 923 (6th Cir. 2009).

³⁹ 18 U.S.C. § 2113(e).

⁴⁰ 18 U.S.C. § 2114(a).

⁴¹ *Id.*

⁴² *United States v. Castro*, 4 F.4th 345, 347 (5th Cir. 2021); see also *United States v. Tejas*, 868 F.3d 1242, 1243–44 (11th Cir. 2017) (per curiam) (theft of an express mail package from the front seat of a United States Postal Service delivery vehicle).

⁴³ *United States v. Stuart*, 1 F.4th 326, 327 (4th Cir. 2021); see also *United States v. Banks*, 982 F.3d 1098, 1101 (7th Cir. 2020) (robbing a United States Post Office); *United States v. Hampton*, 885 F.3d 1016, 1018 (7th Cir. 2018) (per curiam) (same).

⁴⁴ *United States v. Mobley*, 803 F.3d 1105, 1106 (9th Cir. 2015).

The first violation of section 2114(a) is punishable by a maximum term of imprisonment of ten years.⁴⁵ If, however, the offender commits a second or subsequent offense, or the victim is wounded by the assault or the offender puts the victim's life in jeopardy by the use of a dangerous weapon, the penalty increases to a term of imprisonment of not more than 25 years.⁴⁶

Similar to other robbery statutes, section 2114 does not make it unlawful to conspire to commit the prohibited acts; therefore, such conspiracies are prosecuted under the general conspiracy statute at 18 U.S.C. § 371.⁴⁷ As a result, substantive offenses under section 2114 are subject to the statutory penalties discussed above, while conspiracy to commit the substantive offenses under section 2114(a) are subject to a statutory maximum of not more than five years of imprisonment under section 371. To prove a conspiracy to violate section 2114(a) under section 371, the government must prove that (1) there was an agreement among the conspirators to commit an offense (*e.g.*, robbery of the mail in a postal worker's possession), (2) the defendant voluntarily agreed to join the conspiracy, and (3) at least one member of the conspiracy committed an overt act to effect the object of the conspiracy.⁴⁸ As previously discussed, the agreement to commit the offense does not need to be explicit, can be proven by direct or circumstantial evidence, and must indicate the conspirators were united in a common plan or purpose to accomplish the objects of the conspiracy.⁴⁹

D. 18 U.S.C. § 2118 (ROBBERIES AND BURGLARIES INVOLVING CONTROLLED SUBSTANCES)

Section 2118(a) prohibits the taking of controlled substances from the legal possession of a person registered with the United States Drug Enforcement Administration

⁴⁵ 18 U.S.C. § 2114(a); *see, e.g., Mobley*, 803 F.3d at 1109 (section 2114(a) conviction does not require proof defendant knew that property belonged to United States as the ownership of the property at issue is merely a jurisdictional requirement).

⁴⁶ 18 U.S.C. § 2114(a).

⁴⁷ 18 U.S.C. § 371; *see, e.g., Mobley*, 803 F.3d at 1106 (jury convicted defendant of, among other offenses, conspiracy to commit robbery of mail, money, or other property belonging to the United States, in violation of §§ 2114(a) and 371); *United States v. Lloyd*, 859 F. Supp. 2d 387, 389 (E.D.N.Y. 2012) (defendants charged with "Post Office Robbery" in violation of § 2114(a) and conspiracy to commit Post Office Robbery in violation of § 371).

⁴⁸ *See United States v. Smith*, 950 F.3d 893, 895 (D.C. Cir. 2020) (citation omitted); *see, e.g., United States v. Salgado*, 519 F.3d 411, 414 (7th Cir. 2008) (reversing the defendant's § 371 conviction because there was no evidence that the conspirators agreed "to rob a person having lawful charge of money of the United States").

⁴⁹ *See supra* notes 30–32 and accompanying text.

(DEA) under section 302 of the Controlled Substances Act.⁵⁰ Section 302, codified at 21 U.S.C. § 822, requires that a person who manufactures, distributes, or dispenses certain controlled substances or listed chemicals register with the DEA.⁵¹

A violation of section 2118(a), sometimes referenced as “pharmacy robbery,”⁵² is punishable by a fine, a statutory maximum term of imprisonment of up to 20 years, or both if:

(1) the replacement cost of the material or compound to the registrant was not less than \$500, (2) the person who engaged in such taking or attempted such taking traveled in interstate or foreign commerce or used any facility in interstate or foreign commerce to facilitate such taking or attempt, or (3) another person was killed or suffered significant bodily injury as a result of such taking or attempt.⁵³

Section 2118(c) provides for increased penalties for a violation of section 2118(a) under certain circumstances. If the offender used a dangerous weapon to commit the offense, section 2118(c)(1) provides for a maximum term of imprisonment of 25 years.⁵⁴ If the offender kills any person when violating section 2118(a), section 2118(c)(2) provides for a term of imprisonment of any number of years or a term of life.⁵⁵

Section 2118(d) also prohibits conspiracy to violate section 2118(a).⁵⁶ A violation of section 2118(d) is punishable by a statutory maximum term of imprisonment of ten years.⁵⁷

⁵⁰ 18 U.S.C. § 2118(a).

⁵¹ 21 U.S.C. § 822.

⁵² *See, e.g., Boulanger v. United States*, 978 F.3d 24, 32 (1st Cir. 2020) (“The pharmacy robbery statute prohibits taking a controlled substance (in specific circumstances not at issue here) ‘by force or violence or by intimidation.’ ” (quoting 18 U.S.C. § 2118(a))).

⁵³ 18 U.S.C. § 2118(a).

⁵⁴ *Id.* § 2118(c)(1).

⁵⁵ *Id.* § 2118(c)(2).

⁵⁶ *Id.* § 2118(d); *see, e.g., United States v. Osborne*, 514 F.3d 377, 379 (4th Cir. 2008) (defendants were indicted for conspiracy to rob a pharmacy, in violation of § 2118(d) and armed robbery of a pharmacy, in violation of § 2118(a) and (c)(1)).

⁵⁷ 18 U.S.C. § 2118(d).

E. 18 U.S.C. § 2119 (MOTOR VEHICLE)

Section 2119 prohibits taking a motor vehicle with the intent to cause death or serious injury from a person or in the presence of another by force or violence, commonly referred to as carjacking, and the attempt to commit such crime.⁵⁸ Section 2119 states:

Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall [be punished].⁵⁹

The specific intent requirement in section 2119 is satisfied whether the defendant unconditionally or conditionally “inten[d] to cause death or serious bodily harm,” during a carjacking.⁶⁰

Section 2119 provides a tiered penalty structure based on circumstances present in the offense. First, a simple violation or attempted violation is punishable by a maximum term of imprisonment of 15 years.⁶¹ Second, if serious bodily injury results, the maximum term of imprisonment increases to 25 years.⁶² Last, if death results, the penalty is a term of imprisonment for any number of years up to life or a sentence of death.⁶³

⁵⁸ 18 U.S.C. § 2119. As originally enacted, § 2119 required the offender to possess a firearm when taking the motor vehicle. *See* Anti Car Theft Act of 1992, Pub. L. No. 102–519, § 101(a), 106 Stat. 3384. However, Congress subsequently amended § 2119 to remove the firearm requirement. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, § 60003(a)(14), 108 Stat. 1796.

⁵⁹ 18 U.S.C. § 2119; *see, e.g.*, *United States v. Foster*, 507 F.3d 233, 246–47 (4th Cir. 2007) (under § 2119, a person commits the crime of federal carjacking when “(1) with intent to cause death or serious bodily harm (2) took a motor vehicle (3) that had been transported, shipped or received in interstate or foreign commerce (4) from the person or presence of another (5) by force and violence or intimidation.” (quoting *United States v. Applewhaite*, 195 F.3d 679, 685 (3d Cir. 1999))); *see also* *United States v. Lowell*, 2 F.4th 1291, 1297 (10th Cir. 2021), *cert. denied*, No. 21-6459 (U.S. Jan. 10, 2022); *United States v. Small*, 944 F.3d 490, 498 (4th Cir. 2019).

⁶⁰ *Holloway v. United States*, 526 U.S. 1, 8, 12 (1999) (quoting 18 U.S.C. § 2119); *see also* *Small*, 944 F.3d at 498 (“[T]he government need not prove that the defendant intended to cause death or serious harm ‘if unnecessary to steal the car,’ so long as it shows that ‘at the moment the defendant demanded or took control over the driver’s automobile the defendant possessed the intent to seriously harm or kill the driver if necessary to steal the car’ ” (quoting *Holloway*, 526 U.S. at 12)).

⁶¹ 18 U.S.C. § 2119(1).

⁶² *Id.* § 2119(2).

⁶³ *Id.* § 2119(3).

Section 2119 does not make it unlawful to conspire to commit carjacking. As a result, a carjacking conspiracy is prosecuted under the general conspiracy statute at 18 U.S.C. § 371.⁶⁴ As a result, substantive offenses under 2119 are subject to the statutory penalties discussed above, while conspiracy to commit carjacking is subject to a statutory maximum of not more than five years of imprisonment under section 371. To prove a conspiracy to commit the crime of carjacking under section 371, the government must prove that (1) there was an agreement among the conspirators to commit an offense (*e.g.*, carjacking), (2) the defendant voluntarily agreed to join the conspiracy, and (3) at least one member of the conspiracy committed an overt act to effect the object of the conspiracy.⁶⁵ The agreement need not be explicit and can be proven by either direct or circumstantial evidence, but the agreement must show that the conspirators were united in a common plan or purpose to accomplish the objects of the conspiracy.⁶⁶

F. ROBBERY OFFENSES INVOLVING THE USE OR CARRYING A FIREARM (18 U.S.C. § 924(c))

Robbery offenses that involve firearms may qualify as predicate offenses under 18 U.S.C. § 924(c). Section 924(c) provides that a person who uses or carries a firearm during and in relation to, or possesses a firearm in furtherance of, a “crime of violence” or “drug trafficking crime,” as those terms are defined in section 924(c), shall be sentenced to a term of imprisonment ranging from five to 25 years that must be imposed consecutive to the sentence for the underlying offense.⁶⁷

In the case of a second or subsequent conviction under section 924(c), the court must impose a term of imprisonment of not less than 25 years; if the firearm involved is a machinegun or a destructive device, or equipped with a firearm silencer or firearm muffler, the court must impose imprisonment for life.⁶⁸

⁶⁴ 18 U.S.C. § 371; *see, e.g.*, *United States v. Pena*, 963 F.3d 1016, 1021 (10th Cir. 2020) (defendant convicted of conspiracy to commit a carjacking in violation of 18 U.S.C. §§ 371 and 2119), *cert. denied*, 141 S. Ct. 1120 (2021); *Small*, 944 F.3d at 494 (jury found the defendant guilty, among other offenses, of carjacking in violation of § 2119(1) and conspiracy to commit carjacking in violation of § 371).

⁶⁵ *See United States v. Smith*, 950 F.3d 893, 895 (D.C. Cir. 2020) (citation omitted); *see, e.g.*, *Small*, 944 F.3d at 499 (finding substantial evidence in the record to conclude that the defendant or his coconspirators intended to seriously harm or kill the victim if necessary in order to steal his vehicle).

⁶⁶ *See supra* notes 30–32 and accompanying text.

⁶⁷ 18 U.S.C. § 924(c)(1). For violations of § 924(c), the mandatory minimum term of imprisonment for possessing a firearm is five years; for brandishing a firearm is seven years; and discharging a firearm is ten years. *See id.* § 924(c)(1)(A). If the firearm is a short-barreled rifle or shotgun or semiautomatic assault weapon, the mandatory term of imprisonment is ten years, and if it is a machine gun, destructive device, or a firearm equipped with a silencer, 30 years. *See id.* § 924(c)(1)(B). *See infra* note 72 and accompanying text for information on “crime of violence”.

⁶⁸ 18 U.S.C. § 924(c)(1)(C).

Prior to the enactment of the First Step Act of 2018, the penalty for a second or subsequent violation of section 924(c) applied even when the defendant was convicted of multiple section 924(c) counts in the same case.⁶⁹ The First Step Act limited the application of the 25-year penalty by providing that the enhanced penalty at section 924(c)(1)(C) applies only to offenders whose instant violation of 924(c) occurs after a prior section 924(c) conviction has become final.⁷⁰ As a result, a defendant can no longer be sentenced to a “stacked” 25-year penalty based upon multiple violations of section 924(c) conviction in the same case.⁷¹

For the purposes of section 924(c)(3)(A), a “crime of violence” is a felony offense that “has as an element the use, attempted use, or threatened use of physical force against the person or property of another.”⁷² As discussed in the preceding sections, several of the robbery offenses covered in this primer have as an element of the offense, the use, attempted use, or threatened use of physical force against a person or property and, as a result, may qualify as predicate offenses under section 924(c).

⁶⁹ First Step Act of 2018, Pub. L. No. 115–391, § 403, 132 Stat. 5194, 5221–22. The practice of charging multiple violations of § 924(c) within the same proceeding is usually referred to as the “stacking” of mandatory minimum penalties. Pre-First Step Act, one § 924(c) count would result in a mandatory minimum of five years; two such counts would result in a sentence of 30 years (5 years + 25 years); and three counts would result in 55 years (5 years + 25 years + 25 years).

⁷⁰ First Step Act § 403. Post-First Step Act, one § 924(c) count would result in a mandatory minimum of five years; two such counts would result in a sentence of ten years (5 years + 5 years); and three counts would result in 15 years (5 years + 5 years + 5 years).

⁷¹ See, e.g., *United States v. Jordan*, 952 F.3d 160, 171 (4th Cir. 2020) (affirming defendant sentenced pre-First Step Act to 30-years for two § 924(c) convictions obtained in a single prosecution rather than a ten-year sentence post-First Step Act), *cert. denied*, 141 S. Ct. 1051 (2021); *United States v. Richardson*, 948 F.3d 733, 745 (6th Cir.) (explaining that the defendant sentenced pre-First Step Act to 107 years in prison for his five § 924(c) convictions would receive a 35-year sentence if sentenced post-First Step Act), *cert. denied*, 141 S. Ct. 344 (2020).

⁷² 18 U.S.C. § 924(c)(3)(A). Section 924(c)(3) further defines “crime of violence” to include an offense “that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” *Id.* § 924(c)(3)(B). Courts typically refer to § 924(c)(3)(A) as the “force clause” or “elements clause” and § 924(c)(3)(B) as the “residual clause.” See, e.g., *United States v. Taylor*, 979 F.3d 203, 206 (4th Cir. 2020), *cert. granted*, 141 S. Ct. 2882 (2021). In *United States v. Davis*, the Supreme Court held that the residual clause was unconstitutionally vague. 139 S. Ct. 2319, 2336 (2019). Therefore, a § 924(c) conviction may stand only if the underlying offense constitutes a “crime of violence” under the force clause. To determine whether an offense constitutes a “crime of violence” under the force clause, courts employ the “categorical” approach. See *Descamps v. United States*, 570 U.S. 254, 257–58 (2013) (defining categorical approach and modified categorical approach).

For example, because violations of sections 1951,⁷³ 2113(a) and (d),⁷⁴ 2118(a),⁷⁵ and 2119⁷⁶ require the use, attempted use, or threat of force or violence, such crimes may serve as a predicate offense for a violation of section 924(c). Likewise, because section 2114(a) prohibits the assault of any person in lawful possession of mail, money, or property of the United States with the intent to rob the person of such property, this crime may also serve as a predicate offense for section 924(c).⁷⁷

Violations of section 924(c) are referenced in Appendix A to §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) of the

⁷³ 18 U.S.C. § 1951; *see, e.g.*, *United States v. McHaney*, 1 F.4th 489, 491–92 (7th Cir. 2021) (“[W]e have held time and again that Hobbs Act robbery qualifies as a crime of violence under the elements clause— (§ 924(c)(3)(A))—because it entails the use or threat of force Every other court of appeals to have considered this agrees with this conclusion The Supreme Court has declined to accept certiorari on this issue in any of these cases.”); *United States v. Walker*, 990 F.3d 316, 325 (3d Cir. 2021), *petition for cert. filed*, No. 21-102 (U.S. July 26, 2021); *United States v. Dominguez*, 954 F.3d 1251, 1261 (9th Cir. 2020), *petition for cert. filed*, No. 20-1000 (U.S. Jan. 26, 2021); *United States v. Mathis*, 932 F.3d 242, 266 (4th Cir.), *cert. denied sub nom.* *Uhuru v. United States*, 140 S. Ct. 639, *cert. denied sub nom.* *Stokes v. United States*, 140 S. Ct. 640 (2019); *United States v. St. Hubert*, 918 F.3d 1174, 1175 (11th Cir. 2019) (Tjoflat, J., concurring) (mem.); *United States v. Bowens*, 907 F.3d 347, 353 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 1299 (2019); *United States v. Garcia-Ortiz*, 904 F.3d 102, 109 (1st Cir. 2018), *cert. denied*, 139 S. Ct. 1208 (2019); *United States v. Hill*, 890 F.3d 51, 56–57 (2d Cir. 2018), *cert. denied*, 139 S. Ct. 844 (2019); *United States v. Melgar-Cabrera*, 892 F.3d 1053, 1065–66 (10th Cir.), *cert. denied*, 139 S. Ct. 494 (2018); *Diaz v. United States*, 863 F.3d 781, 783 (8th Cir. 2017); *United States v. Gooch*, 850 F.3d 285, 292 (6th Cir.), *cert. denied*, 137 S. Ct. 2230 (2017).

⁷⁴ 18 U.S.C. § 2113(a), (d); *see, e.g.*, *Wingate v. United States*, 969 F.3d 251, 264 (6th Cir. 2020) (section 2113(a) is a crime of violence under § 924(c)’s elements clause); *United States v. Pervis*, 937 F.3d 546, 553 (5th Cir. 2019) (section 2113(a) constitutes a crime of violence under section 924(c)(3)(A)’s elements clause); *United States v. Watson*, 881 F.3d 782, 786 (9th Cir. 2018) (per curiam) (armed bank robbery under § 2113(a) and (d) qualify as a crime of violence under § 924(c)).

⁷⁵ 18 U.S.C. § 2118(a); *see, e.g.*, *Boulanger v. United States*, 978 F.3d 24, 34 (1st Cir. 2020) (“[P]harmacy robbery is a crime of violence under § 924(c) elements clause.”); *Wingate*, 969 F.3d at 264 (same).

⁷⁶ 18 U.S.C. § 2119; *see, e.g.*, *United States v. Runyon*, 994 F.3d 192, 201 (4th Cir. 2021) (carjacking in violation of § 2119 is a crime of violence under § 924(c)); *United States v. Jackson*, 918 F.3d 467, 486 (6th Cir. 2019) (the commission of carjacking by “intimidation” necessarily involves the threatened use of violent physical force and, therefore, that carjacking constitutes a crime of violence under § 924(c)’s elements clause), *petition for cert. filed*, No. 21-5875 (U.S. Oct. 4, 2021); *United States v. Cruz-Rivera*, 904 F.3d 63, 66 (1st Cir. 2018) (“[W]e conclude that the force clause [§ 924(c)(3)(A))] encompasses Cruz’s § 2119 convictions.”); *United States v. Evans*, 848 F.3d 242, 247–48 (4th Cir. 2017) (“[C]arjacking resulting in bodily injury in violation of Section 2119(2), is categorically a crime of violence under the force clause of Section 924(c)(3).”); *United States v. Jones*, 854 F.3d 737, 740–41 (5th Cir. 2017) (“[C]arjacking fits under the definition set forth in § 924(c)(3)(A)—it ‘has as an element the use, attempted use, or threatened use of physical force against the person or property of another.’” (quoting 18 U.S.C. § 924(c)(3)(A))), *abrogated in part on other grounds by* *United States v. Davis*, 139 S. Ct. 2319 (2019); *United States v. Gutierrez*, 876 F.3d 1254, 1257 (9th Cir. 2017) (federal offense of carjacking is categorically a crime of violence under § 924(c)).

⁷⁷ 18 U.S.C. § 2114(a); *see, e.g.*, *United States v. Bryant*, 949 F.3d 168, 182 (4th Cir. 2020) (assaulting a postal employee with the intent to rob her, a violation of § 2114(a), is a crime of violence under § 924(c)(3)(A)).

Guidelines Manual.⁷⁸ Application Note 4 to §2K2.4 states that when a sentence under §2K2.4 is “imposed in conjunction with a sentence for an underlying offense, [the court is not to] apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense”.⁷⁹

For example, in *United States v. Eubanks*, the Seventh Circuit vacated the 4-level enhancement under §2B3.1(b)(2)(D) for a dangerous weapon “otherwise used,” holding that when a defendant is sentenced for using a firearm in furtherance of a violent crime under section 924(c), the sentence may not be enhanced under the guidelines for the same weapon and conduct that underlie the section 924(c) conviction as section 924(c) accounts for the firearm.⁸⁰

Similarly, the Seventh Circuit in *United States v. Foster* held that the 2-level death-threat enhancement at §2B3.1(b)(2)(F) did not apply to the defendant’s underlying sentence for robbery because the threat was accounted for under the sentence imposed for the section 924(c) conviction.⁸¹ The court noted that “neither the text of nor commentary to §2B3.1 [or the text of §2K2.4] suggests a limit on imposing the [death-threat] enhancement in conjunction with a sentence under [section] 924(c).”⁸² Instead, the court interpreted Application Note 4 of §2K2.4 to prohibit the application of §2B3.1(b)(2)(F) to the defendant’s sentence for bank robbery.⁸³ Other circuit courts have also held that Application Note 4 of §2K2.4 prohibits applying the death-threat enhancement to the underlying offense that gave rise to the section 924(c) conviction.⁸⁴

⁷⁸ See U.S. SENT’G COMM’N, *Guidelines Manual*, App. A (Nov. 2021) [hereinafter USSG].

⁷⁹ USSG §2K2.4, comment. (n.4); see, e.g., *United States v. Eubanks*, 593 F.3d 645, 649 (7th Cir. 2010) (holding application of §2B3.1(b)(2)(D) impermissible double-counting because sentence for § 924(c) offense accounts for all guns used in relation to the underlying offense); see also U.S. SENT’G COMM’N, PRIMER ON FIREARMS OFFENSES (2021), <https://www.ussc.gov/guidelines/primers/firearms> (providing an overview of firearms statutes, sentencing guidelines, and case law).

⁸⁰ *Eubanks*, 593 F.3d at 648–49; see also USSG §2K2.4, comment. (n.4).

⁸¹ 902 F.3d 654, 663 (7th Cir. 2018).

⁸² *Id.* at 657.

⁸³ *Id.* at 663.

⁸⁴ See, e.g., *United States v. Katalinic*, 510 F.3d 744, 748 (7th Cir. 2007) (adopting rule used by Sixth and Fourth Circuits that death threats related to the firearm forming the basis of the § 924(c) sentence cannot be double counted by increasing the base offense level for the underlying crime); *United States v. Hazelwood*, 398 F.3d 792, 798–800 (6th Cir. 2005) (relying on §2K2.4 Application Note 4, the court held that because the threat of death was related to the defendant’s brandishing of a firearm, the imposition of the two-point threat enhancement to his sentence for bank robbery was improper); *United States v. Reevey*, 364 F.3d 151, 158–59 (4th Cir. 2004) (relying on §2K2.4 Application Note 4, the court found that the 2-level sentencing enhancement for a threat of death during a carjacking, combined with his § 924(c) conviction and sentence, resulted in an impermissible double counting).

G. DOUBLE JEOPARDY CONSIDERATIONS FOR ROBBERY CONSPIRACY AND SUBSTANTIVE OFFENSES

In some cases, the government may allege the defendant committed or conspired to commit multiple robbery offenses and will charge both substantive and conspiracy offenses in one charging document. The potential of multiple prosecutions for the same offense conduct gives rise to double jeopardy concerns. The Double Jeopardy Clause provides that a criminal defendant may not be subject to multiple punishments or repeated prosecutions for the same offense.⁸⁵ In *Blockburger v. United States*, the Supreme Court held that Double Jeopardy concerns are unfounded so long as each separate statutory provision under which the defendant is indicted or convicted requires proof of an additional fact that the other does not.⁸⁶ Additionally, in *Pinkerton v. United States*, the Supreme Court held that the commission of a substantive offense and a conspiracy to commit that offense are separate and distinct offenses and that Congress has the power to separate the two and to affix different penalties to each offense.⁸⁷

Thus, a defendant may be prosecuted for both conspiracy and substantive robbery offenses without violating the Double Jeopardy Clause because a substantive crime and a conspiracy to commit that crime are separate offenses for Double Jeopardy Clause purposes. For example, a defendant can be convicted of both Hobbs Act conspiracy and substantive Hobbs Act robbery offenses.⁸⁸ Similarly, conspiracy and substantive counts involving the use of a firearm under sections 1951 and 924(c) to commit Hobbs Act robberies do not violate the Double Jeopardy Clause as they “require[] proof of a fact which the other does not.”⁸⁹

III. ROBBERY GUIDELINE: §2B3.1

A. GENERALLY

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).⁹⁰ Section 2B3.1 of the *Guidelines Manual* is the applicable guideline for violations of the

⁸⁵ U.S. CONST. amend. V (“No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb”).

⁸⁶ 284 U.S. 299, 304 (1932).

⁸⁷ 328 U.S. 640, 643 (1946).

⁸⁸ See, e.g., *Brown v. Ohio*, 432 U.S. 161, 165–66 (1977) (discussing the *Blockburger* test to determine whether two offenses are sufficiently distinguishable to avoid violating the Double Jeopardy Clause).

⁸⁹ See, e.g., *United States v. Catalan-Roman*, 585 F.3d 453, 472 (1st Cir. 2009) (quoting *Blockburger*, 284 U.S. at 304).

⁹⁰ USSG App. A.

robbery statutes discussed in this primer. As discussed below, §2B3.1 has one base offense level, seven specific offense characteristics, and one cross reference depending on the conduct involved in or harms resulting from the offense.

1. Guidelines Application Instructions

Section 1B1.1 of Chapter One sets forth instructions for using the eight chapters of the *Guidelines Manual*.⁹¹ Because §2B3.1 has multiple specific offense characteristics that can apply to an offense and specific offense characteristics with multiple offense level adjustments, §1B1.1's instructions on how to apply multiple adjustments in an applicable Chapter Two guideline are important to understand.

Section 1B1.1 explains that within each subsection of a specific offense characteristic, the enhancements are listed in the alternative, meaning the single option that best describes the conduct should be used.⁹² For example, §2B3.1(b)(2) provides for an enhancement related to firearms, dangerous weapons, and the threat of death.⁹³ Choose the single highest enhancement that best describes the conduct.⁹⁴ If the defendant discharged a firearm, increase by 7 levels, but if the defendant brandished or possessed it, increase by 5 levels instead. Similarly, §2B3.1(b)(3) provides for an increase based on the degree of a victim's bodily injury if bodily injury occurred.⁹⁵ Alternative enhancements are listed depending on the degree of injury – 6 levels for permanent or life-threatening bodily injury, compared to 2 levels for bodily injury. When deciding which alternative best describes the conduct, consult both the Application Notes to the guideline, and any relevant definitions provided in §1B1.1. Relevant to the robbery guideline, §1B1.1 defines terms such as “firearm,” “serious bodily injury,” and “otherwise used.”⁹⁶

2. Relevant Conduct

Section 1B1.3 defines relevant conduct as “the range of conduct that is relevant to determining the applicable offense level.”⁹⁷ Section 1B1.3(a)(1)(A) includes as relevant conduct “all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant.”⁹⁸ Section 1B1.3(a)(1)(B) includes

⁹¹ USSG §1B1.1.

⁹² USSG §1B1.1, comment (n.4).

⁹³ USSG §2B3.1(b)(2)(A)–(F).

⁹⁴ USSG §1B1.1, comment (n.5).

⁹⁵ USSG §2B3.1(b)(3)(A)–(E).

⁹⁶ USSG §1B1.1, comment (n.1).

⁹⁷ USSG §1B1.3, comment. (backg'd.); *see also* U.S. SENT'G COMM'N, PRIMER ON RELEVANT CONDUCT (2021), <https://www.ussc.gov/guidelines/primers/relevant-conduct> (identifying relevant conduct concepts and key cases).

⁹⁸ USSG §1B1.3(a)(1)(A).

as relevant conduct certain acts and omissions of others in the case of “jointly undertaken criminal activity.”⁹⁹ A “jointly undertaken criminal activity” is “a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy”¹⁰⁰ Under §1B1.3(a)(1)(B), the defendant is accountable for all acts and omissions of others that were:

- (i) within the scope of the jointly undertaken criminal activity;
- (ii) in furtherance of that criminal activity; and
- (iii) reasonably foreseeable in connection with that criminal activity.¹⁰¹

For robbery offenses sentenced under §2B3.1, the defendant is accountable for his or her conduct in the offense of conviction under §1B1.3(a)(1)(A) and the conduct of others that is part of any jointly undertaken criminal activity in connection with the offense of conviction under §1B1.3(a)(1)(B).¹⁰²

Section 1B1.3 also provides for an additional type of relevant conduct that is, however, *not* applicable to the robbery offenses sentenced under §2B3.1. Section 1B1.3(a)(2) adopts broader rules, often referred to as “expanded relevant conduct,” that hold defendants accountable for acts outside their offense of conviction so long as the acts were “part of the same course of conduct or common scheme or plan as the offense of conviction.”¹⁰³ The terms “common scheme or plan” and “same course of conduct” are described in detail in Application Note 5(B) to §1B1.3.¹⁰⁴ The conduct must be connected to the count of conviction by “at least one common factor, such as common victims, common accomplices, common purpose, or similar modus operandi” or the conduct must be “sufficiently connected or related to each other” as to constitute “part of a single episode, spree, or ongoing series of offenses.”¹⁰⁵

Notably, the relevant conduct rules exclude robbery offenses from the application of expanded relevant conduct. Section 1B1.3(a)(2) states that expanded relevant conduct only applies to defendants convicted of offenses that are grouped under subsection (d) of §3D1.2 (Groups of Closely Related Counts).¹⁰⁶ Section 2B3.1 offenses are not grouped under subsection (d), and, in fact, are specifically excluded from grouping under subsection (d).¹⁰⁷ This means that when applying the robbery guideline at §2B3.1, only

⁹⁹ USSG §1B1.3(a)(1)(B).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² See USSG §1B1.3(a)(1)(A), (B).

¹⁰³ See USSG §1B1.3(a)(2).

¹⁰⁴ USSG §1B1.3, comment (n.5(B)).

¹⁰⁵ USSG §1B1.3, comment (n.5(B)(i)–(ii)).

¹⁰⁶ USSG §1B1.3(a)(2); §3D1.2(d).

¹⁰⁷ USSG §3D1.2(d) (listing the guidelines that are grouped and specifically excluded from the operation of

conduct that is part of the offense of conviction is considered. Conduct that was part of dismissed or acquitted counts cannot be used to determine the guideline range. For example, if a defendant is initially charged with three bank robberies that were committed close in time, using the same accomplices and modus operandi, but the defendant pleads only to the first bank robbery, only the conduct that is part of that single robbery can be used to determine the applicable offense characteristics under Chapters Two and Three. In this example, if bodily injury occurred only during the second and third bank robberies, do not apply the bodily injury enhancement at §2B3.1(b)(3). Similarly, if the defendant recklessly endangered others while fleeing from the second and third bank robberies, do not apply the reckless endangerment enhancement at §3C1.2 (Reckless Endangerment During Flight). In contrast, if bodily injury or reckless endangerment occurred during the single count of conviction, then the associated enhancements would apply.

B. DETERMINING THE BASE OFFENSE LEVEL

Section 2B3.1(a) provides for a Base Offense Level of 20.¹⁰⁸

C. APPLYING SPECIFIC OFFENSE CHARACTERISTICS

1. Section 2B3.1(b)(1) (Robbery of a Financial Institution or a Post Office)

Section 2B3.1(b)(1) provides for a 2-level enhancement “[i]f the property of a financial institution or post office was taken, or if the taking of such property was an object of the offense[.]”¹⁰⁹ The term “financial institution” is not defined in §2B3.1. As a result, courts may look to other sources for the meaning of “financial institution.” For example, the Seventh Circuit in *United States v. Cook*¹¹⁰ reviewed the definition of the term in §2B1.1 (Theft, Property Destruction, and Fraud)¹¹¹ and *Black’s Law Dictionary*¹¹² before

§3D1.2(d)).

¹⁰⁸ USSG §2B3.1(a).

¹⁰⁹ USSG §2B3.1(b)(1).

¹¹⁰ 850 F.3d 328 (7th Cir. 2017).

¹¹¹ USSG §2B1.1, comment. (n.1) (defining “financial institution” as “any institution described in 18 U.S.C. § 20, § 656, § 657, § 1005, § 1006, § 1007, or § 1014; any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan) association, union or employee pension fund; any health, medical, or hospital insurance association; brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government. ‘Union or employee pension fund’ and ‘any health, medical, or hospital insurance association,’ primarily include large pension funds that serve many persons (e.g., pension funds of large national and international organizations, unions, and corporations doing substantial interstate business), and associations that undertake to provide pension, disability, or other benefits (e.g., medical or hospitalization insurance) to large numbers of persons.”).

¹¹² *Financial Institution*, BLACK’S LAW DICTIONARY (8th ed. 2004). Both the then-current 8th and the now-

concluding that the common meaning of the term covers businesses offering “an array of financial services, including check cashing, money transfers, money orders, and loans.”¹¹³

2. Section 2B3.1(b)(2) (Firearm; Dangerous Weapon; Threat of Death)

Section 2B3.1(b)(2) is a six-tier enhancement providing increases where the offense involved a firearm, a dangerous weapon, or a threat of death. Specifically, §2B3.1(b)(2) provides that (A) if a firearm was discharged, increase by seven levels; (B) if a firearm was otherwise used, increase by six levels; (C) if a firearm was brandished or possessed, increase by five levels; (D) if a dangerous weapon was otherwise used, increase by four levels; (E) if a dangerous weapon was brandished or possessed, increase by three levels; or (F) if a threat of death was made, increase by two levels.¹¹⁴ As discussed above in Section III.A, the court is to apply only the specific offense characteristic subsection that results in the greatest enhancement for the conduct in the offense. Additionally, §2B3.1(b)(3), discussed below, provides a five-tier enhancement for bodily injury and limits the adjustment from both §2B3.1(b)(2) and §2B3.1(b)(3) to not exceed 11 levels.¹¹⁵

a. 7-level increase if firearm discharged

If a firearm is discharged during the offense, §2B3.1(b)(2)(A) provides for a 7-level increase in the base offense level.¹¹⁶ The term “firearm” means “(i) any weapon (including a starter gun) [designed to or readily convertible] 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.”¹¹⁷ The guideline definition for “firearm” closely tracks with the definition of “firearm” at 18 U.S.C. § 921 (Definitions [used in Firearms Offenses]).¹¹⁸

current 11th editions of *Black’s Law Dictionary* define the term “financial institution” to mean a “business, organization, or other entity that manages money, credit, or capital, such as a bank, credit union, savings-and-loan association, securities broker or dealer, pawnbroker, or investment company.” *Financial Institution*, BLACK’S LAW DICTIONARY (11th ed. 2019).

¹¹³ *Cook*, 850 F.3d at 333.

¹¹⁴ USSG §2B3.1(b)(2).

¹¹⁵ USSG §2B3.1(b)(3).

¹¹⁶ USSG §2B3.1(b)(2)(A).

¹¹⁷ USSG §1B1.1, comment. (n.1(H)) (application note further defines “firearm” to state “[a] weapon, commonly known as a ‘BB’ or pellet gun, that uses air or carbon dioxide pressure to expel a projectile is a dangerous weapon but not a firearm.”). The term “firearm” is defined in Application Note 1 of §2B3.1 by reference to the definition of “firearm” in the commentary to §1B1.1. *See* USSG §2B3.1, comment. (n.1).

¹¹⁸ 18 U.S.C. § 921(a)(3) (defining “firearm” to mean “(A) 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; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm”); *see, e.g.*, *United States v. Brown*, 117 F.3d 353, 354–56 (7th Cir. 1997) (section 921(a)(3)’s definition of firearm is identical, in all relevant respects, to the guidelines’

Courts have held that an object meets both the guidelines' and the section 921 definition of "firearm" when it is capable of "expelling a projectile," even if it must be modified to do so. For example, a starter pistol may be a firearm if it can or is capable of being modified to fire a projectile.¹¹⁹ Additionally, modifying a firearm to make it inoperable does not exclude it from being a firearm under the guidelines or statutory definitions.¹²⁰

The statutory and guidelines definitions of a firearm are substantially similar, but not identical. Section 921(a)(3)'s definition excludes antique firearms, including replicas of antique firearms and black powder firearms, while the guidelines' definition does not.¹²¹ As a result, courts have applied the firearms enhancement in offenses involving antique firearms on the basis that such weapons meet §1B1.1's definition as it "will . . . expel a projectile by the action of an explosive."¹²²

The courts are split on whether §2B3.1(b)(2)(A) should apply where the shooter was a non-participant in the offense. Section 2B3.1(b)(2)(A) states that "[i]f a firearm was discharged, increase by [seven] levels," but does not specify who must discharge the

definition); *see also* USSG App. C, amend. 388 (effective Nov. 1, 1991) (revising the definition of "firearm" in §1B1.1 commentary to track more closely with the definition of firearm in 18 U.S.C. § 921).

¹¹⁹ USSG §1B1.1, comment. (n.1(H)) (defining firearm to include starter pistols only if it "will or is designed to or may readily be converted to expel a projectile by the action of an explosive"); *see, e.g.*, *United States v. Burnett*, 16 F.3d 358, 361 (9th Cir. 1994) (vacating application of firearm enhancement and remanding for district court to determine whether defendant's starter gun is capable of, or can be modified, to fire a projectile).

¹²⁰ *See, e.g.*, *United States v. Rivera*, 415 F.3d 284, 286 (2d Cir. 2005) (holding that an inoperable weapon falls within § 921(a)(3)'s definition of a "firearm"); *United States v. Brown*, 117 F.3d 353, 354–55 (7th Cir. 1997) (removing a firearm's firing pin is not a modification that excludes the firearm from § 921 or guidelines' definition); *United States v. Ruiz*, 986 F.2d 905, 910 (5th Cir. 1993) (filing down gun's hammer did not change the fact that the gun was designed to expel a projectile).

¹²¹ *See supra* notes 117–19 and accompanying text. *See also* 18 U.S.C. § 921(a)(16) (defining the term "antique firearm" to mean "(A) any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured in or before 1898; or (B) any replica of any firearm described in subparagraph (A) if such replica[] (i) is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition, or (ii) uses rimfire or conventional centerfire fixed ammunition which is no longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade; or (C) any muzzle loading rifle, muzzle loading shotgun, or muzzle loading pistol, which is designed to use black powder, or a black powder substitute, and which cannot use fixed ammunition. For purposes of this subparagraph, the term "antique firearm" shall not include any weapon which incorporates a firearm frame or receiver, any firearm which is converted into a muzzle loading weapon, or any muzzle loading weapon which can be readily converted to fire fixed ammunition by replacing the barrel, bolt, breechblock, or any combination thereof.").

¹²² *See, e.g.*, *United States v. Kirvan*, 86 F.3d 309, 312 (2d Cir. 1996) (quoting USSG §1B1.1, comment. (n.1(H)) (antique black powder revolver was a firearm for purposes of the guidelines' definition of firearm).

firearm for the purposes of the enhancement.¹²³ Under the relevant conduct guideline at §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)),¹²⁴ the defendant is accountable for all actions “that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.”¹²⁵ Section 1B1.3(a)(1)(A) explains that relevant conduct always includes acts the defendant counseled, commanded, induced, procured, or willfully caused.¹²⁶ The split regarding §2B3.1(b)(2)(A) is the result of the courts’ different determinations on whether an offender can induce or willfully cause a non-participant to discharge a firearm.¹²⁷ Additionally, the Eighth Circuit has found that §2B3.1(b)(2)(A) does not require that the defendant discharged the firearm, only that a firearm was discharged.¹²⁸

b. 6-level increase if a firearm was otherwise used

Section 2B3.1(b)(2)(B) provides for a 6-level increase if a defendant otherwise used a firearm.¹²⁹ The term “otherwise used” means conduct that “did not amount to the discharge of a firearm but was more than brandishing, displaying, or possessing a

¹²³ USSG §2B3.1(b)(2)(A).

¹²⁴ USSG §1B1.3. *See also* discussion *supra* Section III.A.2.

¹²⁵ USSG §1B1.3(a)(1).

¹²⁶ USSG §1B1.3(a)(1)(A).

¹²⁷ *Compare* United States v. McQueen, 670 F.3d 1168, 1171 (11th Cir. 2012) (affirming discharge enhancement when attempt to escape caused Customs and Border Protection officers to fire two illuminated warning shots); United States v. Roberts, 203 F.3d 867, 870–71 (5th Cir. 2000) (struggling with armed guard during robbery induced guard to fire his gun); United States v. Molina, 106 F.3d 1118, 1122–25 (2d Cir. 1997) (under the relevant conduct principles of §1B1.3, it is reasonably foreseeable that in an encounter between armed robbers and armed guards, a shooting is likely to occur), *with* United States v. Hill, 381 F.3d 560, 562–63 (6th Cir. 2004) (vacating enhancement because there was no showing that defendant “willfully caused” guard to shoot him and reasonable foreseeability is not relevant for actions by third parties not in furtherance of a joint undertaking); United States v. Gordon, 64 F.3d 281, 283 (7th Cir. 1995) (relevant conduct principles under §1B1.3 require the defendant to have an actual intent to cause an action and not be based only on the commission of the underlying offense).

¹²⁸ *See* United States v. Triplett, 104 F.3d 1074, 1083 (8th Cir. 1997).

¹²⁹ USSG §2B3.1(b)(2)(B); *see, e.g.*, United States v. Johnson, 803 F.3d 610, 617 (11th Cir. 2015) (defendant brandished pistol, jumped on the teller counter, pointed the pistol at tellers and demanded money without dye packs; after discovering that the tellers did include dye packs, defendant stated, “I said I will kill you.”); United States v. Burton, 126 F.3d 666, 678 (5th Cir. 1997) (affirming application of 6-level enhancement because the firearm was “otherwise used” when waved around and pointed at victims during bank robbery to ensure their compliance).

firearm[.]”¹³⁰ Pointing a dangerous weapon at someone with the intent to instill fear is otherwise using, not brandishing,¹³¹ a dangerous weapon.¹³²

For example, *United States v. Johnson*, the Eleventh Circuit found the defendant otherwise used a firearm because the defendant’s conduct “clearly constituted an implicit threat because it communicated to the tellers that their failure to comply with his instructions would result in bodily harm or death.”¹³³ Under the relevant conduct rules, discussed in Section III.A, courts have held that the enhancement may apply where the use of a firearm by a co-defendant was reasonably foreseeable.¹³⁴

c. 5-level increase if a firearm is brandished or possessed

Section 2B3.1(b)(2)(C) provides for a 5-level increase if a firearm is brandished or possessed.¹³⁵ The term “brandished” means “all or part of the weapon was displayed, or the presence of the weapon was otherwise made known to another person, in order to intimidate that person, regardless of whether the weapon was directly visible to that person.”¹³⁶

Courts have expressed the view that brandishing is shaking or waving a weapon menacingly and involves a generalized, instead of a specific, threat.¹³⁷ The 5-level enhancement applied in a conspiracy to commit robbery where it was established “with

¹³⁰ USSG §1B1.1, comment. (n.1(J)) (defining “otherwise used,” with reference to a dangerous weapon, including a firearm, to mean “that the conduct did not amount to the discharge of a firearm but was more than brandishing, displaying, or possessing a firearm or other dangerous weapon.”). The term “otherwise used” is defined in Application Note 1 of §2B3.1 by reference to the definition of “otherwise used” in the commentary to §1B1.1. *See* USSG §2B3.1, comment. (n.1).

¹³¹ *See* USSG §1B1.1, comment. (n.1(C)) (defining “brandished,” with reference to a dangerous weapon, including a firearm, to mean “that all or part of the weapon was displayed, or the presence of the weapon was otherwise made known to another person, in order to intimidate that person, regardless of whether the weapon was directly visible to that person. Accordingly, although the dangerous weapon does not have to be directly visible, the weapon must be present.”).

¹³² *See, e.g., United States v. Hano*, 922 F.3d 1272, 1297 (11th Cir. 2019) (pointing a toy gun, which qualified as a “dangerous weapon”, at a person with the intent to instill fear in another amounted to “otherwise used”).

¹³³ *Johnson*, 803 F.3d at 617.

¹³⁴ *See, e.g., United States v. Daudinot*, 809 F.3d 1027, 1028–29 (8th Cir. 2016) (defendant’s knowledge of co-defendant’s past use of a firearm in a bank robbery sufficiently supported application of §2B3.1(b)(2)(B)).

¹³⁵ USSG §2B3.1(b)(2)(C); *see, e.g., United States v. Montes-Fosse*, 824 F.3d 168, 171 (1st Cir. 2016) (agreeing with the district court that §2B3.1(b)(2)(C) does not require a victim to know a firearm is present to apply).

¹³⁶ USSG §1B1.1, comment. (n.1(C)). *See supra* notes 130–31 (defining the terms “otherwise used” and “brandished”).

¹³⁷ *See, e.g., United States v. Johnson*, 931 F.2d 238, 240 (3d Cir. 1991).

reasonable certainty” that the conspirators intended to possess or brandish a firearm during the crime.¹³⁸

d. 4-level increase if a dangerous weapon was otherwise used

Section 2B3.1(b)(2)(D) provides for a 4-level increase in the base offense level if a dangerous weapon is otherwise used.¹³⁹ The term “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.”¹⁴⁰ Examples of dangerous weapons include plastic toy guns¹⁴¹ and “bomb-like” (*e.g.*, two red sticks with a fuse) objects.¹⁴² They also include objects used in a manner creating the impression that it is capable of inflicting harm, such as mace or pepper spray,¹⁴³ or using a sledgehammer or baseball bat to threaten bystanders.¹⁴⁴

In *United States v. Johnson*, the Third Circuit held that a sledgehammer and baseball bat were “otherwise used” because they were carried into a jewelry store robbery to smash display cases and then used to threaten bystanders.¹⁴⁵ In *United States v. Miller*, the Eleventh Circuit affirmed that lighting the fuse of a fake bomb and explicitly threatening a bank teller transformed an implicit threat into an explicit one to qualify for the 4-level enhancement for “otherwise us[ing]” a dangerous weapon.¹⁴⁶ The Eleventh Circuit in *United States v. Hano* also held that a key consideration in determining whether a

¹³⁸ *United States v. McKeever*, 824 F.3d 1113, 1120 (D.C. Cir. 2016).

¹³⁹ USSG §2B3.1(b)(2)(D); *see, e.g.*, *United States v. Bell*, 947 F.3d 49, 62 (3d Cir. 2020) (toy gun pointed at the victim’s neck sufficient for application of §2B3.1(b)(2)(D), otherwise using a dangerous weapon).

¹⁴⁰ USSG §1B1.1 comment. (n.1(E)) (application note further states “a defendant wrapp[ing] a hand in a towel during a bank robbery to create the appearance of a gun” qualifies as a “dangerous weapon”). The term “dangerous weapon” is defined in Application Note 1 of §2B3.1 by reference to the definition of “dangerous weapon” in the commentary to §1B1.1. *See* USSG §2B3.1, comment. (n.1).

¹⁴¹ *See, e.g., Bell*, 947 F.3d at 62 (objects that appear to be dangerous weapons should be considered dangerous weapons for purposes of §2B3.1).

¹⁴² *See, e.g., United States v. Miller*, 206 F.3d 1051, 1052 (11th Cir. 2000) (affirming application of 4-level enhancement at §2B3.1(b)(2)(D) for displaying to a bank teller what looked like a bomb, “lighting the fuse, and asking the teller if she knew what ‘it’ was (referring to the bomb-like object)”).

¹⁴³ *See, e.g., United States v. Neill*, 166 F.3d 943, 949–50 (9th Cir. 1999) (affirming application of 4-level enhancement at §2B3.1(b)(2)(D) for use of a dangerous weapon because pepper spray caused extreme pain and prolonged impairment of a bodily organ, it satisfied the definition of a dangerous weapon, and the district court correctly adjusted the sentence).

¹⁴⁴ *United States v. Johnson*, 199 F.3d 123, 128 (3d Cir. 1999).

¹⁴⁵ *Johnson*, 199 F.3d at 127–28.

¹⁴⁶ *Miller*, 206 F.3d at 1054.

dangerous weapon is “otherwise used” is whether it is pointed at a specific person to create fear and facilitate compliance with demands.¹⁴⁷

e. 3-level increase if a dangerous weapon was brandished or possessed

Section 2B3.1(b)(2)(E) provides for a 3-level enhancement where a dangerous weapon was brandished or possessed.¹⁴⁸ For example, igniting and displaying road flares is brandishing or possessing a dangerous weapon.¹⁴⁹ Brandishing represents an implicit threat that force may be used while otherwise using a dangerous weapon is when the threat becomes more explicit.¹⁵⁰ Courts have also opined that “brandishing” constitutes an implicit threat that force might be used, whereas a weapon is “otherwise used” when the threat becomes more explicit.¹⁵¹

f. 2-level increase if a threat of death was made

Section 2B3.1(b)(2)(F) provides for a 2-level increase if a threat of death is made in the offense.¹⁵² Application Note 6 of §2B3.1 explains, the phrase “a threat of death” can be “an oral or written statement, act, gesture, or combination thereof [but a death threat] does not have to state expressly his intent to kill the victim in order for the [§2B3.1(b)(2)(F)] enhancement to apply.”¹⁵³ However, courts have opined that “something more” is required to transform the general threat of harm inherent in every bank robbery into a threat of death.¹⁵⁴ The contextual circumstances should be taken into consideration when determining whether the offender’s overall conduct “would instill in a reasonable person,

¹⁴⁷ 922 F.3d 1272, 1296–97 (11th Cir. 2019).

¹⁴⁸ USSG §2B3.1(b)(2)(E); *see, e.g.*, *United States v. Taylor*, 961 F.3d 68, 75–77 (2d Cir. 2020) (vacating and remanding application of §2B3.1(b)(2)(E) as defendant’s hand gesture was insufficient; an unconcealed hand would not appear to be itself a weapon).

¹⁴⁹ *United States v. Boyd*, 924 F.2d 945, 947–48 (9th Cir. 1991).

¹⁵⁰ *See, e.g.*, *United States v. Bell*, 947 F.3d 49, 62 (3d Cir. 2020) (pointed a weapon at the store employee’s neck, ordered him to the ground, and then struck him with the weapon); *Miller*, 206 F.3d at 1054 (defendant lit the fuse of a fake bomb while explicitly threatening the bank teller); *Johnson*, 199 F.3d at 126 (co-defendant held a baseball bat aloft to “break necks” or “knock heads off”).

¹⁵¹ *See, e.g.*, *United States v. Gilkey*, 118 F.3d 702, 705–06 (10th Cir. 1997) (dangerous weapon, a gun, was “otherwise used,” not “brandished,” when it was used to directly threaten the victims and force them to move according to co-defendant’s directions). *But see* *United States v. Matthews*, 20 F.3d 538 (2d Cir. 1994) (pointing firearm at customers during bank robbery, ordering them to floor, and threatening to kill them if they did not comply was “brandishing”).

¹⁵² USSG §2B3.1(b)(2)(F).

¹⁵³ USSG §2B3.1, comment. (n.6).

¹⁵⁴ *See, e.g.*, *United States v. Perez*, 943 F.3d 1329, 1335–36 (11th Cir. 2019) (per curiam) (defendant wore no disguise, was not obviously carrying a weapon, and the demand note made reference to a need to feed his kids; defendant’s conduct and language did not rise to the level of a threat of death).

who is a victim of the offense, a fear of death.”¹⁵⁵ The statement, “I have a gun,” coupled with a perception that the threat could be consummated, can be sufficient to instill a fear of death, even when the gun is not displayed.¹⁵⁶

3. Section 2B3.1(b)(3) (Bodily Injury)

Section 2B3.1(b)(3) provides a graduated enhancement based on the seriousness of the bodily injury sustained by a victim.¹⁵⁷ Although §2B3.1 does not define “victim,” courts have interpreted the term “any victim” in §2B3.1(b)(3) “to include any employee, bystander, customer, or police officer who gets assaulted during the bank robbery or during an attempted get-away.”¹⁵⁸ Courts have held that the enhancements at §2B3.1(b)(3) can be applied even when the defendant or coconspirators did not personally inflict the injury.¹⁵⁹

If any victim sustains (A) bodily injury, the offense level is increased by two levels, (B) serious bodily injury, four levels, or (C) permanent or life-threatening bodily injury, six levels.¹⁶⁰ Additionally, if the degree of injury falls between bodily injury and serious bodily injury, §2B3.1(b)(3)(D) provides for a 3-level increase,¹⁶¹ and if the injury is between serious bodily injury and permanent or life-threatening bodily injury, §2B3.1(b)(3)(E) provides for a 5-level increase.¹⁶²

¹⁵⁵ *United States v. Wooten*, 689 F.3d 570, 575 (6th Cir. 2012) (quoting USSG §2B3.1, comment. (n.6)); *see also* *United States v. Emmett*, 321 F.3d 669, 673 (7th Cir. 2003) (defendant put his hand into his jacket, which could lead a reasonable teller to believe he had a gun).

¹⁵⁶ *See, e.g.*, *United States v. Jennings*, 439 F.3d 604, 611 (9th Cir. 2006) (applying enhancement if defendant announces he has a gun, but does not show it or threaten to use it); *United States v. Murphy*, 306 F.3d 1087, 1090 (11th Cir. 2002) (per curiam) (affirming “I have a gun” statement qualifies as a death threat even if defendant is unarmed); *United States v. Gibson*, 155 F.3d 844, 846–47 (7th Cir. 1998) (explaining “I have a gun” statement instills a sense of fear in a reasonable teller when confronted by a robber). *But see* *Perez*, 943 F.3d at 1335–36 (vacating and remanding application of §2B3.1(b)(2)(F) as absence of threatening gestures, menacing actions, and defendant’s statement that he had “kids to feed” likely softened the impact of the demand).

¹⁵⁷ USSG §2B3.1(b)(3).

¹⁵⁸ *United States v. Muhammad*, 948 F.2d 1449, 1456 (6th Cir. 1991); *see, e.g.*, *United States v. Mays*, 967 F.3d 748, 751 (8th Cir. 2020) (chef working in a kitchen at a neighboring restaurant grazed by a stray bullet is a victim under §2B3.1(b)(3)); *United States v. Molina*, 106 F.3d 1118, 1122 (2d Cir. 1997) (explaining “any victim” in §2B3.1(b)(3) includes bystanders assaulted in the course of a bank robbery).

¹⁵⁹ *Molina*, 106 F.3d at 1125 (affirming 4-level enhancement when bullet fired by guard during commission of a robbery struck bystander in the foot).

¹⁶⁰ USSG §2B3.1(b)(3)(A)–(C).

¹⁶¹ USSG §2B3.1(b)(3)(D); *see, e.g.*, *Mays*, 967 F.3d at 751–52 (affirming enhancement that victim’s injury fell between bodily injury and serious bodily injury).

¹⁶² USSG §2B3.1(b)(3)(E).

Application Note 1 at §1B1.1 define the terms “bodily injury” as “any significant injury, [such as] an injury that is painful and obvious”, “serious bodily injury” as an “injury involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty”, and “permanent or life-threatening bodily injury” as an “injury involving a substantial risk of death [or] 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.”¹⁶³ The courts may use a variety of factors to categorize such injuries. For example, the factors a court may consider supporting a finding that the injury is “significant” are duration (*e.g.*, the injury must last for some meaningful time, but need not last for months or years) and visibility (*e.g.*, visible injuries such as bumps, bruises, and redness or swelling are sufficient).¹⁶⁴

a. 2-level increase for bodily injury

Section 2B3.1(b)(3)(A) provides for a 2-level enhancement if any victim sustained bodily injury.¹⁶⁵ In *United States v. Jackson*, the Sixth Circuit affirmed the 2-level enhancement for bodily injury where the victim in a carjacking was struck so hard he lost consciousness and suffered a severe contusion to the head, along with scrapes and minor bruises to the arm and shoulder.¹⁶⁶ The defendants argued that the injuries did not qualify for the 2-level enhancement because the victim did not seek medical attention. The court rejected this, stating the guidelines definition requires only that the injuries be significant (*i.e.*, “painful and obvious” or the “type for which medical attention ordinarily would be sought”) but the definition does not require the victim to seek treatment.¹⁶⁷

However, not all injuries satisfy the bodily injury enhancement. In *United States v. Mejia-Canales*, the district court applied the 2-level enhancement for bodily injury based on the presentence report’s description of a small laceration to the victim’s mouth and two

¹⁶³ USSG §1B1.1, comment. (n.1(B)), (n.1(M)), (n.1(K)).

¹⁶⁴ *United States v. Brown*, 200 F.3d 700, 709 (10th Cir. 1999) (citations omitted).

¹⁶⁵ USSG §2B3.1(b)(3)(A).

¹⁶⁶ 918 F.3d 467, 487–88 (6th Cir. 2019).

¹⁶⁷ *Jackson*, 918 F.3d at 487 (quoting USSG §1B1.1, comment. (n.1(B)); *see also* *United States v. Aguilar-Ibarra*, 740 F.3d 587, 592 (11th Cir. 2014) (per curiam) (undisputed that the victim was assaulted by multiple masked men brandishing replica firearms and then transported to the hospital with minor injuries); *United States v. Eubanks*, 593 F.3d 645, 652 (7th Cir. 2010) (victim’s scrapes and bruises amounted to significant injuries that satisfied the guidelines’ definition of “painful and obvious”); *United States v. Ledford*, 218 F.3d 684, 691 (7th Cir. 2000) (affirming 2-level enhancement for bodily injury where victim suffered “bruising on her side and arm”); *United States v. Hamm*, 13 F.3d 1126, 1127–28 (7th Cir. 1994) (affirming 2-level enhancement for bodily injury where victim “suffered bumps and bruises and had ‘the wind knocked out of him’ as a result of being hit and knocked down” and “sustained a back injury requiring chiropractic treatment”); *United States v. Greene*, 964 F.2d 911, 912 (9th Cir. 1992) (per curiam) (pain lingering for 24 hours, repeated blows to the head represent the type of injury “for which medical attention ordinarily would be sought”); *United States v. Muhammad*, 948 F.2d 1449, 1456 (6th Cir. 1991) (officer’s beating resulted in numerous abrasions, the hyperextension of his shoulder, and soreness in his knees and elbow for two weeks).

poor quality photographs of the victim's mouth.¹⁶⁸ The Tenth Circuit reversed, finding that this was the only evidence taken by the district court, and it did not support the factual finding that the injuries were nontrivially painful or lasting.¹⁶⁹ The court noted that testimony by the victim or someone with first-hand experience with the victim's injuries, or medical reports on the injuries, were needed and that other circuits have vacated the bodily injury enhancement due to a lack of evidence in the record.¹⁷⁰

b. 4-level increase for serious bodily injury

Section 2B3.1(b)(3)(B) provides for a 4-level enhancement if any victim sustained serious bodily injury.¹⁷¹ A serious bodily injury involves extreme physical pain, protracted impairment of the function of a bodily member, organ, or mental faculty, or requires medical intervention, such as surgery, hospitalization, or physical rehabilitation.¹⁷² In *United States v. Bogan*, the Seventh Circuit affirmed the 4-level enhancement where the victim suffered lacerations requiring sutures, a fractured eye-socket, emotional distress, migraine headaches, and the potential loss of teeth.¹⁷³

c. 6-level increase for permanent or life-threatening bodily injury

Section 2B3.1(b)(3)(C) provides for a 6-level enhancement if any victim sustained permanent or life-threatening bodily injury.¹⁷⁴ Such injuries involve “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.”¹⁷⁵ Gunshot wounds can result in life-threatening injuries and cause

¹⁶⁸ 467 F.3d 1280, 1284–85 (10th Cir. 2006).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 1284–85; *see, e.g.*, *United States v. Zuniga*, 720 F.3d 587, 594 (5th Cir. 2013) (per curiam) (vacating the §2B3.1(b)(3)(A) enhancement because the witness statement in the PSR did not specify whether the victim sustained any injury); *United States v. Guerrero*, 169 F.3d 933, 947 (5th Cir. 1999) (vacating because there was no evidence of any injury); *United States v. Dodson*, 109 F.3d 486, 489 (8th Cir. 1997) (vacating enhancement because victim was not called to testify regarding the nature of his injuries or whether he had suffered any pain as a result of being choked; the only evidence concerning the injuries suffered was the PSR's description of the injuries); *United States v. Harris*, 44 F.3d 1206, 1218 (3d Cir. 1995) (vacating the 2-level enhancement because the record did not disclose anything about the treatment the bank tellers received from paramedics or the degree of pain experienced by the tellers).

¹⁷¹ USSG §2B3.1(b)(3)(B).

¹⁷² USSG §1B1.1, comment. (n.1(M)).

¹⁷³ 267 F.3d 614, 624 (7th Cir. 2001).

¹⁷⁴ USSG §2B3.1(b)(3)(C).

¹⁷⁵ USSG §1B1.1, comment. (n.1(K)).

impairment of bodily functions.¹⁷⁶ In *United States v. Martin*, the Eighth Circuit affirmed the application of the 6-level enhancement where the injuries resulted in the victims' death.¹⁷⁷ A co-defendant's conduct may also serve as the basis for the 6-level enhancement if the injury is permanent or life-threatening.¹⁷⁸

d. 3- or 5-level increases if the injury is between bodily injury, serious bodily injury or permanent or life-threatening bodily injury

Section 2B3.1(b)(3)(D) provides for a 3-level enhancement if the court determines that an injury falls between "bodily injury" and "serious bodily injury."¹⁷⁹ Similarly, §2B3.1(b)(3)(E) provides for a 5-level enhancement if the court determines that an injury falls between "serious bodily injury" and "permanent or life-threatening bodily injury."¹⁸⁰

Circuit courts recognize that the sentencing court is in the best position to determine the degree of injuries after viewing the relevant evidence.¹⁸¹ The Fourth Circuit observed that whether an injury is "significant" should not be determined by a precise standard or mechanically applied, but should instead be "determined by a very factually-specific inquiry which takes into account a multitude of factors, some articulable and some more intangible, that are observable in hearing the evidence presented on the injury."¹⁸²

¹⁷⁶ See, e.g., *United States v. Washington*, 702 F.3d 886, 897 (6th Cir. 2012) (affirming 6-level enhancement where victim was shot four times, producing injuries described by EMTs as life-threatening, and "resulting in a six-month convalescence, a year-long need for a colostomy bag, the implantation of a steel rod in [victims'] leg, and a permanent impairment in the use of his hand"); see also *United States v. Baggett*, 342 F.3d 536, 540 (6th Cir. 2003) (affirming 6-level enhancement where domestic assault victim suffered a fractured finger, a cracked tooth, and substantial contusions and bruises that caused spatial disorientation as well as the combination of "severe bleeding, bruising and broken bones could reasonably be viewed as amounting to a life-threatening bodily injury").

¹⁷⁷ 777 F.3d 984, 990 (8th Cir. 2015) (affirming 6-level enhancement for the infliction of permanent bodily injuries that resulted in two deaths).

¹⁷⁸ See, e.g., *United States v. Patton*, 927 F.3d 1087, 1094 (10th Cir. 2019) (defendant was in custody when co-defendant shot a detective that resulted in injuries severe enough to force the detective's retirement from the Topeka Police Department.).

¹⁷⁹ USSG §2B3.1(b)(3)(D); see, e.g., *United States v. Eubanks*, 593 F.3d 645, 651 (7th Cir. 2010) (affirming 3-level enhancement where victim almost lost consciousness and suffered bruises and lacerations requiring medical attention, including four staples to close the head wound).

¹⁸⁰ USSG §2B3.1(b)(3)(E).

¹⁸¹ See, e.g., *Eubanks*, 593 F.3d at 652 (deferring to the district court on this fact-specific inquiry); *United States v. Hamm*, 13 F.3d 1126, 1128 (7th Cir. 1994) ("Because the district court hears this evidence, it is by far best-suited to assess these myriad factors and determine whether a 'significant injury' has occurred" (quoting *United States v. Lancaster*, 6 F.3d 208, 210 (4th Cir. 1993) (per curiam))).

¹⁸² See *Lancaster*, 6 F.3d at 210; see also *Hamm*, 13 F.3d at 1128 (agreeing with the Fourth Circuit in *Lancaster* that the district court is best situated to assess the evidence concerning the victim's injuries and imposing the appropriate level of guideline enhancement under §2B3.1(b)).

e. Limitation on the cumulative adjustments for firearms, dangerous weapons, a threat of death, and bodily injury

Section 2B3.1(b)(3) also limits the maximum combined adjustment permitted under §2B3.1(b)(2) for firearms, dangerous weapons, and a threat of death and §2B3.1(b)(3) for bodily injury to not more than 11 levels.¹⁸³ For example, if the 7-level enhancement at §2B3.1(b)(2)(A) for discharge of a firearm and the 6-level enhancement at §2B3.1(b)(3)(C) for permanent or life-threatening bodily injury both apply,¹⁸⁴ the cumulative adjustment is 11 levels, not 13.¹⁸⁵

4. Section 2B3.1(b)(4) (Abduction and Physical Restraint)

Section 2B3.1(b)(4) provides for alternative enhancements for abduction or physical restraint.¹⁸⁶ Section 2B3.1(b)(4)(A) provides for a 4-level enhancement when “any person was abducted to facilitate [the] commission of the offense or to facilitate escape.”¹⁸⁷ Section 2B3.1(b)(4)(B) provides for a 2-level enhancement when “any person was physically restrained to facilitate commission of the offense or to facilitate escape.”¹⁸⁸ The abduction and physical restraint enhancements are mutually exclusive; both cannot apply.

Abduction occurs when “a victim was forced to accompany an offender to a different location.”¹⁸⁹ Restraint is “the forcible restraint of the victim such as by being tied, bound, or locked up.”¹⁹⁰ Because some restraint on a victim’s physical movement occurs in virtually every robbery, some circuits have adopted different approaches when applying the physical restraint enhancement to avoid its application in every case.¹⁹¹

The distinction between abduction and restraint may rest on what constitutes “a different location,” and courts recognize that the line between restraint and abduction is

¹⁸³ USSG §2B3.1(b)(3).

¹⁸⁴ USSG §2B3.1(b)(2)(A), (3)(C).

¹⁸⁵ USSG §2B3.1(b)(3); *see also* USSG §2B3.1, comment. (n.4) (explaining that the “combined adjustments for weapon involvement and injury are limited to a maximum enhancement of 11 levels”).

¹⁸⁶ USSG §2B3.1(b)(4).

¹⁸⁷ USSG §2B3.1(b)(4)(A).

¹⁸⁸ USSG §2B3.1(b)(4)(B).

¹⁸⁹ USSG §1B1.1, comment. (n.1(A)). *See, e.g.*, *United States v. Redmond*, 965 F.3d 416, 419–20 (5th Cir. 2020) (abduction enhancement improper since defendant did not “accompany” tellers when he told them to go into another room, shut the door, and count to 100 as he escaped), *cert. denied*, 141 S. Ct. 1411 (2021).

¹⁹⁰ USSG §1B1.1, comment. (n.1(L)).

¹⁹¹ *See, e.g.*, *United States v. Taylor*, 961 F.3d 68, 78–79 (2d Cir. 2020) (using a three-factor test and collecting cases); *United States v. Bell*, 947 F.3d 49, 56 (3d Cir. 2020) (identifying five relevant factors); *United States v. Herman*, 930 F.3d 872, 876 (7th Cir. 2019) (focusing on the defendant’s action rather than the victim’s reaction); *United States v. Parker*, 241 F.3d 1114, 1118 (9th Cir. 2001) (requiring “sustained focus” on a victim over a period of time).

not always clear.¹⁹² For example, the Third, Fourth, Fifth, and Tenth Circuits have held that an abduction occurs for purposes of §2B3.1(b)(4)(A) when an offender forces a victim from one room or area of a building to another room or area within the same building.¹⁹³ In contrast, the Sixth, Ninth, and Eleventh Circuits have held that movement within the same building may not constitute abduction.¹⁹⁴ Likewise, in *United States v. Eubanks*, the Seventh Circuit held that moving victims from one room to another may constitute physical restraint, but not abduction.¹⁹⁵ However, the Seventh Circuit held in *United States v. Taylor* that forcing a person from a parking lot into a bank or credit union is abduction.¹⁹⁶ Courts have differed on whether pointing a gun at a person and ordering them not to move is enough to constitute physical restraint.¹⁹⁷

¹⁹² See *United States v. Eubanks*, 593 F.3d 645, 652 (7th Cir. 2010).

¹⁹³ See, e.g., *United States v. Buck*, 847 F.3d 267, 276–77 (5th Cir. 2017) (forcing employees to move from the front of the store to the back sufficient to make the abduction enhancement applicable); *United States v. Archuleta*, 865 F.3d 1280, 1288 (10th Cir. 2017) (forcing bank manager and teller from lobby and teller area around a corner and into a separate vault area is abduction); *United States v. Reynos*, 680 F.3d 283, 291 (3d Cir. 2012) (moving employees from the bathroom area to the cash register was abduction); *United States v. Osborne*, 514 F.3d 377, 390 (4th Cir. 2008) (moving employees from front of store to the pharmacy area sufficient for the abduction enhancement).

¹⁹⁴ See, e.g., *United States v. Hill*, 963 F.3d 528, 536 (6th Cir. 2020) (moving from the sales floor to the back of the store not abduction); *United States v. Nelson*, 137 F.3d 1094, 1112 (9th Cir. 1998) (ordering a jewelry store employee and customer to the back room at gunpoint constitutes physical restraint); *United States v. Whatley*, 719 F.3d 1206, 1221–23 (11th Cir. 2013) (moving locations inside a bank not abduction).

¹⁹⁵ See, e.g., *Eubanks*, 593 F.3d at 654 (transporting the victims from one room to another is not enough for abduction).

¹⁹⁶ *United States v. Taylor*, 128 F.3d 1105, 1110–11 (7th Cir. 1997) (forcing a bank employee at gunpoint from a parking lot into the bank warranted a 4-level enhancement for abduction). Other circuits deciding cases with similar fact-patterns as *Taylor* have arrived at the same result. See, e.g., *United States v. Whooten*, 279 F.3d 58, 61 (1st Cir. 2002) (forcing employee, at gunpoint and while threatening to kill her, outside of the store and 65 feet into the parking lot was abduction); *United States v. Davis*, 48 F.3d 277, 279 (7th Cir. 1995) (forcing victim at gunpoint from parking lot to inside the credit union satisfied abduction requirement).

¹⁹⁷ Compare *United States v. Dimache*, 665 F.3d 603, 606–07 (4th Cir. 2011) (pointing gun at tellers prevented them from leaving bank); *United States v. Miera*, 539 F.3d 1232, 1234–36 (10th Cir. 2008) (standing in front of bank’s exit and waving gun prevented occupants from exiting bank); *United States v. Wallace*, 461 F.3d 15, 33–34 (1st Cir. 2006) (ordering victim at gunpoint not to leave federally-licensed firearms dealership); *United States v. Gonzalez*, 183 F.3d 1315, 1327 (11th Cir. 1999) (pointing firearm at victims during home-invasion robbery is physical restraint), with *United States v. Bell*, 947 F.3d 49, 57 (3d Cir. 2020) (pointing plastic firearm at store employee not sufficient for enhancement as conduct must involve some physical aspect); *United States v. Herman*, 930 F.3d 872, 874–75 (7th Cir. 2019) (pointing gun at robbery victims involves psychological coercion, not physical restraint); *United States v. Parker*, 241 F.3d 1114, 1118 (9th Cir. 2001) (pointing gun at bank teller not enough given nearly all bank robberies involve such conduct); *United States v. Drew*, 200 F.3d 871, 880 (D.C. Cir. 2000) (interpreting 2-level adjustment to §3A1.3 for “physical restraint,” which also references the definition at §1B1.1, pointing a firearm at victim is not sufficient because there was not physical contact, as the guideline definition requires); *United States v. Anglin*, 169 F.3d 154, 163–64 (2d Cir. 1999) (pointing gun at bank tellers did not involve the physical contact required by the guidelines definition); *United States v. Hickman*, 151 F.3d 446, 461 (5th Cir. 1998) (pointing firearm at restaurant employee during robbery is what any armed robber would normally do; every armed robbery would be enhanced), *aff’d on reh’g*, 179 F.3d 230 (5th Cir. 1999) (per curiam).

5. Section 2B3.1(b)(5) (Offenses Involving Carjacking)

Section 2B3.1(b)(5) provides for a 2-level enhancement if the offense involved carjacking.¹⁹⁸ Application Note 1 defines “carjacking” to mean “the taking or attempted taking of a motor vehicle from the person or presence of another by force and violence or by intimidation.”¹⁹⁹ The guidelines enhancement is distinct from the statutory offense at 18 U.S.C. § 2119. As a result, a defendant who takes a car from a person or in the presence of another may receive the 2-level enhancement under §2B3.1(b)(5) even though the defendant was not convicted under section 2119.²⁰⁰

The guidelines do not define the term “person or presence” used in Application Note 1. Courts considering the meaning of “presence” have concluded that it means the automobile is within the reach, observation, or control of the person but for the defendant’s actions and use of fear and intimidation.²⁰¹ Thus, “presence” may mean a significant degree of nearness, but not necessarily within the easy reach of the victim.²⁰² At least two circuits, the Sixth and Seventh, have held that forcing a bank employee to surrender car keys during a robbery and later using the car to escape is sufficient to apply the carjacking enhancement.²⁰³

¹⁹⁸ USSG §2B3.1(b)(5).

¹⁹⁹ USSG §2B3.1, comment. (n.1); *see, e.g.*, *United States v. Smith*, 767 F.3d 187, 192 (3d Cir. 2014) (finding that the defendant exercised dominion and control over driver’s vehicle during carjacking; defendant coerced driver at gunpoint to drive to bank against her will).

²⁰⁰ *See, e.g.*, *United States v. Williams*, 553 F.3d 1073, 1082 (7th Cir. 2009) (although defendant himself did not participate in the carjacking by co-conspirator as the conspirators fled from scene of credit union robbery, it was reasonably foreseeable to defendant that carjacking might occur, thereby warranting 2-level enhancement for robbery involving a carjacking); *United States v. Denton*, 246 F.3d 784, 790 (6th Cir. 2001) (defendant who kidnapped victim and forced her to drive him in her car to store for purpose of robbing it did not need to be charged under federal carjacking statute in order to receive 2-level enhancement for carjacking under the guidelines); *United States v. Bates*, 213 F.3d 1336, 1340 (11th Cir. 2000) (finding a specific intent requirement is unnecessary as the facts satisfy both the guidelines and statutory definition carjacking; by demanding the car keys, grabbing victim’s arm, and forcing him into his house for the keys, defendant attempted to take victim’s car by using force and violence or by intimidation).

²⁰¹ *See, e.g.*, *United States v. Boucha*, 236 F.3d 768, 775 (6th Cir. 2001) (finding that property is “in the presence of a person if it is so within his reach, observation and control that he could, if not overcome by violence or prevented by fear, retain possession of it”).

²⁰² *See, e.g.*, *United States v. Savarese*, 385 F.3d 15, 20 (1st Cir. 2004) (vehicle was proximate to the victims’ in the driveway just outside their home, retained control of the area where the vehicle was located, but induced to relinquish their keys only as a result of the defendants’ threats and acts of violence); *United States v. Edwards*, 231 F.3d 933, 937 (5th Cir. 2000) (victim only 15 feet away from vehicle and defendant forcibly took the vehicle’s keys).

²⁰³ *See United States v. Rogers*, 777 F.3d 934, 936–37 (7th Cir. 2015); *Boucha*, 236 F.3d at 775–76.

6. Section 2B3.1(b)(6) (Firearm, Destructive Device, or Controlled Substance Taken or Object of the Offense)

Section 2B3.1(b)(6) provides for a 1-level enhancement of the base offense level if a firearm, destructive device, or controlled substance is taken, or if the taking of such items was the object of the offense.²⁰⁴ Application Note 1 defines the terms “firearm” and “destructive device” by using the definition of those terms in the commentary to §1B1.1.²⁰⁵

Both §2B3.1(b)(6) and §2B3.1(b)(2) provide for enhancements where a firearm or a destructive device was involved. The guidelines provide that the cumulative application of multiple adjustments within one guideline and from multiple guidelines are permitted unless the guideline(s) instruct otherwise.²⁰⁶ Accordingly, the Tenth Circuit in *United States v. Rojas* held that because the enhancement for taking a firearm and destructive device involves conduct that is distinct from using, possessing, brandishing, or discharging a firearm or dangerous weapon, application of §2B3.1(b)(6) and §2B3.1(b)(2)(C) is not double counting.²⁰⁷ Additionally, when the defendant has also been convicted under 18 U.S.C. § 924(c), nothing in §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes), the guideline applicable to section 924(c) offenses, prohibits the application of §2B3.1(b)(6).²⁰⁸

7. Section 2B3.1(b)(7) (Loss Amount)

Section 2B3.1(b)(7) provides an enhancement of one to seven levels based on the amount of loss in the offense if the loss exceeds \$20,000.²⁰⁹ Application Note 3 to §2B3.1 defines “loss” to mean “the value of the property taken, damaged, or destroyed.”²¹⁰

Courts differ in their approach regarding whether the value of a stolen vehicle used during a robbery should be included in the loss calculation. The Eighth Circuit in *United States v. Powell* included the value of a stolen vehicle used during a robbery in the loss amount because the guidelines definition includes the value of the property taken,

²⁰⁴ USSG §2B3.1(b)(6); *see, e.g.*, *United States v. Herman*, 930 F.3d 872, 874 (7th Cir. 2019) (taking of a firearm).

²⁰⁵ *See supra* notes 117–19 and accompanying text for the definition of “firearm.” *See also* USSG §1B1.1, comment. (n.1(G)) (defining “destructive device” to mean “any article described in 26 U.S.C. § 5845(f) (including an explosive, incendiary, or poison gas[] (i) bomb, (ii) grenade, (iii) rocket having a propellant charge of more than four ounces, (iv) missile having an explosive or incendiary charge of more than one-quarter ounce, (v) mine, or (vi) device similar to any of the devices described in the preceding clauses”).

²⁰⁶ *See* USSG §1B1.1, comment. (n.4).

²⁰⁷ 531 F.3d 1203, 1208 (10th Cir. 2008).

²⁰⁸ *Id.* at 1207–08.

²⁰⁹ USSG §2B3.1(b)(7). In 2015, the Commission amended the loss table to account for inflation. *See* USSG App. C, amend. 791 (effective Nov. 1, 2015).

²¹⁰ USSG §2B3.1, comment. (n.3).

damaged, or destroyed in the underlying offense and the loss caused “in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.”²¹¹ The First Circuit in *United States v. Cruz–Santiago* and *United States v. Austin* maintains a distinction between a carjacking that occurs during a robbery and vehicles stolen in preparation for a robbery; it is acceptable to include the value of carjacked vehicles as “loss,” but not vehicles stolen in preparation for and used during the robbery.²¹²

D. CROSS REFERENCE FOR MURDER

Section 2B3.1(c)(1) provides a cross reference to §2A1.1 (First Degree Murder) if the victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111:

If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder).²¹³

Section 1111 defines murder as “the unlawful killing of a human being with malice aforethought” or “committed in the perpetration of, or attempt to perpetrate” certain enumerated felonies, including robbery, and covers both first- and second-degree murder.²¹⁴

Section 1B1.5 (Interpretation of References to Other Offense Guidelines) provides guidance on how to apply a guideline reached through a cross reference.²¹⁵ The conduct considered by the court in applying the cross reference includes the defendant’s relevant conduct.²¹⁶ Under relevant conduct,²¹⁷ the defendant is accountable for all actions performed in preparation for the offense, during the offense, and following the offense to

²¹¹ 283 F.3d 946, 948 (8th Cir. 2002) (quoting USSG §1B1.3(a)(1)) (stating that the vehicle stolen and used as a getaway car was obviously “taken” from its owner and damaged during the escape); *United States v. Donaby*, 349 F.3d 1046, 1051 (7th Cir. 2003) (damage to van stolen in preparation for, and used during the robbery, appropriately counted as loss).

²¹² *United States v. Cruz-Santiago*, 12 F.3d 1, 3 (1st Cir. 1993); *United States v. Austin*, 239 F.3d 1, 7–8 (1st Cir. 2001).

²¹³ USSG §2B3.1(c)(1).

²¹⁴ 18 U.S.C. § 1111. Murder in the perpetration of a felony is sometimes referenced as “felony murder.” *See, e.g., United States v. Lowell*, 2 F.4th 1291, 1297–300 (10th Cir. 2021) (death occurring during a carjacking is felony murder), *cert. denied*, No. 21-6459 (U.S. Jan. 10, 2022); *United States v. Garcia-Ortiz*, 528 F.3d 74, 80 (1st Cir. 2008) (killing during robbery is felony murder under § 1111).

²¹⁵ USSG §1B1.5.

²¹⁶ USSG §1B1.5, comment. (n.3).

²¹⁷ USSG §1B1.3. *See also* discussion *supra* Section III.A.2.

avoid detection.²¹⁸ Additionally, relevant conduct always includes acts the defendant aided, abetted, counseled, commanded, induced, procured, or willfully caused.²¹⁹

In *United States v. Lowell*, the Tenth Circuit affirmed the application of the cross reference at §2B3.1(c) in a carjacking where the defendant, driving a vehicle he carjacked hours earlier, struck and killed a motorcyclist during a high-speed police pursuit.²²⁰ The circuit court held that because the death occurred during the commission of a felony, the carjacking, and the death occurred “in the perpetration of” the carjacking, it constituted felony murder under section 1111.²²¹

Some courts have held that a jury does not need to find the defendant guilty of murder; all that is required is that the preponderance of the evidence proves a victim was killed under circumstances that would constitute murder under federal law.²²² For example, in *United States v. Rodriguez-Adorno*, the First Circuit applied the cross reference in a carjacking case where the victim was shot and killed by the defendant’s coconspirator.²²³

E. UPWARD DEPARTURE FOR INTENT TO MURDER THE VICTIM

Application Note 5 at §2B3.1 provides an upward departure may be warranted if the defendant intended to murder a victim in the commission of a robbery.²²⁴

In *United States v. Stewart*, the Sixth Circuit affirmed the application of a 6-level enhancement for permanent or life-threatening bodily injuries the defendant caused to a bank manager, along with an additional 4-level upward departure under Application Note 5 of §2B3.1 for the victim’s permanent or life-threatening bodily injuries.²²⁵ The Sixth

²¹⁸ USSG §1B1.3(a)(1).

²¹⁹ USSG §1B1.3(a)(1)(A).

²²⁰ 2 F.4th 1291, 1297–300 (10th Cir. 2021), *cert. denied*, No. 21-6459 (U.S. Jan. 10, 2022).

²²¹ *Id.* Because the death occurred before the defendant had reached “a point of temporary safety,” that is, a point where the scope of the carjacking had terminated, the death was “in the perpetration of” the carjacking. *Id.* at 1300. *See also* USSG §2A1.1, comment. (n.1) (“This guideline applies in cases of premeditated killing,” or “when death results from the commission of certain felonies”).

²²² *See, e.g., United States v. French*, 719 F.3d 1002, 1008–09 (8th Cir. 2013) (affirming application of §2B3.1(c) based upon a preponderance of the evidence); *United States v. Rodriguez-Adorno*, 695 F.3d 32, 43 (1st Cir. 2012) (affirming the district court’s determination that the victim’s killing would constitute murder under § 1111); *United States v. Garcia-Ortiz*, 528 F.3d 74, 82 (1st Cir. 2008) (affirming that the victim can be an alleged co-felon if the alleged co-felon were killed during the perpetration of a robbery); *United States v. Sherrod*, 445 F.3d 980, 983 (7th Cir. 2006) (affirming application of §2B3.1(c) based upon a preponderance of the evidence that the victim’s killing would constitute murder under § 1111).

²²³ 695 F.3d 32, 43–44 (1st Cir. 2012) (affirming application of §2B3.1(c) where defendant’s coconspirator killed the victim).

²²⁴ USSG §2B3.1, comment. (n.5).

²²⁵ 628 F.3d 246, 257–58 (6th Cir. 2010).

Circuit rejected the defendant's argument that the district court improperly double counted the victim's injuries, holding that the departure was based solely on the defendant's intent to kill the victim and warranted regardless of whether the victim actually sustained any serious physical injuries.²²⁶ That is, the court could have applied the departure without any consideration of the victim's injuries under §2B3.1.²²⁷

²²⁶ *Id.* at 258.

²²⁷ *Id.*