

# Primer



## Selected Offenses Against the Person and VICAR



Prepared by the  
Office of the General Counsel

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## I. INTRODUCTION

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

## II. SELECTED OFFENSES AGAINST THE PERSON

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

### A. MURDER

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

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

Murder in the first degree is defined as:

[e]very murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder,

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

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

<sup>3</sup> 18 U.S.C. § 1111(a); *see, e.g.*, *United States v. Williams*, 41 F.4th 979, 985 (8th Cir. 2022) (“[M]alice aforethought means an intent at the time of a killing willfully to take the life of a human being or an intent willfully to act in callous and wanton disregard of the consequences to human life . . . .”); *United States v. Delaney*, 717 F.3d 553, 555 (7th Cir. 2013) (malice aforethought requires the government to prove that the defendant harbored an intent to kill).



kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery; or perpetrated as part of a pattern or practice of assault or torture against a child or children; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed.<sup>4</sup>

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

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

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

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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).<sup>11</sup> For murder in violation of 18 U.S.C. § 1111(a), Appendix A specifies the offense guidelines at §2A1.1 (First Degree Murder) and §2A1.2 (Second Degree Murder), both found in Subpart 1 (Homicide) of Chapter Two, Part A of the *Guidelines Manual*.<sup>12</sup>

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<sup>4</sup> 18 U.S.C. § 1111(a).

<sup>5</sup> *Id.* § 1111(c)(3) (defining “child abuse” as “intentionally or knowingly causing death or serious bodily injury to a child”). “Serious bodily injury” in turn is defined in 18 U.S.C. § 1365(h)(3) as bodily injury involving “a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.”

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

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

<sup>8</sup> *Id.* § 1111(b). The guideline range for every offense must follow the boundaries of any applicable statutory minimum or maximum sentences. *See* U.S. SENT’G COMM’N, GUIDELINES MANUAL §5G1.1 (Nov. 2023) [hereinafter USSG].

<sup>9</sup> 18 U.S.C. § 1111(a); *see also* Janis v. United States, 73 F.4th 628, 631 (8th Cir. 2023) (Second-degree murder under 18 U.S.C. § 1111(a) is a “crime of violence” under 18 U.S.C. § 924(c)(3)(A); because § 1111(a) “requires malice aforethought, the crime always involves ‘consciously directed’ force [as outlined in *Borden v. United States*, 593 U.S. 420 (2021),] and thus constitutes a ‘crime of violence’ under § 924(c)’s force clause.”), *cert. denied*, 144 S. Ct. 1019 (2024).

<sup>10</sup> 18 U.S.C. § 1111(b).

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

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

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

Section 2A1.1 provides a base offense level of 43.<sup>13</sup> There are no specific offense characteristics.

Section 2A1.1 applies to: (i) premeditated killings<sup>14</sup>; (ii) the commission of certain enumerated felonies resulting in death (“felony murder”), as outlined by statute<sup>15</sup> and set forth in cross references from other guidelines, such as §2A4.1 (Kidnapping, Abduction, Unlawful Restraint)<sup>16</sup> and §2B3.1 (Robbery);<sup>17</sup> and (iii) offenses where the applicable guideline requires the offense level to be calculated using the underlying crime, such as §2E1.3 (Violent Crimes in Aid of Racketeering Activity), where the underlying crime would meet the definition of first degree murder.<sup>18</sup> With respect to felony murders covered by §2A1.1, the government must prove that the defendant had the requisite intent to commit the underlying felony that resulted in death, rather than intent to commit murder.<sup>19</sup>

A cross reference to §2A1.1 may apply based on an uncharged murder or a murder that does not result in a conviction as long as the murder qualifies as relevant conduct to the underlying offense under §1B1.3.<sup>20</sup> Relevant conduct includes “all acts and omissions

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<sup>13</sup> USSG §2A1.1(a).

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

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

<sup>16</sup> USSG §2A1.1, comment. (n.1) (citing USSG §2A4.1(c)(1)); *see, e.g.*, *United States v. Barraza*, 982 F.3d 1106, 1114–15 & n.4 (8th Cir. 2020) (affirming application of §2A1.1 to juvenile defendant pursuant to §2A4.1(c) cross reference “for cases in which kidnapping resulting in death would qualify as first-degree murder” and holding that jury findings were not required to apply the cross reference).

<sup>17</sup> USSG §2B3.1(c)(1) (instructing the court to apply §2A1.1 if a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111); *see, e.g.*, *United States v. Lowell*, 2 F.4th 1291, 1297–1300 (10th Cir. 2021) (the district court properly applied the USSG §2B3.1(c) cross reference to §2A1.1 “because it determined a carjacking death constituted felony murder under 18 U.S.C. § 1111”).

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

<sup>19</sup> See *United States v. Pearson*, 203 F.3d 1243, 1275–76 (10th Cir. 2000) (district court correctly applied §2A1.1 to an accidental killing that occurred during the commission of a Hobbs Act robbery, explaining that “the commission of the robbery constitutes the ‘malice aforethought’ required for § 1111(a) felony murder”); *cf.* *United States v. Jackson*, 32 F.4th 278, 286 (4th Cir. 2022) (“To be guilty of premeditated murder [under section 1111(a)], the Government must prove a person intended to kill the victim. In contrast, proof of felony murder does not require proof of intent but rather proof of the (attempted) perpetration of a listed crime.”).

<sup>20</sup> USSG §1B1.3. Base offense levels, any specific offense characteristics, cross references in Chapter Two, and adjustments in Chapter Three, are to be determined on the basis of relevant conduct. See USSG §1B1.3. Thus, while the applicable Chapter Two offense guideline section is determined by the statute of conviction, relevant conduct applies to many guideline provisions. See, e.g., *United States v. Shavers*, 955 F.3d 685, 699 (8th Cir. 2020) (affirming application of murder cross reference in drug guideline where evidence supported “the district court’s finding, by the preponderance of the evidence, that [the defendant] was the one who

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

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

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

Section 2A1.2 provides a base offense level of 38.<sup>26</sup> There are no specific offense characteristics.

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killed [the victim] during the course of, and in furtherance of, a drug deal, even if the jury acquitted [the defendant] on the firearm charge”); *United States v. Jackson*, 782 F.3d 1006, 1013–14 (8th Cir. 2015) (no violation of Fifth or Sixth Amendment to apply §2A1.1 from a §2D1.1 cross reference based on a murder that was proven only by a preponderance at sentencing).

<sup>21</sup> USSG §1B1.3(a)(1); *see also, e.g.*, *United States v. Graciani-Febus*, 800 F.3d 48, 50, 53 (1st Cir. 2015) (the district court did not err by applying the cross reference at §2D1.1(d) to §2A1.1 because the defendant’s relevant conduct under his RICO conviction involved “narcotics distribution and acts of violence, including murder and attempted murder”); *United States v. Carrozza*, 4 F.3d 70, 73–77, 84 (1st Cir. 1993) (“[R]elevant conduct in a RICO case includes all conduct reasonably foreseeable to the particular defendant in furtherance of the RICO enterprise to which he belongs” including uncharged conduct such as “extortion, narcotics trafficking, loansharking, gambling, and murder”).

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

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

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

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

<sup>26</sup> USSG §2A1.2(a).



Like the first-degree murder guideline, §2A1.2 may be applied through a cross reference or specific offense characteristic from another offense guideline.<sup>27</sup> Applying a cross reference to §2A1.2 is appropriate where a killing with malice aforethought qualifies as relevant conduct to the underlying offense.<sup>28</sup> Malice aforethought may be established with evidence of extreme recklessness and wanton disregard for human life.<sup>29</sup>

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

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

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<sup>27</sup> For example, §2A1.2 could be applied through guidelines for kidnapping, VICAR, transporting an illegal alien, or unlawful firearm possession. *See* USSG §§2A4.1(b)(7), 2E1.3(a)(2), 2K2.1(c)(1)(B), 2L1.1(c). *But see* *United States v. Brooks*, 67 F.4th 1244, 1250 (10th Cir. 2023) (because attempted murder requires an intent to kill, a cross-reference from §2K2.1 to §2A2.1 based on a finding of only malice aforethought was reversible error).

<sup>28</sup> *See, e.g., United States v. Ashford*, 718 F.3d 377, 384 (4th Cir. 2013) (applying the second degree murder guideline through §2K2.1(c)'s directive to substitute the offense level for any offense committed in connection with illegal possession of the firearm where defendant's conduct, threatening to kill and then shooting the victim, "warranted an inference of malice"); *United States v. Lemus-Gonzalez*, 563 F.3d 88, 92–93 (5th Cir. 2009) (applying the second degree murder guideline through §2L1.1(c)'s directive to apply "the appropriate homicide guideline" where the transportation of unlawful immigrants resulting in death evinced extreme recklessness and wanton disregard for life). *Cf. United States v. Smith*, 100 F.4th 1244, 1251 (10th Cir. 2024) (The district court did not err in denying a two-level reduction for acceptance of responsibility under §3E1.1(a) for a defendant who challenged the factual element of intent at trial by arguing that he lacked the requisite mens rea for second-degree murder and was ultimately convicted of involuntary manslaughter.).

<sup>29</sup> *See* cases cited *supra* note 28.

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

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

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

<sup>33</sup> *See, e.g., United States v. Paster*, 173 F.3d 206, 217–18 (3d Cir. 1999) (district court did not abuse its discretion in determining that the defendant's conduct was more heinous than the heartland of second degree murders where the defendant stabbed the victim sixteen times with a butcher knife).

## **B. ASSAULT**

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

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

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

- (1) Assault with intent to commit murder or sexual abuse offenses under sections 2241 or 2242 (20-year maximum);
- (2) Assault with intent to commit any felony except murder or sexual abuse offenses under sections 2241 or 2242 (10-year maximum);
- (3) Assault with a dangerous weapon with intent to do bodily harm (10-year maximum);
- (4) Assault by striking, beating, or wounding (1-year maximum);
- (5) Simple assault (6-month maximum)<sup>35</sup> and simple assault with a victim under the age of 16 years (1-year maximum);<sup>36</sup>
- (6) Assault resulting in serious bodily injury (10-year maximum);<sup>37</sup>
- (7) Assault resulting in substantial bodily injury to a spouse, intimate partner, dating partner, or victim under the age of 16 years (5-year maximum); and
- (8) Assault of a spouse, intimate partner, or dating partner by strangling, suffocating, or attempting to do either (10-year maximum).<sup>38</sup>

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

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

<sup>36</sup> *See* United States v. Harris, 10 F.4th 1005, 1015 (10th Cir. 2021) (“The federal simple assault provision—§ 113 (a)(5)—has no intent requirement. Subsection (a)(3) in that same statute, which prohibits assault with a dangerous weapon, requires specific intent.”).

<sup>37</sup> *See* United States v. Love, 20 F.4th 407, 409 (8th Cir. 2021) (“For a conviction under 18 U.S.C. § 113(a)(6), the government must prove: (1) an intentional assault of another person (2) who suffered serious bodily injury (3) within the special maritime and territorial jurisdiction of the United States.”).

<sup>38</sup> 18 U.S.C. § 113(a).

Section 113(b) defines several terms used in subsection (a),<sup>39</sup> including substantial bodily injury;<sup>40</sup> serious bodily injury;<sup>41</sup> spouse, intimate partner, and dating partner;<sup>42</sup> strangling;<sup>43</sup> and suffocating.<sup>44</sup>

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

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The above assault offenses are sentenced under Subpart 2 (Assault) of Chapter Two, Part A of the *Guidelines Manual*. Violations of section 113(a)(1) are referenced to §2A2.1; violations of section 113(a)(2), (3), (6), and (8) are referenced to §2A2.2; and violations of section 113(a)(4), (5), and (7) are referenced to §2A2.3.<sup>45</sup> Each of these guidelines is addressed below.

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<sup>39</sup> Section 113 does not define the term “assault,” but courts have adopted the common law meaning of the term. *See, e.g.*, United States v. Verwiebe, 874 F.3d 258, 261 (6th Cir. 2017) (“Because [18 U.S.C.] § 113 does not define ‘assault,’ courts give the term its established common law meaning.” (citing United States v. Turley, 352 U.S. 407, 411 (1957))), *abrogated on other grounds by* Borden v. United States, 593 U.S. 420 (2021).

<sup>40</sup> 18 U.S.C. § 113(b)(1) (“substantial bodily injury” is bodily injury involving “(A) a temporary but substantial disfigurement; or (B) a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty”).

<sup>41</sup> *Id.* § 113(b)(2) (“serious bodily injury” is defined by reference to section 1365 as bodily injury involving: a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty).

<sup>42</sup> *Id.* § 113(b)(3). All three terms are defined by reference to section 2266. A spouse or intimate partner is a spouse, former spouse, person who shares a child in common, person who cohabits or has cohabited as a spouse, or person who has been in a social relationship of a romantic or intimate nature. *Id.* § 2266(7)(A)(i). The statute requires courts to determine whether a person is an “intimate partner” based on “the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.” *Id.* § 2266(7)(A)(i)(II); *see, e.g.*, United States v. LaVictor, 848 F.3d 428, 458 (6th Cir. 2017) (non-cohabiting individuals who had been romantically involved for several years, had plans to get married, and visited each other every weekend were “intimate partners”). Similarly, a “dating partner” is a person who “has been in a social relationship of a romantic or intimate nature,” based on the length and type of relationship and frequency of interaction. 18 U.S.C. § 2266(10).

<sup>43</sup> 18 U.S.C. § 113(b)(4) (“‘[S]trangling’ means intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of a person by applying pressure to the throat or neck, regardless of whether that conduct results in any visible injury or whether there is any intent to kill or protractedly injure the victim[.]”).

<sup>44</sup> *Id.* § 113(b)(5) (“‘[S]uffocating’ means intentionally, knowingly, or recklessly impeding the normal breathing of a person by covering the mouth of the person, the nose of the person, or both, regardless of whether that conduct results in any visible injury or whether there is any intent to kill or protractedly injure the victim.”).

<sup>45</sup> USSG App. A; *see also* United States v. Sandoval, 959 F.3d 1243, 1247 (10th Cir. 2020) (explaining that the assault guidelines and base offense levels reflect the statutory “differentiat[ion] based on a defendant’s mental state” and “other criteria”).

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

For assault with the intent to commit murder in violation of 18 U.S.C. § 113(a)(1) and attempted murder in violation of 18 U.S.C. § 1113, among other similar offenses,<sup>46</sup> Appendix A specifies the guideline at §2A2.1. Section 2A2.1(a)(1) provides a base offense level of 33 if the object of the offense would have constituted first degree murder.<sup>47</sup> Otherwise, §2A2.1(a)(2) provides a base offense level of 27.<sup>48</sup>

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

*i. Bodily injury enhancement*

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

- (A) For "permanent or life-threatening bodily injury," a 4-level increase applies;
- (B) For "serious bodily injury," a 2-level applies; and
- (C) If the severity of the injury falls between the severity specified in (A) and (B), a 3-level increase applies.<sup>49</sup>

"Permanent or life-threatening bodily injury" and "serious bodily injury" are defined by reference to §1B1.1, Application Note 1.<sup>50</sup>

"Permanent or life-threatening bodily injury" is an "injury involving a substantial risk of death; loss or substantial impairment of the function of a bodily member, organ, or

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<sup>46</sup> For example, Appendix A likewise directs the application of §2A2.1 for attempted murder in violation of a number of other statutes, such as 18 U.S.C. § 1114, which prohibits the attempted murder of an officer or employee of the United States engaged in or on account of the performance of official duties, and 18 U.S.C. § 1512(a), which prohibits attempted murder with intent to tamper with a witness or official proceedings.

<sup>47</sup> USSG §2A2.1(a)(1).

<sup>48</sup> USSG §2A2.1(a)(2).

<sup>49</sup> USSG §2A2.1(b)(1).

<sup>50</sup> USSG §2A2.1, comment. (n.1). These definitions also apply to other offenses detailed in this primer, including aggravated and simple assault, as well as kidnapping. Cases interpreting these terms may be relevant to all the offenses in this primer, *see, e.g.*, *United States v. Spinelli*, 352 F.3d 48, 57 (2d Cir. 2003) (citing cases applying bodily injury enhancement in §2B3.1 to elucidate enhancement in §2A2.1), although the facts of cases within the same offense guideline may be more readily analogized to each other.

mental faculty that is likely to be permanent; or an obvious disfigurement that is likely to be permanent.”<sup>51</sup>

“Serious bodily injury” is an “injury involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation.”<sup>52</sup> Serious bodily injury also is “deemed to have occurred” when an “offense involve[s] conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.”<sup>53</sup>

Determining the proper enhancement is a highly fact-specific inquiry. The 4-level enhancement for “permanent or life-threatening bodily injuries” encompasses, on the one hand, injuries that are permanent and “substantial” (but not necessarily “terribly severe”),<sup>54</sup> and, on the other hand, injuries that are temporary but life-threatening.<sup>55</sup> To determine whether an injury is “likely to be permanent,”<sup>56</sup> the courts typically consider the victim’s current medical prognosis. That prognosis need not remove all uncertainty concerning the victim’s future treatability,<sup>57</sup> but must rest on “more than the generalized

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

<sup>52</sup> USSG §1B1.1, comment. (n.1(M)). As a disjunctive list, “the Guideline applies where the victim suffered any one of [the listed] ailments.” *United States v. Flores*, 974 F.3d 763, 765 (6th Cir. 2020). The guidelines’ definition of “serious bodily injury” differs from the statutory definition in 18 U.S.C. § 1365, which the federal assault statute incorporates. *See* 18 U.S.C. § 113(b)(2); *supra* note 41; *see also, e.g.*, *United States v. Roy*, 408 F.3d 484, 494 (8th Cir. 2005) (explaining the difference between the statutory and guideline definitions of “serious bodily injury”).

<sup>53</sup> USSG §1B1.1, comment. (n.1(M)). Sections 2241 and 2242 criminalize, among other things, causing another person to engage in a sexual act by force, 18 U.S.C. § 2241(a), or threats of force, *see id.* § 2242(1); *see also id.* §§ 2241(a) (prohibiting sexual acts by threats of “death, serious bodily injury, or kidnapping”); 2242(2); (prohibiting engaging in a sexual act with an incapacitated victim); 2241(b) (prohibiting the incapacitation and then engaging in a sexual act with a victim); 2241(c) (prohibiting engaging in a sexual act with certain minors).

<sup>54</sup> *See, e.g.*, *United States v. Price*, 149 F.3d 352, 354 (5th Cir. 1998) (affirming application of the “permanent or life-threatening bodily injury” enhancement applied under the aggravated assault guideline where the victim suffered a 15 to 25 percent permanent loss of hand function).

<sup>55</sup> For example, an injury may be immediately life-threatening but have no long-term effects on a victim. *See, e.g.*, *United States v. Brazier*, 933 F.3d 796, 802–03 & n.4 (7th Cir. 2019) (affirming the district court’s finding of life-threatening injury where the defendants shot the victim in the arm, beat the victim in the head, kicked him, poured alcohol in his gunshot wound, and dumped him in an alley even though they thought the he might be dying; in *dictum*, the court opined that the record also would have supported a finding of permanent injury because, ten months after the offense, the victim “still could not use or straighten his arm”); *United States v. Bryant*, 913 F.3d 783, 787 (8th Cir. 2019) (finding “no error in the court’s conclusion that [the victim] faced a substantial risk of death when she was strangled to the point of unconsciousness, which qualifies as a life-threatening bodily injury sufficient to warrant the enhancement,” even though the victim fully recovered because “injuries resulting in a substantial risk of death need not be permanent”).

<sup>56</sup> USSG §1B1.1, comment. (n.1(K)).

<sup>57</sup> *See, e.g.*, *United States v. Webster*, 500 F.3d 606, 608 (7th Cir. 2007) (“If an impairment has not been corrected by the time of sentencing, and will last for life unless surgically corrected in the future, then it



and subjective impression of the victim” that the injury is permanent.<sup>58</sup> For example, a victim who suffers permanent facial scars satisfies the definition of permanent bodily injury and warrants the enhancement, even though the injury may not be serious.<sup>59</sup>

The 2-level enhancement for serious bodily injury, in contrast, applies where a victim suffers severe “but temporary or treatable injuries.”<sup>60</sup> The 3-level enhancement requires sentencing courts to draw fine lines between serious injuries and injuries that are permanent or life-threatening.<sup>61</sup>

Courts have interpreted “bodily injury” to include harm to a victim’s mental and emotional health.<sup>62</sup> Because nearly all attempted murders inflict at least some psychological harm, courts recognize the need to carefully distinguish among the levels of mental harm<sup>63</sup>—for example, the 4-level enhancement in subdivision (A) applies only if the impairment of the mental faculty is “likely to be permanent,” so the district court must consider “evidence as to the nature, severity, and likely duration of [the victim’s psychological] injuries” to determine whether any, and, if so, which, enhancement applies.<sup>64</sup>

Whether a bodily injury enhancement applies turns on the results of the criminal act (*i.e.*, the extent of the victim’s injuries), not the nature or severity of the defendant’s

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should be treated as ‘permanent’ under the Guidelines unless future correction would be a straightforward procedure.”).

<sup>58</sup> United States v. Guang, 511 F.3d 110, 125 (2d Cir. 2007).

<sup>59</sup> See, *e.g.*, United States v. Phillips, 239 F.3d 829, 848 (7th Cir. 2001) (noting in an aggravated assault case that the enhancement applied to facial scars that were a permanent disfigurement, even though they were less serious than impairments in other cases).

<sup>60</sup> United States v. Price, 149 F.3d 352, 354 (5th Cir. 1998); see, *e.g.*, United States v. Flores, 974 F.3d 763, 765–66 (6th Cir. 2020) (affirming application of serious bodily injury enhancement where victim suffered extreme pain from deep stab wounds and needed “significant medical intervention” to close the wounds and treat “his extensive blood loss” and explaining that either condition (extreme pain or medical intervention) would have sufficed).

<sup>61</sup> See, *e.g.*, United States v. Roy, 408 F.3d 484, 496 (8th Cir. 2005) (not clear error to decide that the victim’s injuries were more serious than “serious bodily injury” but less serious than “permanent or life-threatening” where the defendant stabbed the victim’s abdominal wall, which was “potentially life-threatening” and caused substantial immediate pain and left a scar).

<sup>62</sup> See, *e.g.*, United States v. Urbina-Robles, 817 F.3d 838, 847 (1st Cir. 2016) (district court did not clearly err in finding serious bodily injury where the victims “continued to receive psychological and psychiatric treatment since the night of the crime” and where one victim, a surgeon, was “diagnosed with depression, anxiety, panic attacks, and insomnia” and became “unable to perform surgeries as a result of the mental impact of the crime”); United States v. Spinelli, 352 F.3d 48, 58 (2d Cir. 2003) (“There is no question that emotional or psychological injuries can be ‘permanent or life-threatening,’ and that they may, in some instances, cause the ‘loss or substantial impairment of the function of a . . . mental faculty.’ ”).

<sup>63</sup> See *Spinelli*, 352 F.3d at 59.

<sup>64</sup> *Id.* at 59–60 (remanding for further proceedings regarding the victim’s psychological injuries and the applicability of the §2A2.1(b)(1) enhancement where the victim was shot at several times and forced to enter a witness protection program).

conduct,<sup>65</sup> though some courts have expressly allowed consideration of how the circumstances of a particular offense may exacerbate a victim's risk of death.<sup>66</sup> Further, an upward departure may be warranted where an offense creates "a substantial risk of death or serious bodily injury" to multiple people.<sup>67</sup>

ii. *Pecuniary value enhancement*

Section 2A2.1(b)(2) provides for a 4-level increase where an offense involves the offer or receipt of anything of pecuniary value in exchange for undertaking the murder.<sup>68</sup> This enhancement may be applied in murder-for-hire cases, such as where a defendant offers money for someone else to murder a victim<sup>69</sup> or where a defendant is paid money to murder someone.<sup>70</sup>

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

Appendix A specifies the guideline at §2A2.2 for certain offenses covered by the federal assault statute, 18 U.S.C. § 113, including assault with intent to commit a felony other than murder or sexual abuse;<sup>71</sup> assault with a dangerous weapon with intent to do

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<sup>65</sup> See, e.g., *id.* at 59 ("[T]he sentencing enhancements at issue are directed at the injurious *results* of a defendant's crime, not his conduct."); *United States v. Dodson*, 109 F.3d 486, 489 (8th Cir. 1997) (same); *United States v. Perkins*, 89 F.3d 303, 308 (6th Cir. 1996) (same).

<sup>66</sup> Compare, e.g., *United States v. Morgan*, 238 F.3d 1180, 1188–89 (9th Cir. 2001) (explaining that carjacking during which the defendant locked the victim "in the trunk of a car in freezing weather for many hours," and then dumped the defendant "in a ditch in a remote area on a freezing night" could constitute a life-threatening injury and remanding case to consider whether the defendant's "maltreatment" of the defendant was "life-threatening"), and *United States v. Williams*, 258 F.3d 669, 674 (7th Cir. 2001) (citing *Morgan* and holding that evidence supported serious bodily injury enhancement where the victim "was left alone in an icy ditch, tied up with duct tape, to fend for herself while she was in" a bloody beaten state; the application note defining life-threatening injury "does not speak in certainties; it speaks of risk, and [the victim] undoubtedly faced life-threatening risk"), with *Spinelli*, 352 F.2d at 57 n.5 (suggesting that *Morgan* involved "a somewhat different approach" in determining whether the serious bodily injury enhancement is warranted, in part due to the "considerable resemblance [of the offense in *Morgan*] to the kidnapping example described" in the commentary).

<sup>67</sup> USSG §2A2.1, comment. (n.2).

<sup>68</sup> USSG §2A2.1(b)(2). This enhancement parallels the §2A2.2(b)(5) enhancement in the aggravated assault guideline, which covers assaults motivated by "payment or offer of money or other thing of value." See *infra* Section II.B.2.b.v.

<sup>69</sup> See, e.g., *United States v. Ivory*, 532 F.3d 1095, 1103–04 (10th Cir. 2008) (affirming application of enhancement where defendants were "complicit in" an offer to pay for murder).

<sup>70</sup> See, e.g., *id.* (the court had adequate evidentiary support to apply §2A2.1(b)(2) based on (1) testimony that money was offered to murder the intended victim and (2) a phone conversation inferring the defendants' complicity in the offer to murder the intended victim).

<sup>71</sup> 18 U.S.C. § 113(a)(2).

bodily harm;<sup>72</sup> assault resulting in serious bodily injury;<sup>73</sup> and assault of a spouse, intimate partner, or dating partner by strangling or suffocating;<sup>74</sup> as well as assault offenses committed against specific individuals, such as certain domestic or foreign officials.<sup>75</sup>

As used in the guideline, an “aggravated assault” is defined as a “felonious assault that involved (A) a dangerous weapon with intent to cause bodily injury (*i.e.*, not merely to frighten) with that weapon; (B) serious bodily injury; (C) strangling, suffocating, or attempting to strangle or suffocate; or (D) an intent to commit another felony.”<sup>76</sup> Thus, §2A2.2 applies to assaults made more severe by one or more aggravating factors.<sup>77</sup> It also covers attempted manslaughter and assault with intent to commit manslaughter.<sup>78</sup>

Section 2A2.2(a) provides a base offense level of 14.<sup>79</sup> Section 2A2.2(b) provides seven enhancements that may increase the total offense level: (1) a 2-level increase if the assault involved more than minimal planning; (2) tiered increases for use of a firearm or dangerous weapon; (3) tiered increases based on the degree of the victim’s bodily injury; (4) a 3-level increase for strangling or suffocating a spouse or intimate partner, or attempting to do so; (5) a 2-level increase if the assault was motivated by payment; (6) a 2-level increase for violations of a protective order; and (7) a 2-level increase for convictions under certain statutes that prohibit assault against public officials and their families.<sup>80</sup>

*i. More than minimal planning enhancement*

Section 2A2.2(b)(1) provides for a 2-level increase for assaults involving “more than minimal planning.”<sup>81</sup> As used in the guideline, a defendant engages in “more than minimal planning” when he plans more “than is typical for commission of the offense in a simple form” or takes “significant affirmative steps . . . to conceal the offense,” other than conduct

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<sup>72</sup> *Id.* § 113(a)(3).

<sup>73</sup> *Id.* § 113(a)(6).

<sup>74</sup> *Id.* § 113(a)(8).

<sup>75</sup> 18 U.S.C. §§ 111, 112.

<sup>76</sup> USSG §2A2.2, comment. (n.1).

<sup>77</sup> USSG §2A2.2, comment. (backg’d.).

<sup>78</sup> *Id.*

<sup>79</sup> USSG §2A2.2(a).

<sup>80</sup> USSG §2A2.2(b). As discussed below, the maximum combined enhancement under §2A2.2(b)(2) and (3) (for dangerous weapon and bodily injury, respectively) is ten and the maximum combined enhancement under §2A2.2(b)(2), (3), and (4) (for strangling or suffocating an intimate partner) is 12. USSG §2A2.2(b)(3), (b)(4).

<sup>81</sup> USSG §2A2.2(b)(1).

to which the adjustment for obstruction of justice, §3C1.1, would apply.<sup>82</sup> To illustrate, while a defendant who merely waited to ensure that there would be no witnesses before committing an offense would not qualify for the enhancement, a defendant who lures a victim to a specific location or wears a ski mask to prevent identification would qualify.<sup>83</sup>

To evaluate whether the enhancement is warranted, courts generally look at the extent of any planning, coordination, or concealment, or whether the offense was instead committed at the spur of the moment.<sup>84</sup>

*ii. Dangerous weapon enhancement*

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

- (A) If a firearm was discharged, a 5-level increase applies;
- (B) If a dangerous weapon, including a firearm, was “otherwise used,” a 4-level increase applies; and
- (C) If a dangerous weapon, including a firearm, was brandished or its use was threatened, a 3-level increase applies.<sup>85</sup>

In assault cases involving a dangerous weapon with the intent to cause bodily injury (one of the guideline definitions of aggravated assault), the base offense level and the weapon enhancement account for different aspects of the offense and both will apply, even where both are based on the same conduct regarding the weapon.<sup>86</sup>

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<sup>82</sup> USSG §2A2.2, comment. (n.2); *see also* USSG §3C1.1 (“If (1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction . . . increase the offense level by 2 levels.”).

<sup>83</sup> USSG §2A2.2, comment. (n.2).

<sup>84</sup> *Compare, e.g.,* United States v. Foster, 898 F.2d 25, 27 (4th Cir. 1990) (applying the §2A2.2(b)(1) enhancement where the defendant bought materials to make a bomb, assembled the bomb, placed it in the victim’s car, and concealed the bomb with clothes, all of which did “not describe an offense committed on the spur of the moment”), *with* United States v. Tapia, 59 F.3d 1137, 1144 (11th Cir. 1995) (§2A2.2(b)(1) enhancement did not apply where the defendant called someone to ascertain whether another inmate would be testifying against him and then attacked the inmate, but made the phone call immediately before the attack, did not take any steps to have the inmate placed in the cell with him, and did not try to conceal the offense).

<sup>85</sup> USSG §2A2.2(b)(2).

<sup>86</sup> USSG §2A2.2, comment. (n.3 & backg’d.). Application Note 3 resolved a circuit split over whether the enhancement for use of a dangerous weapon during an aggravated assault that was only aggravated due to that same weapon constituted impermissible double-counting. *See* USSG App. C, amend. 614 (effective Nov. 1, 2001) (clarifying that both enhancements apply); *see also* United States v. Duke, 870 F.3d 397, 404–05 (6th Cir. 2017) (providing overview of the history of the dangerous weapon enhancement’s double counting issue).

The terms “firearm,”<sup>87</sup> “dangerous weapon,”<sup>88</sup> “otherwise used,”<sup>89</sup> and “brandished”<sup>90</sup> are defined by reference to §1B1.1, Application Note 1.<sup>91</sup> While a defendant may “brandish” a weapon to alert a victim that he has the immediate ability to do violence, the “otherwise used” enhancement applies in more directly threatening situations, such as where a defendant points the weapon at the victim.<sup>92</sup> An object need not actually cause serious bodily injury to be “capable of” doing so and meet the definition of “dangerous weapon.”<sup>93</sup>

The definition of dangerous weapon also can include an instrument not ordinarily used as a weapon, such as a car, chair, or ice pick, as long as it was involved in the offense

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<sup>87</sup> “‘Firearm’ means: (i) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (ii) the frame or receiver of any such weapon; (iii) any firearm muffler or silencer; or (iv) any destructive device.” USSG §1B1.1, comment. (n.1(H)).

<sup>88</sup> “‘Dangerous weapon’ means: (i) an instrument capable of inflicting death or serious bodily injury; or (ii) an object that is not an instrument capable of inflicting death or serious bodily injury but (I) closely resembles such an instrument; or (II) the defendant used the object in a manner that created the impression that the object was such an instrument (*e.g.* a defendant wrapped a hand in a towel during a bank robbery to create the appearance of a gun).” USSG §1B1.1, comment. (n.1(E)); *see, e.g.*, *United States v. Taylor*, 961 F.3d 68, 71–72, 74–77 (2d Cir. 2020) (district court erred in applying dangerous weapon enhancement where the defendant acted as though he had a firearm by putting his hand near his waistband during several robberies and by holding his belt during another robbery; “[w]hile someone could conceal a hand within his or her pants to make the hand appear to be a weapon, using a hand to *hold* a belt is not using one’s hand to make the *hand* appear to be a weapon”). Other offense guidelines also reference the same §1B1.1 definition of “dangerous weapon.” *See, e.g.*, USSG §2B3.1(b)(2)(E) (robbery with a dangerous weapon).

<sup>89</sup> “‘Otherwise used’ means conduct that does not involve the discharge of a firearm but is more than brandishing, displaying, or possessing a firearm or other dangerous weapon. USSG §1B1.1, comment. (n.1(J)).

<sup>90</sup> “‘Brandished’ means to display all or part of a weapon or to otherwise make the weapon’s presence made known to intimidate another person. USSG §1B1.1, comment. (n.1(C)). The weapon need not be directly visible to the victim, though it must be present. *Id.*

<sup>91</sup> USSG §2A2.2, comment. (n.1).

<sup>92</sup> *See, e.g.*, *United States v. Bell*, 947 F.3d 49, 61–62 (3d Cir. 2020) (defendant “otherwise used” a dangerous weapon where he pointed a toy gun at the victim, ordered him to the ground, and struck him with it, because those actions go beyond brandishing); *United States v. Williams*, 520 F.3d 414, 423 (5th Cir. 2008) (defendant “otherwise used” a shank during an assault when he pulled it out, pointed it, and swung it at the victim).

<sup>93</sup> *See, e.g.*, *United States v. Tolbert*, 668 F.3d 798, 801–03 (6th Cir. 2012) (not conjecture to conclude that a plastic water pitcher was capable of causing serious bodily harm and qualified as a “dangerous weapon” even though no such harm actually occurred); *see also, e.g.*, *United States v. Douglas*, 957 F.3d 602, 607 (5th Cir. 2020) (*per curiam*) (affirming application of dangerous weapon enhancement where defendant used a more-potent-than usual pepper spray, an expert testified that the spray could cause severe injuries when deployed close to the victim, two victims required hospital treatment, and one victim suffered extended impairment in one eye).



with the intent to commit bodily injury.<sup>94</sup> Thus, shoes,<sup>95</sup> a plastic water pitcher,<sup>96</sup> and firewood<sup>97</sup> may count as dangerous weapons where they are employed with the intent to cause bodily injury. Indeed, courts have found that nearly anything can count as a dangerous weapon under the proper circumstances,<sup>98</sup> as long as the object is used as a weapon.<sup>99</sup> The 3-level enhancement for threats to use a weapon is assessed from the victim's perspective, and it does not require the actual presence or possession of a weapon.<sup>100</sup>

*iii. Bodily injury enhancement*

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

- (A) For bodily injury, a 3-level increase applies;
- (B) For serious bodily injury, a 5-level increase applies;
- (C) For permanent or life-threatening bodily injury, a 7-level increase applies;
- (D) If the severity of the injury falls between the severity specified in (A) and (B), a 4-level increase applies; and
- (E) If the severity of the injury falls between the severity specified in (B) and (C), a 6-level increase applies.<sup>101</sup>

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<sup>94</sup> USSG §2A2.2, comment. (n.1).

<sup>95</sup> See *United States v. Swallow*, 891 F.3d 1203, 1205 (9th Cir. 2018) (“Although tennis shoes are not inherently dangerous, Swallow undoubtedly used his shoes to augment the force of the kicks and the stomp he delivered to the victim’s head; the shoes enabled Swallow to inflict greater harm than if he had delivered the kicks and stomp with his bare feet.”); *United States v. Velasco*, 855 F.3d 691, 694 (5th Cir. 2017) (affirming the enhancement where a defendant stomped on a victim’s head with shoes).

<sup>96</sup> See, e.g., *Tolbert*, 668 F.3d at 803 (water pitcher was a “dangerous weapon” based on its characteristics like hardness, size, shape, and weight; the circumstances in which it was used to strike the victim’s head; and the common experience that the object was capable of inflicting harm, even though no such harm actually resulted).

<sup>97</sup> See, e.g., *United States v. Tisnolthtos*, 115 F.3d 759, 763 (10th Cir. 1997) (“a piece of firewood qualifies as a dangerous weapon when it is used to inflict serious bodily injury”).

<sup>98</sup> See, e.g., *United States v. Milliron*, 984 F.3d 1188, 1196 (6th Cir. 2021) (objects as disparate as “walking sticks, leather straps, rakes, tennis shoes, rubber boots, dogs, rings, concrete curbs, clothes irons, and stink bombs” can count as dangerous weapons (quoting *United States v. Callahan*, 801 F.3d 606, 628 (6th Cir. 2015))).

<sup>99</sup> See also, e.g., *United States v. Dayea*, 32 F.3d 1377, 1380 (9th Cir. 1994) (enhancement did not apply where an intoxicated defendant caused a drunk-driving accident with his car without intent to injure).

<sup>100</sup> See, e.g., *United States v. Chee*, 110 F.3d 1489, 1493–94 (9th Cir. 1997) (while few cases address the “threat of weapon use,” the plain language of the guidelines does not require a weapon actually be present; requiring its presence would create a redundancy with the “brandished” clause).

<sup>101</sup> USSG §2A2.2(b)(3).

The cumulative adjustments from applying the bodily injury enhancement in §2A2.2(b)(3) and the weapon enhancement in §2A2.2(b)(2) cannot exceed 10 levels.<sup>102</sup> The terms “serious bodily injury” and “permanent or life-threatening bodily injury” have the same meaning as used in the bodily injury enhancement to the assault with intent to commit murder guideline (§2A2.1, discussed in Section II.B.2.a.i).<sup>103</sup>

“Bodily injury” is defined as “any significant injury; *e.g.*, an injury that is painful and obvious, or is of a type for which medical attention ordinarily would be sought.”<sup>104</sup> The term “significant injury” is “open-ended” and not susceptible to a precise definition.<sup>105</sup> The bodily injury enhancement encompasses injuries such as scratches and eye pain,<sup>106</sup> being hit while on the ground,<sup>107</sup> and cuts and bruises from being hit with hands and bare feet.<sup>108</sup>

Determining the proper degree of enhancement cannot rest solely on the mechanical terms used to describe the injury—for example, a “laceration” may range from trivial to life-threatening depending on context, including whether the victim loses a lot of blood or suffers from hemophilia.<sup>109</sup> Further, a graze injury from a bullet that causes lingering pain after medical treatment but not surgery or hospitalization may fall between

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<sup>102</sup> *Id.* At least one court has held the “victim” must be the object of the aggravated assault for the bodily injury enhancement to apply. *United States v. Moore*, 958 F.2d 646, 651 (5th Cir. 1992) (reversing a bodily injury enhancement in a sentence for assaulting a federal officer with a deadly weapon where the defendant fired shots at both a federal and city officer but only the city officer was injured).

<sup>103</sup> As set forth above, “ ‘serious bodily injury’ means injury involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation.” USSG §1B1.1, comment. (n.1(M)). “ ‘Permanent or life-threatening bodily injury’ means injury involving a substantial risk of death; loss or substantial impairment of the function of a bodily member, organ, or mental faculty that is likely to be permanent; or an obvious disfigurement that is likely to be permanent.” USSG §1B1.1, comment. (n.1(K)).

<sup>104</sup> USSG §1B1.1, comment. (n.1(B)).

<sup>105</sup> *See, e.g.*, *United States v. Lancaster*, 6 F.3d 208, 209–10 (4th Cir. 1993) (per curiam) (whether an injury is “significant” is a fact-specific inquiry that accounts for both articulable and intangible factors best assessed by the district court).

<sup>106</sup> *See, e.g.*, *United States v. Douglas*, 957 F.3d 602, 607–08 (5th Cir. 2020) (per curiam) (affirming bodily injury enhancement where defendant pepper sprayed victims at close range, requiring hospital treatment and leaving one victim with protracted impairment of one eye); *United States v. Steele*, 550 F.3d 693, 703–04 (8th Cir. 2008) (affirming application of bodily injury enhancement where the defendant jammed his thumbs into the victim’s eyes and the victim sought medical attention; the resulting eye pain and scratches were “painful and obvious” injuries).

<sup>107</sup> *See, e.g.*, *United States v. Egbert*, 562 F.3d 1092, 1101–02 (10th Cir. 2009) (reversing serious bodily injury enhancement for lack of evidence regarding the victim’s injuries, such as whether the victim required medical treatment, but explaining that the evidence supported a finding of bodily injury).

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

<sup>109</sup> *See, e.g.*, *United States v. Tavares*, 93 F.3d 10, 16 (1st Cir. 1996) (“Depending on context, an inch long laceration requiring eight stitches might or might not constitute serious bodily injury. For example, if there was a great deal of blood loss, or the victim was a hemophiliac, such an injury might well be thought serious.”).

“bodily injury” and “serious bodily injury.”<sup>110</sup> Whether a particular injury warrants a particular enhancement must be assessed based on the facts of the victim’s injuries, treatment, and prognosis in each case.<sup>111</sup>

*iv. Strangling or suffocating enhancement*

Section 2A2.2(b)(4) provides for a 3-level increase for offenses involving strangling, suffocating, or attempted strangling or suffocating of a spouse, intimate partner, or dating partner.<sup>112</sup> The cumulative adjustments from the weapon enhancement, bodily injury enhancement, and the strangling or suffocating enhancement may not exceed 12 levels.<sup>113</sup>

“Strangling” and “suffocating” have the same meanings that they do for purposes of the federal assault statute at 18 U.S.C. § 113 and “spouse,” “intimate partner,” and “dating partner,” have the same meanings for the purposes of domestic violence and stalking offenses as defined at 18 U.S.C. § 2266.<sup>114</sup> Though strangling, suffocating, or attempting to do either serve as an enumerated basis for applying the aggravated assault guideline,<sup>115</sup> the same conduct (when committed against an intimate partner or spouse) may warrant the 3-level enhancement under §2A2.2(b)(4).<sup>116</sup>

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<sup>110</sup> See, e.g., *United States v. Mays*, 967 F.3d 748, 751–52 (8th Cir. 2020) (district court did not clearly err in finding that robbery victim’s injuries fell between “bodily injury” and “serious bodily injury” where she suffered injuries that required medical treatment and resulted in lingering pain but did not require surgery or hospitalization).

<sup>111</sup> See, e.g., *United States v. Markle*, 628 F.3d 58, 63 (2d Cir. 2010) (“Although determining whether an injury is ‘significant’ requires a fact-specific inquiry, injuries warranting medical attention generally are deemed ‘significant.’ ”); cases cited *supra* notes 105–110.

<sup>112</sup> USSG §2A2.2(b)(4). The domestic violence guideline provides a similar enhancement. See USSG §2A6.2(b).

<sup>113</sup> USSG §2A2.2(b)(4).

<sup>114</sup> See USSG §2A2.2, comment. (n.1) (citing 18 U.S.C. §§ 113, 2266); see also *supra* notes 42–44. As set forth above, “strangling” is intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of a person by applying pressure to the throat or neck, regardless of resulting injury or intent to injure or kill. “Suffocating” is intentionally, knowingly, or recklessly impeding the normal breathing of a person by covering the mouth or nose, regardless of resulting injury or intent to injure or kill. A “spouse or intimate partner” is a spouse, former spouse, person who shares a child in common, person who cohabits or has cohabited with the abuser, or person who has been in a social relationship of a romantic or intimate nature with the abuser. A “dating partner” is a person who has been in a social relationship of a romantic or intimate nature with the abuser, based on the length and type of relationship and frequency of interaction. See USSG §2A2.2, comment. (n.1) (citing 18 U.S.C. §§ 113, 2266).

<sup>115</sup> USSG §2A2.2, comment. (backg’d).

<sup>116</sup> See USSG §1B1.1, comment. (n.4(B)) (noting that absent an instruction to the contrary, Chapter Two enhancements, Chapter Three adjustments, and Chapter Four determinations are to be applied cumulatively and can be triggered by the same underlying conduct); see, e.g., *United States v. Harrington*, 946 F.3d 485, 487–89 (9th Cir. 2019) (applying the strangulation enhancement to offense of assault of a spouse by strangulation is not impermissible double counting because §2A2.2’s base offense level is not specific to strangulation conduct and thus does not necessarily capture the harm covered by the enhancement).

v. *Payment enhancement*

Section 2A2.2(b)(5) provides for a 2-level increase for assault “motivated by a payment or offer of money or other thing of value.”<sup>117</sup> This enhancement applies to cases where the perpetrator of the assault was hired, paid, or offered something of value for undertaking the assault—not cases where money plays an indirect role in triggering the assault, such as where an assault is committed in retribution for a robbery.<sup>118</sup>

vi. *Court protection order enhancement*

Section 2A2.2(b)(6) provides for a 2-level increase for offenses involving the violation of a court protection order.<sup>119</sup> Section 1B1.1 defines “court protection order” by reference to 18 U.S.C. § 2266(5), which provides in part that a protection order is any:

order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence, or contact or communication with or physical proximity to, another person . . . so long as any civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection.<sup>120</sup>

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

Section 2A2.2(b)(7) provides for a 2-level increase for defendants convicted under 18 U.S.C. §§ 111(b) (assaulting certain federal officers) or 115 (influencing a federal official by threatening a family member).<sup>121</sup> Unlike other specific offense characteristics that are

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<sup>117</sup> USSG §2A2.2(b)(5). This enhancement is similar to the enhancement in §2A2.1(b)(2), discussed above, for offenses involving the offer or receipt of anything of pecuniary value for undertaking the murder. *See supra* Section II.B.2.a.ii; *United States v. Swallow*, 891 F.3d 1203, 1205 (9th Cir. 2018) (the enhancements at §2A2.1(b)(2) and §2A2.2(b)(5) serve the same functions and both cover cases where an offense was committed for hire).

<sup>118</sup> *See Swallow*, 891 F.3d at 1205–06 (reversing payment enhancement for a defendant who engaged in an assault because he was encouraged and taunted by his wife for letting the victim steal their money).

<sup>119</sup> USSG §2A2.2(b)(6).

<sup>120</sup> USSG §1B1.1, comment. (n.1(D)); 18 U.S.C. § 2266(5). The protection order also must be “consistent with 18 U.S.C. § 2265(b),” *id.*, such that (1) an issuing state, tribal, or territorial court must have jurisdiction over the parties and matter under the law of the state, Indian tribe, or territory; and (2) reasonable notice and opportunity to be heard must be given to the person against whom the order is sought; in the case of *ex parte* orders, notice and opportunity to be heard must be provided within the time required by state, tribal, or territorial law and in any event within a reasonable time after the order is issued, sufficient to protect the respondent’s due process rights. 18 U.S.C. § 2265(b).

The enhancement does not apply if the defendant was not properly served with the protection order in accordance with the law of that court. *See, e.g., United States v. Thompson*, 921 F.3d 82, 87–88 (2d Cir. 2019) (district court erred in applying the protection order enhancement under §2A6.2(b)(1)(A) where the government failed to prove that the state court properly served the defendant with the *ex parte* protection order).

<sup>121</sup> USSG §2A2.2(b)(7).

applied based on the relevant conduct principles set forth in §1B1.3, this enhancement applies only where the defendant was convicted of one of the specified offenses.<sup>122</sup> If the enhancement applies, the official victim adjustment at §3A1.2 also applies.<sup>123</sup>

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

The guideline at §2A2.3 covers misdemeanor assault and battery and any felonious assault not covered by the aggravated assault guideline,<sup>124</sup> including several offenses covered by the federal assault statute, such as assault by striking, beating, or wounding;<sup>125</sup> simple assault;<sup>126</sup> and assault resulting in substantial bodily injury to a spouse or intimate partner, a dating partner, or an individual under the age of 16 years.<sup>127</sup>

*i. Base offense level*

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

- (1) 7, if the offense involved physical contact, or if a dangerous weapon (including a firearm) was possessed and its use was threatened; or
- (2) 4, otherwise.<sup>128</sup>

The guideline does not define “physical contact.”<sup>129</sup> One circuit has held that the term encompasses indirect physical contact, such as throwing an offensive liquid onto a victim.<sup>130</sup> Like the other assault guidelines, “dangerous weapon” is defined by reference to §1B1.1, Application Note 1.<sup>131</sup>

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

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

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

<sup>125</sup> 18 U.S.C. § 113(a)(4).

<sup>126</sup> *Id.* § 113(a)(5).

<sup>127</sup> *Id.* § 113(a)(7).

<sup>128</sup> USSG §2A2.3(a).

<sup>129</sup> The term “physical contact” also is used in §2A2.4 (Obstructing or Impeding Officers).

<sup>130</sup> *United States v. Taliaferro*, 211 F.3d 412, 415–16 (7th Cir. 2000) (“physical contact” under §2A2.4(b)(1) includes throwing a cup of urine at a prison guard because the law of battery has long included indirect acts such as spitting).

<sup>131</sup> USSG §2A2.3, comment. (n.1); USSG §1B1.1, comment. (n.1(E)) (defining “dangerous weapon” as “(i) an instrument capable of inflicting death or serious bodily injury; or (ii) an object that is not an instrument



*ii. Bodily injury enhancement*

Section 2A2.3(b)(1), the only specific offense characteristic in this guideline, provides for: (A) a 2-level increase if the victim sustained bodily injury; or (B) a 4-level increase if the offense resulted in substantial bodily injury to a spouse, intimate partner, or dating partner, or an individual under the age of 16 years.<sup>132</sup> “Bodily injury” has the same meaning set forth in §1B1.1, Application Note 1.<sup>133</sup> “Spouse, intimate partner, or dating partner” have the meanings set forth in 18 U.S.C. § 2266.<sup>134</sup> “Substantial bodily injury” is defined as “bodily injury which involves (A) a temporary but substantial disfigurement; or (B) a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty.”<sup>135</sup> Substantial bodily injury is, by definition, less severe than serious bodily injury, used in §2A2.2.<sup>136</sup>

*iii. Cross reference*

Where the defendant’s conduct constitutes aggravated assault, §2A2.3(c) instructs that the aggravated assault guideline at §2A2.2 applies.<sup>137</sup>

## **C. KIDNAPPING**

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

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Section 1201 of title 18, United States Code, proscribes certain kidnapping offenses, providing jurisdictional constraints and statutory penalties for both completed and inchoate offenses.<sup>138</sup> Specifically, section 1201(a) outlines punishments for “[w]hoever

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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 it was such an instrument”).

<sup>132</sup> USSG §2A2.3(b)(1).

<sup>133</sup> USSG §2A2.3, comment. (n.1); USSG §1B1.1, comment. (n.1(B)) (defining “bodily injury” as “any significant injury; *e.g.*, an injury that is painful and obvious, or is of a type for which medical attention ordinarily would be sought”).

<sup>134</sup> USSG §2A2.3, comment. (n.1); *see supra* note 42 (setting forth definitions from 18 U.S.C. § 2266(7), (10)).

<sup>135</sup> USSG §2A2.3, comment. (n.1) (citing 18 U.S.C. § 113(b)(1)).

<sup>136</sup> *Compare id. with* USSG §1B1.1, comment. (n.1(M)) (defining “serious bodily injury” as an injury involving “extreme” pain or “protracted” impairment).

<sup>137</sup> USSG §2A2.3(c).

<sup>138</sup> 18 U.S.C. § 1201.

unlawfully<sup>139</sup> seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise”<sup>140</sup> any person when:

- (1) The person is willfully transported through interstate or foreign commerce “or the offender travels in interstate or foreign commerce or uses the mail or any means, facility, or instrumentality of interstate or foreign commerce in committing or in furtherance of the commission of the offense”;<sup>141</sup>
- (2) Any kidnapping act is done within the special maritime and territorial jurisdiction of the United States;
- (3) Any kidnapping act is done within the special aircraft jurisdiction of the United States;
- (4) The person is a foreign official, an internationally protected person, or an official guest; or
- (5) The person is a certain domestic officer or employee and any of the above acts are done while the victim is engaged in, or on account of, the performance of official duties.<sup>142</sup>

If a victim is not released within 24 hours, a rebuttable presumption that the victim was transported in interstate or foreign commerce applies.<sup>143</sup> Further, the United States can exercise jurisdiction over an internationally protected person outside the United States

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<sup>139</sup> See, e.g., *United States v. Safehouse*, 985 F.3d 225, 237 (3d Cir. 2021) (“[I]n a kidnapping case, to show that the defendant acted ‘unlawfully,’ the prosecution must prove that the victim did not consent to come along.”).

<sup>140</sup> 18 U.S.C. § 1201(a); see, e.g., *United States v. Ferguson*, 65 F.4th 806, 815 (6th Cir. 2023) (“To commit attempted kidnapping, [the defendant] had to take a substantial step not only in furtherance of the global concept of his plan, but also toward a holding of the [victims] against their will and for an appreciable period of time.”); *United States v. Small*, 988 F.3d 241, 250 (6th Cir. 2021) (requirement that the victim be “held for ‘ransom or reward or otherwise’ ” is “interpreted broadly” to apply “not only for reward, but for any other reason” as long as the defendant “hold[s] the victim for some purpose of his own[;]” in that case, the government satisfied this element with “ample evidence that the victim was seized and confined in order to enable the defendants to steal the victim’s possessions and escape without any interference or resistance” (internal quotations omitted)).

<sup>141</sup> 18 U.S.C. § 1201(a)(1); see, e.g., *United States v. Windham*, 53 F.4th 1006, 1011 (6th Cir. 2022) (“[I]ntrastate use of a cell phone and automobile satisfies § 1201(a)(1)’s interstate commerce requirements.”); *United States v. Prothro*, 41 F.4th 812, 828 (7th Cir. 2022) (rejecting the defendant’s argument that a court must consider each automobile’s specific use in interstate commerce, rather than automobiles as a class, when deciding their instrumentality status); *Small*, 988 F.3d at 251 (explaining that, in 2006, Congress expanded the federal kidnapping statute “to reach kidnappings in which the defendant crosses state lines or channels or facilities of interstate commerce were used to commit the crime, even when the physical kidnapping occurred within the borders of a single state”).

<sup>142</sup> 18 U.S.C. § 1201(a). Excluded from this list of kidnapping offenses are cases where a parent engages in the listed conduct with a child, *id.*, though a “parent” does not include a person whose parental rights have been terminated by a final court order, *id.* § 1201(h).

<sup>143</sup> *Id.* § 1201(b).

if: (1) the victim is a representative, officer, employee, or agent of the United States; (2) the defendant is a national of the United States; or (3) the defendant is found afterwards in the United States.<sup>144</sup>

The penalty range for kidnapping or a conspiracy to commit kidnapping, where at least one conspirator performs an overt act to effect the object of the conspiracy, is any term of years or life imprisonment.<sup>145</sup> Where the death of any person results, the penalty is life imprisonment or death.<sup>146</sup> A 20-year mandatory minimum penalty applies to offenses involving unrelated adult defendants and child victims under the age of 18 years.<sup>147</sup> A 20-year statutory maximum applies to attempted kidnappings.<sup>148</sup>

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

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The guideline at §2A4.1 (Kidnapping, Abduction, Unlawful Restraint) applies to various kidnapping offenses, including those outlined above, hostage taking under 18 U.S.C. § 1203, and kidnapping of specific types of victims in violation of 18 U.S.C. §§ 115(b)(2) and 351(b).<sup>149</sup> Federal kidnapping offenses generally encompass three categories of conduct: limited duration kidnapping with an unharmed victim; kidnapping that facilitates another offense (such as sexual assault); and kidnapping for ransom or political demand.<sup>150</sup>

Section 2A4.1(a) provides a base offense level of 32.<sup>151</sup> Where a victim is killed under circumstances that would constitute murder under the federal murder statute at 18 U.S.C. § 1111 had the killing taken place in the territorial or maritime jurisdiction of the United States, the cross reference in §2A4.1(c) directs that §2A1.1 (First Degree Murder) applies.<sup>152</sup>

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<sup>144</sup> *Id.* § 1201(e).

<sup>145</sup> *Id.* § 1201(a), (c); *see, e.g., Small*, 988 F.3d at 252–53 (inferring that the defendants “realized the purpose and result of their actions” where they acted in concert to invade the victim’s “home, hold her at gunpoint, and tie her up in order to steal her valuables”).

<sup>146</sup> 18 U.S.C. § 1201(a); *see, e.g., United States v. Ross*, 969 F.3d 829, 838 (8th Cir. 2020) (“[T]he kidnapping statute requires a causal relationship between the kidnapping and the death,” which “means that the kidnapping is a but-for cause of the death”), *vacated on other grounds sub nom, King v. United States*, 142 S. Ct. 332 (2021).

<sup>147</sup> 18 U.S.C. § 1201(g).

<sup>148</sup> *Id.* § 1201(d).

<sup>149</sup> *See* USSG App. A.

<sup>150</sup> USSG §2A4.1, comment. (backg’d.).

<sup>151</sup> USSG §2A4.1(a).

<sup>152</sup> USSG §2A4.1(c); *see, e.g., United States v. Barraza*, 982 F.3d 1106, 1109, 1114–15 & n.4 (8th Cir. 2020) (affirming application of §2A1.1 pursuant to §2A4.1(c) cross reference where defendant and a friend kidnapped and killed two victims and holding that jury finding of intent to kill was not required to apply the cross reference).

Section 2A4.1(b) provides seven enhancements to the base offense level: (1) a 6-level increase if ransom was demanded; (2) a tiered increase based on the degree of the victim's bodily injury; (3) a 2-level increase for use of a dangerous weapon; (4) a tiered increase based on the time that passed before the victim was released; (5) a 6-level increase where the victim was sexually exploited; (6) a 3-level increase where the victim was a minor who was placed with another in exchange for money or other consideration; and (7) various increases if the kidnapping occurred in connection with another offense.<sup>153</sup>

**a. Ransom enhancement**

Section 2A4.1(b)(1) provides for a 6-level increase “[i]f a ransom demand or a demand upon government was made.”<sup>154</sup> Because the guideline does not define “ransom,” several courts have looked to the original meaning of the term, which includes “the money, price, or consideration paid or demanded for redemption of a kidnapped person” or “a payment that releases from captivity.”<sup>155</sup> Based on its ordinary meaning, the Second, Fifth, Ninth, and Eleventh Circuits have held that “ransom” includes payment that a kidnapper believes is owed to him by the victim and demands made to the victim instead of a third party.<sup>156</sup> On the other hand, the Seventh Circuit has held that the ransom demand must be made to a third party and not solely to a captured party.<sup>157</sup> The Seventh Circuit rejected the Black’s Law Dictionary definition of “ransom” as overinclusive, explaining that the

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<sup>153</sup> USSG §2A4.1(b).

<sup>154</sup> USSG §2A4.1(b)(1).

<sup>155</sup> *United States v. Digiorgio*, 193 F.3d 1175, 1178 (11th Cir. 1999) (per curiam) (alteration omitted) (applying the plain meaning of “ransom” from Black’s Law Dictionary); *see also, e.g., United States v. Escobar-Posado*, 112 F.3d 82, 83 (2d Cir. 1997) (per curiam) (applying the plain meaning of “ransom” from Webster’s Third New International Dictionary).

<sup>156</sup> *See United States v. Fernandez*, 770 F.3d 340, 343 (5th Cir. 2014) (adopting a plain meaning definition of “ransom” as “consideration paid or demanded for the release of someone or something from captivity” and applying the ransom enhancement regardless of whether the money demanded was owed (internal quotation omitted)); *Digiorgio*, 193 F.3d at 1178 (a ransom demand encompasses demanding money from a kidnapping victim who the defendant believes owes him money because nothing in its ordinary meaning “excludes previously-owed money from qualifying as the ‘payment that releases from captivity’ ”); *Escobar-Posado*, 112 F.3d at 83 (upholding a ransom enhancement where the defendant demanded money owed to him from one released victim in exchange for the release of two other victims because “there is nothing in the word’s ordinary usage—a ‘consideration paid or demanded for the redemption of a captured person’—that precludes a ransom from consisting of a demand for a sum that the kidnapper believes is owed to him”); *see also United States v. Sierra-Velasquez*, 310 F.3d 1217, 1221 (9th Cir. 2002) (agreeing with the Eleventh and Second Circuits that the ransom enhancement applies even if that money is already owed to the defendant but having no occasion to address whether the demand must be made to a third party).

<sup>157</sup> *United States v. Reynolds*, 714 F.3d 1039, 1044–46 (7th Cir. 2013) (language of §2A4.1(b)(1) presupposes the existence of a third party by including a “demand upon government”; making a demand that reaches a third party has a greater risk of harm, warranting additional punishment, and heightened deterrence). *But see United States v. Romero*, 906 F.3d 196, 205–09 (1st Cir. 2018) (discussing *Reynolds*, *Digiorgio*, and *Escobar-Posado* and holding that the defendant could not establish plain error based on *Reynolds* where a ransom demand was made to a kidnapped victim).

definition would otherwise cover a “simple mugging” where the assailant offers to let a victim go in exchange for her valuables.<sup>158</sup>

Although the enhancement is written in the past tense—applying whenever a ransom demand “was made”—at least one court has held that the enhancement can apply where a ransom note goes undelivered as long as it is “reasonably certain” that the demand would have been made if doing so had been feasible.<sup>159</sup>

### **b. Bodily injury enhancement**

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

- (A) For “permanent or life-threatening bodily injury,” a 4-level increase applies;
- (B) For “serious bodily injury,” a 2-level increase applies; and
- (C) If the severity of the injury falls between the severity specified in (A) and (B), a 3-level increase applies.<sup>160</sup>

The degrees of injury are defined by reference to §1B1.1, Application Note 1, except that “serious bodily injury” as used in §2A4.1 excludes “criminal sexual abuse.”<sup>161</sup> Rather, criminal sexual abuse is addressed by the specific offense characteristic in subsection (b)(5).<sup>162</sup>

In the context of a kidnapping offense, “permanent or life-threatening bodily injury” may involve the denial of food or medical care.<sup>163</sup> Further, an injury need not be life threatening to satisfy the 4-level enhancement; instead it can be a permanent injury.<sup>164</sup>

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<sup>158</sup> *Reynolds*, 714 F.3d at 1044.

<sup>159</sup> *United States v. Ferreira*, 275 F.3d 1020, 1028–30 (11th Cir. 2001) (applying ransom enhancement where defendants made repeated phone calls to the object of the ransom demand and drafted and printed a ransom letter but were captured before it could be delivered; for uncompleted crimes like attempts, the court should apply any adjustment that can be determined “with reasonable certainty” (quoting USSG §2A4.1, comment. (n.5) (currently numbered as n.4))).

<sup>160</sup> USSG §2A4.1(b)(2).

<sup>161</sup> USSG §2A4.1, comment. (n.1).

<sup>162</sup> *Id.*

<sup>163</sup> See USSG §1B1.1, comment. (n.1(K)) (“In the case of a kidnapping, for example, maltreatment to a life-threatening degree (*e.g.*, by denial of food or medical care) would constitute life-threatening bodily injury.”); see, *e.g.*, *United States v. Brazier*, 933 F.3d 796, 802–03 (7th Cir. 2019) (permanent or life-threatening bodily injury enhancement was sufficiently supported where the kidnapping victim was denied medical care for a gunshot wound and was beaten).

<sup>164</sup> See, *e.g.*, *United States v. Medlin*, 65 F.4th 326, 333 (6th Cir. 2023) (“A permanent injury is one that cannot in time heal and return to itself.”); *United States v. Torrealba*, 339 F.3d 1238, 1245–46 (11th Cir. 2003) (permanent or life-threatening bodily injury enhancement applied to a kidnapping victim who suffered



Because “serious bodily injury” is defined to include injuries “involving extreme physical pain” or “protracted impairment,” the victim need not seek medical care or suffer a lasting injury to satisfy the 2-level enhancement.<sup>165</sup>

As discussed above,<sup>166</sup> the lines between the different degrees of injury are “not sharp” and require case-by-case evaluation of the victim’s injuries and medical prognosis.<sup>167</sup> At least one court has limited the bodily injury enhancement to persons who suffer injuries as victims of a kidnapping and not persons who suffer collateral bodily injury during the kidnapping.<sup>168</sup>

### **c. Dangerous weapon enhancement**

Section 2A4.1(b)(3) provides for a 2-level increase if a dangerous weapon was used in connection with the kidnapping.<sup>169</sup> The phrase “a dangerous weapon was used” means that a firearm was discharged, or a firearm or dangerous weapon was otherwise used.<sup>170</sup>

The term “otherwise used” requires more than brandishing a weapon.<sup>171</sup> While brandishing means that at least part of a weapon is displayed, or the presence of a weapon is otherwise made known, “otherwise used” generally requires a more overt or specific threat of harm.<sup>172</sup> However, an explicit threat of harm, like pointing a weapon at someone,

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facial scarring and nerve damage that were “likely permanent,” and whose facial symmetry would “never be the same as it was prior to the attack”).

<sup>165</sup> See, e.g., *United States v. Saint Louis*, 889 F.3d 145, 158 (4th Cir. 2018) (painful beatings during kidnapping amounted to serious bodily injury even though the victim never sought medical intervention and did not suffer any protracted impairments).

<sup>166</sup> See discussion *supra* Section II.B.2.a.i.

<sup>167</sup> See, e.g., *Brazier*, 933 F.3d at 803 (while the district court did not clearly err in applying the permanent or life-threatening injury enhancement, it also may have been reasonable to apply the lesser enhancements for serious bodily injury or for injury between the two degrees).

<sup>168</sup> *United States v. Sickinger*, 179 F.3d 1091, 1093–94 (8th Cir. 1999) (reversing application of the bodily injury enhancement to the kidnapping victim’s friend who was severely injured in the course of trying to prevent the kidnapping of the victim).

<sup>169</sup> USSG §2A4.1(b)(3).

<sup>170</sup> USSG §2A4.1, comment. (n.2) (citing USSG §1B1.1, comment. (n.1) for definitions of “firearm” and “dangerous weapon”). These are the same definitions used in the assault guidelines, discussed above. See discussion *supra* Section II.B.2.b.ii.

<sup>171</sup> See, e.g., *United States v. Bonilla-Guizar*, 729 F.3d 1179, 1187–88 (9th Cir. 2013) (plain error to apply the dangerous weapon enhancement under §2A4.1(b)(3) based solely upon brandishing a firearm).

<sup>172</sup> See, e.g., *United States v. Kruger*, 839 F.3d 572, 578–79 (7th Cir. 2016) (discussing other cases that have looked for conduct that creates a “personalized threat of harm” to “distinguish mere brandishing of a weapon from other use” (citation omitted)).

is not necessarily a requirement, since the context in which a kidnapping occurs may convey an implicit threat of harm to a specific individual.<sup>173</sup>

Likewise, the enhancement has been applied where a dangerous weapon was pressed against the victim's leg and also pointed at another party—an infant—to secure a kidnapping victim's cooperation.<sup>174</sup> It also has been applied where the person in whom fear was sought to be instilled is not at the same location as the weapon—specifically, where the defendant sent a photo of a kidnapped child with a firearm pointed at the child's head to threaten the victim's mother.<sup>175</sup> There, the court explained that the pointing of the gun at one person was used to instill fear in another person to coerce compliance.<sup>176</sup>

#### **d. Victim release enhancement**

Section 2A4.1(b)(4) provides for: (A) a 2-level increase if the victim was not released within 30 days; and (B) a 1-level increase if the victim was not released within seven days.<sup>177</sup> This enhancement “recognizes the increased suffering involved in lengthy kidnappings and provides an incentive to release the victim.”<sup>178</sup> In a kidnapping conspiracy case (in which co-defendants joined the conspiracy at different times in the hostage's capture), one court defined the start date that triggers the seven- and 30-day clocks as the date the victim was taken hostage, rather than the date each specific defendant became involved in the kidnapping.<sup>179</sup>

When a victim is actually “released” may raise complicated factual disputes because the line between release and confinement may not always be clear. For example, courts have held that the enhancement may apply where a victim has access to a phone or

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<sup>173</sup> See, e.g., *id.* at 579 (defendant's actions leading up to and during the kidnapping plausibly created a specific threat of harm where a firearm was used to convey an implicit threat to harm the victim if he attempted to escape, even though the defendant never pointed the firearm or made explicit threats during the kidnapping).

<sup>174</sup> See, e.g., *United States v. Coyle*, 309 F.3d 1071, 1075 (8th Cir. 2002) (affirming application of §2A4.1(b)(3) enhancement based on the defendant's holding of a knife against a mother's leg and pointing the knife at her baby to secure her cooperation during a kidnapping).

<sup>175</sup> *United States v. Yelverton*, 197 F.3d 531, 533–35 (D.C. Cir. 1999) (there was “use” of a dangerous weapon where a gun was deployed to make a direct threat to a mother about her son, who remained in custody at the time she received a photograph of him blindfolded with a gun pointed at him).

<sup>176</sup> *Id.*

<sup>177</sup> USSG §2A4.1(b)(4).

<sup>178</sup> USSG §2A4.1, comment. (backg'd.).

<sup>179</sup> *United States v. Lorenzo-Hernandez*, 279 F.3d 19, 24 (1st Cir. 2002) (applying the seven-day victim release enhancement to a defendant even though he allegedly joined a conspiracy five days before the victim was released; the “guidelines speak to the *release date* of the victim, not to the length of time the defendant is involved in the kidnapping” in order to create incentives to release kidnapping victims).

transportation but fails to use that access,<sup>180</sup> or where a victim is occasionally left alone but still is mentally or emotionally unable to flee.<sup>181</sup> One court has held that the enhancement may apply where a victim is murdered while in captivity and found after the enhancement time period.<sup>182</sup>

**e. Sexual exploitation enhancement**

Section 2A4.1(b)(5) provides for a 6-level increase if a victim was sexually exploited.<sup>183</sup> “Sexually exploited” is defined to include acts prohibited by 18 U.S.C. §§ 2241–44, 2251, and 2421–23.<sup>184</sup> Thus, applying the enhancement requires consulting the federal sexual abuse statutes and a case-by-case assessment of the underlying facts of the kidnapping offense.<sup>185</sup>

**f. Minor victim enhancement**

Section 2A4.1(b)(6) provides for a 3-level increase where the victim is a minor who, in exchange for money or other consideration, was placed in the care or custody of another person who lacked any legal right to such care or custody.<sup>186</sup>

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<sup>180</sup> *Cf., e.g.,* United States v. Wiora, 172 F.3d 877 (9th Cir. 1999) (unpublished table decision) (remanding for an evidentiary hearing on whether the victim release enhancement should be applied because the defendant’s arguments regarding the victim’s access to a phone and daily taxi trips raised a “substantial factual dispute”).

<sup>181</sup> *Cf., e.g.,* United States v. Sickinger, 179 F.3d 1091, 1093 (8th Cir. 1999) (holding, in the context of a previous guideline reduction for releasing a kidnapping victim within 24 hours, that the victim was not “released” even if she was left alone at a store and could have escaped because she was not in a physical, mental, or emotional position to do so given the defendant’s abusive behavior).

<sup>182</sup> United States v. Gaddy, 894 F.2d 1307, 1315–16 (11th Cir. 1990) (the 30-day victim release enhancement applied where a victim was abducted, shot within 24 hours, and found after 30 days—and thus never released alive).

<sup>183</sup> USSG §2A4.1(b)(5). The current Application Note 1 to §2A4.1, which provides that criminal sexual abuse should be taken into account under subsection (b)(5), was added in response to section 2 of the Carjacking Correction Act of 1996, which amended 18 U.S.C. § 2119(2) to include aggravated sexual abuse under 18 U.S.C. § 2241 and sexual abuse under 18 U.S.C. § 2242 within the statutory definition of “serious bodily injury.” USSG App. C, amend. 545 (effective Nov. 1, 1997); *see also* Carjacking Correction Act of 1996, Pub. L. No. 104–217, § 2, 110 Stat. 3020. To implement the legislation, the Commission broadened the definition of “serious bodily injury” in certain offense conduct guidelines to include sexual assault but amended Application Note 1 to state that criminal sexual abuse conduct within the kidnapping guideline is taken into account in (b)(5) instead of the “serious bodily injury” enhancement. USSG App. C, amend. 545 (effective Nov. 1, 1997).

<sup>184</sup> USSG §2A4.1, comment. (n.3). This includes aggravated sexual abuse (18 U.S.C. § 2241), sexual abuse (§ 2242), sexual abuse of a minor or ward (§ 2243), abusive sexual contact (§ 2244), sexual exploitation of children (§ 2251), and transportation for illegal sexual activity and related crimes (§§ 2421–2423).

<sup>185</sup> *See, e.g.,* United States v. Hernandez-Orozco, 151 F.3d 866, 870 (8th Cir. 1998) (not clear error to apply the sexual exploitation enhancement where a defendant’s sexual acts with the victim were accomplished by putting the victim in fear, in violation of 18 U.S.C. § 2242(1), in light of the victim’s age and detention).

<sup>186</sup> USSG §2A4.1(b)(6).

As part of its amendments to the federal kidnapping statute, 18 U.S.C. § 1201, to require courts to account for certain specific offense characteristics in cases involving victims under the age of 18 years, Congress likewise directed the Sentencing Commission to include these characteristics in the guidelines.<sup>187</sup> The requirement in §2A4.1(b)(6) that the kidnapper have “no legal right to such care or custody” thus parallels 18 U.S.C. § 1201(g)(1), which requires a 20-year minimum sentence when a minor is kidnapped by someone who is not a family member and is without “legal custody.”<sup>188</sup>

The First Circuit has interpreted “care and custody of another person” to exclude placing the minor in the care of a co-conspirator who is expecting part of a ransom.<sup>189</sup> The court explained that the enhancement best fits two situations: (1) a kidnap-for-hire in which a third party (such as a parent whose custodial rights have been terminated or a childless person who wants to raise a child) pays the kidnapper to abduct and give the minor to the third party; and (2) a ransom-demanding kidnapper who pays a third party to keep the minor to make him or her harder to find.<sup>190</sup> However, the enhancement calls for a fact-specific inquiry that may turn on subtle factual distinctions.

For example, the Fifth Circuit distinguished the First Circuit’s decision and upheld the application of the enhancement where a third party was paid to care for the victims but was not a charged co-conspirator and was not compensated with an expected share of the ransom.<sup>191</sup>

#### **g. Enhancement for kidnapping in connection with another offense**

Under §2A4.1(b)(7), “[i]f the victim was kidnapped, abducted, or unlawfully restrained during the commission of, or in connection with, another offense or escape therefrom;<sup>192</sup> or if another offense was committed during the kidnapping, abduction, or unlawful restraint,” the offense level must be increased to:

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<sup>187</sup> USSG §2A4.1, comment. (backg’d.) (citing Crime Control Act of 1990, Pub. L. No. 101-647, § 401, 104 Stat. 4789).

<sup>188</sup> See *United States v. Alvarez-Cuevas*, 415 F.3d 121, 125–26 (1st Cir. 2005) (discussing the legislative history of §2A4.1(b)(6) and § 1201(g)(1) and explaining that the enhancements show that Congress was concerned that situations such as a kidnap-for-hire by a noncustodial parent may pose greater harm to a minor victim).

<sup>189</sup> *Id.* at 125–27 (reversing minor victim enhancement because holding otherwise would mean applying the enhancement to every conspirator in a kidnapping where any conspirator who expects a share of the ransom cares for the child in the interim, which would blur the distinction between that common kidnapping situation and a kidnap-for-hire situation, and create incentives to abandon care of the child).

<sup>190</sup> *Id.*

<sup>191</sup> *United States v. Cedillo-Narvaez*, 761 F.3d 397, 405 (5th Cir. 2014) (finding no plain error in applying the minor victim enhancement under the unambiguous plain language of the enhancement and “under the specific factual circumstances of th[e] case”).

<sup>192</sup> The term “another offense” includes federal, state, and local offenses. See USSG §2A4.1, comment. (backg’d.); see also, e.g., *United States v. Cree*, 166 F.3d 1270, 1271–72 (8th Cir. 1999) (per curiam) (“another

- (A) the offense level from the Chapter Two guideline for that other offense, if such guideline includes an adjustment for the kidnapping, abduction, or unlawful restraint, or otherwise takes that conduct into account; or
- (B) in any other case, 4 plus the offense level from the guideline for that other offense, but no greater than level 43.<sup>193</sup>

Thus, subsection (7)(A) applies if the offense level for “another offense” accounts for the kidnapping in an adjustment, and subsection (7)(B) applies if the offense level does not include such an adjustment. For example, §2A4.1(b)(7)(A) directs the application of the robbery guideline at §2B3.1 where a defendant commits a kidnapping during a robbery because the robbery guideline includes an adjustment for abduction.<sup>194</sup> Consistent with the relevant conduct rules governing liability for the acts of others in a jointly undertaken criminal activity, a conspirator to a kidnapping who does not personally commit “another offense” still may be subject to the enhancement.<sup>195</sup>

The enhancement applies only if the resulting offense level from (A) or (B) would be greater than the §2A4.1 offense level.<sup>196</sup> The potential interaction of subsection (b)(7) with other provisions in §2A4.1 underscores the importance of applying each specific offense characteristics in order.<sup>197</sup> For example, if a victim suffers sexual abuse during the kidnapping, the sexual exploitation enhancement in §2A4.1(b)(5) may be triggered.<sup>198</sup> But after applying that enhancement, the court also may consider applying the §2A4.1(b)(7) enhancement for that sexual abuse, triggering a different offense guideline altogether under the criminal sexual abuse guideline at §2A3.1.<sup>199</sup> If applying §2A3.1 yields a greater

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offense” could include a sexual assault committed outside of Native American territory and thus outside of federal jurisdiction); *United States v. Anderson*, 5 F.3d 795, 801–03 (5th Cir. 1993) (clarifying that “another offense” does not require federal jurisdiction and rejecting the defendant’s argument that his sexual abuse conduct could not be “another offense” because it did not constitute federal sexual abuse or aggravated sexual abuse).

<sup>193</sup> USSG §2A4.1(b)(7).

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

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

<sup>196</sup> USSG §2A4.1(b)(7).

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

<sup>198</sup> See USSG §2A4.1(b)(5).

<sup>199</sup> See, *e.g.*, *United States v. Michaud*, 268 F.3d 728, 738–39 (9th Cir. 2001) (where the defendant committed aggravated sexual abuse during a kidnapping, which qualified for the sexual exploitation

offense level than otherwise calculated under §2A4.1, then §2A4.1(b)(7) supplants the enhancement calculations performed in §2A4.1(b)(1) through (6).

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

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

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

Section 1959 of title 18 proscribes certain violent crimes when committed in aid of racketeering and provides statutory penalties based on different underlying acts.<sup>200</sup> VICAR was enacted as part of the Comprehensive Crime Control Act of 1984 to complement the Racketeer Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. § 1962, by enhancing liability through the prosecution of violent crimes committed by a defendant to maintain his position in an organized criminal enterprise.<sup>201</sup> As discussed below, section 1959 incorporates by reference several terms and definitions from the RICO statute.

##### ***1. Elements of a VICAR Offense***

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

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

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enhancement, it was proper to instead apply the higher §2A3.1 offense level under the enhancement set forth in §2A4.1(b)(7)(A)).

<sup>200</sup> 18 U.S.C. § 1959.

<sup>201</sup> For a detailed overview of the RICO statute and guideline, see U.S. SENT'G COMM'N, PRIMER ON RICO OFFENSES (RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS) (2024), <https://www.ussc.gov/guidelines/primers/rico> [hereinafter RICO PRIMER].

<sup>202</sup> 18 U.S.C. § 1959(a). Courts have phrased this multi-element test in different ways. *See, e.g.*, United States v. Rodriguez, 971 F.3d 1005, 1009 (9th Cir. 2020) ("To support a VICAR conviction, the government must show: (1) that the criminal organization exists; (2) that the organization is a racketeering enterprise; (3) that the defendants committed or attempted or conspired to commit a violent crime; and (4) that they acted for the purpose of promoting their position in or gaining entrance to the racketeering enterprise." (internal quotation and brackets omitted)); United States v. Portillo, 969 F.3d 144, 164 (5th Cir. 2020) ("In order to establish a violation of this statute, the government must prove: (1) an enterprise engaged in racketeering; (2) the activities affected interstate commerce; (3) a [violent crime]; and (4) the [violent crime] was committed for payment by the enterprise or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise." (internal quotation omitted)); *see also, e.g.*, United States v. Archer,



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

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

Second, the government must show that the defendant committed (or attempted or conspired to commit) a violent crime. Specifically, VICAR applies to a defendant who “murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in

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977 F.3d 181, 189 (2d Cir. 2020) (VICAR “requires that one use or threaten violence for a least one of three possible purposes: (1) pecuniary gain, (2) ‘gaining entry’ into an ‘enterprise’ . . . , or (3) ‘maintaining or increasing [one’s] position’ in that enterprise” (quoting 18 U.S.C. § 1959(a))).

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

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

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

<sup>206</sup> 18 U.S.C. § 1959(b)(2); see, e.g., *United States v. Perry*, 35 F.4th 293, 318 (5th Cir. 2022) (“Although RICO [and VICAR] ‘do[] not specifically define the outer boundaries of the “enterprise” concept,’ the ‘term “any” ensures that the definition has a wide reach, and the very concept of an association in fact is expansive.’” (citing *Boyle v. United States*, 556 U.S. 938, 944 (2009) (citations omitted))).

<sup>207</sup> 18 U.S.C. § 1959(b)(2).

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

<sup>209</sup> *Boyle*, 556 U.S. at 944–45.

<sup>210</sup> *Millan-Machuca*, 991 F.3d at 20 (“Indeed, the Supreme Court has recognized that RICO, and, thus, also VICAR, extends to ‘both legitimate and illegitimate enterprises.’” (quoting *United States v. Turkette*, 452 U.S. 576, 580–81 (1981))).

serious bodily injury upon, or threatens to commit a crime of violence against” an individual in violation of state or federal law, or attempts or conspires to do so.<sup>211</sup>

Some Circuits have held that the provision of state or federal law violated by the defendant need not itself “match” one of the enumerated generic offenses to serve as a predicate for VICAR.<sup>212</sup> Rather, VICAR requires only that a defendant’s *conduct* constitute both a violation of state or federal law as well as one of the enumerated generic offenses (murder, kidnapping, maiming, assault with a dangerous weapon, assault resulting in serious bodily injury, threat to commit a crime of violence).<sup>213</sup>

Finally, the defendant must have committed the crime of violence “as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity.”<sup>214</sup> Under VICAR, this “membership purpose” (*i.e.*, furthering the defendant’s role in the enterprise) need not be the sole or “but-for cause” of the defendant’s conduct.<sup>215</sup> Rather, the circuits have variously described this element as requiring that membership be a “substantial purpose,”<sup>216</sup> “animating purpose,”<sup>217</sup> or a “large part” of the reason for the defendant’s actions.<sup>218</sup>

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## 2. Statutory Penalties

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

- (1) Murder is punishable by death or life imprisonment, and kidnapping is punishable by imprisonment for any term of years or for life;

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<sup>211</sup> 18 U.S.C. § 1959(a).

<sup>212</sup> *United States v. Keene*, 955 F.3d 391, 398–99 (4th Cir. 2020); *cf.*, *e.g.*, *United States v. Savage*, 970 F.3d 217, 274 (3d Cir. 2020) (“[T]he VICAR statute requires a predicate act that is chargeable under state or federal law . . . [and] trial courts frequently instruct juries on the elements of the specific state or federal offense that is charged as the predicate act rather than outlining a ‘generic’ version of the crime.”).

<sup>213</sup> *Keene*, 955 F.3d at 394, 398–99. Because the defendants were not charged with threatening to commit a “crime of violence,” the court declined to address whether that term may require application of the categorical approach. *Id.* at 396–97.

<sup>214</sup> 18 U.S.C. § 1959(a); *see, e.g.*, *United States v. Garcia*, 65 F.4th 1158 (10th Cir. 2023) (per curiam) (court vacated VICAR convictions because the government failed to present evidence, direct or circumstantial, connecting the defendants’ murder of another person to their membership in a violent gang).

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

<sup>216</sup> *Rodriguez*, 971 F.3d at 1010–11.

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

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

- (2) Maiming carries a maximum term of 30 years;
- (3) Assault with a dangerous weapon or assault resulting in serious bodily injury carries a maximum term of 20 years;
- (4) Threatening to commit a crime of violence carries a maximum term of 5 years;
- (5) Attempting or conspiring to commit murder or kidnapping carries a maximum term of 10 years; and
- (6) Attempting or conspiring to commit a crime involving maiming, assault with a dangerous weapon, or assault resulting in serious bodily injury carries a maximum term of 3 years.<sup>219</sup>

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

The offense guideline at §2E1.3 covers violations of the VICAR statute, 18 U.S.C. § 1959.<sup>220</sup> The text of the statute and the Background Commentary to §2E1.3 underscore the breadth of the guideline, which covers conduct ranging from threats of violence to murder, with maximum terms of imprisonment ranging from three years to life, depending on the underlying offense.<sup>221</sup>

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

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

There are no specific offense characteristics.

The minimum base offense level of 12 is applied only when it is higher than the offense level that would apply to the underlying crime.<sup>223</sup> This ensures that the base offense level for the VICAR offense will always be at least 12, even if the underlying crime has a lower offense level. However, the guideline for the underlying violent offense often will yield an offense level higher than 12.<sup>224</sup>

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<sup>219</sup> 18 U.S.C. § 1959(a).

<sup>220</sup> See USSG §2E1.3.

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

<sup>222</sup> USSG §2E1.3.

<sup>223</sup> USSG §2E1.3, comment. (n.2).

<sup>224</sup> See, e.g., *United States v. Martinez*, 136 F.3d 972, 978–79 (4th Cir. 1998) (where the district court found the crime underlying the defendant’s VICAR offense to be conspiracy to commit murder, the applicable offense level was 32 under §2A1.5, rather than 12 under §2E1.3).

When a state offense serves as a VICAR predicate, the conduct’s “most analogous federal offense” must be used to determine which guideline to apply to calculate the offense level.<sup>225</sup> To identify the federal offense that is “most analogous” to the state offense, courts may consider the substance of the conduct criminalized and the severity of the offense and need not find an exact match.<sup>226</sup>

In determining the base offense level applicable to the underlying crime or racketeering activity, §1B1.3 directs the court to account for all relevant conduct—including uncharged conduct,<sup>227</sup>—that qualifies as a predicate offense or racketeering activity under section 1959.<sup>228</sup> Nonetheless, the courts of appeals have taken different approaches regarding how to determine the guideline that applies to the underlying crime.<sup>229</sup> In particular, consistent with §1B1.3, the First, Seventh, and Eighth Circuits have held that the applicable offense guideline can be based on relevant conduct.<sup>230</sup> In contrast, the Second Circuit has held that the district court must determine the applicable offense guideline for the underlying racketeering crime based on the defendant’s charging document.<sup>231</sup>

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

<sup>226</sup> *See, e.g.,* *United States v. Lisiansky*, 806 F.3d 706, 709–10 (2d Cir. 2015) (per curiam) (affirming, in a §2E1.4 case, the use of the guideline at §2A1.5 for conspiracy or solicitation to commit murder where it was more analogous to the defendant’s underlying New York state offense); *United States v. Langley*, 919 F.2d 926, 930–32 (5th Cir. 1990) (in applying §2E1.2 where the underlying “unlawful activity” involved promoting prostitution under Texas law, the “most analogous federal offense” was a violation of the Mann Act, 18 U.S.C. § 2421, which punishes similar conduct and is a felony like the Texas offense). The Fifth Circuit noted that a federal offense still can be “analogous” to a state offense even if it requires an additional “federalizing” jurisdictional element, such as the transportation of people for the purpose of prostitution. *Langley*, 919 F.2d at 931.

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

<sup>228</sup> *See* 18 U.S.C. § 1959 (prohibiting certain enumerated offenses “in violation of the laws of any State or the United States” and defining “racketeering activity” by reference to section 1961).

<sup>229</sup> The term “underlying crime or racketeering activity” is similar to terms used in other guidelines in Chapter Two, Part E (Offenses Involving Criminal Enterprises and Racketeering). *See* USSG §§2E1.1(a)(2) (“underlying racketeering activity”), 2E1.2(a)(2) (“underlying crime of violence or other unlawful activity”), 2E1.4(a)(2) (“underlying unlawful conduct”).

<sup>230</sup> *United States v. Smith*, 232 F.3d 650, 651 (8th Cir. 2000) (per curiam) (relevant conduct rules under §1B1.3 mean that the “underlying unlawful conduct” in §2E1.4(a)(2) need not be charged in the indictment); *United States v. Carrozza*, 4 F.3d 70, 75–77 (1st Cir. 1993) (“underlying racketeering activity” in §2E1.1(a)(2) includes relevant conduct under §1B1.3 because the RICO guideline does not explicitly instruct against the general rule that relevant conduct includes uncharged conduct); *United States v. Masters*, 978 F.2d 281, 284–85 (7th Cir. 1992) (noting that §2E1.1(a)(2)’s base offense level instruction refers to the underlying “activity” not the underlying “conviction”).

<sup>231</sup> *United States v. McCall*, 915 F.2d 811, 814–15 (2d Cir. 1990) (in a VICAR case, the “underlying crime or racketeering activity” in §2E1.3 means the underlying crime charged in the charging document; district court should have selected the guideline section based on the defendant’s offense of conviction (assault with a

#### IV. GUIDELINE APPLICATION CONSIDERATIONS

In some cases, federal murder, assault, and VICAR offenses may qualify as predicate offenses for certain sentencing enhancements or statutes of conviction, including §4B1.1 (Career Offender), 18 U.S.C. § 924(c) (using or carrying a firearm during and in relation to a crime of violence or possessing a firearm in furtherance of such an offense), and 18 U.S.C. § 924(e) (Armed Career Criminal Act).<sup>232</sup> To determine whether an offense qualifies as a

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dangerous weapon), rather than his actual conduct (which the court found would have constituted assault with intent to murder)).

In the analogous RICO context, the Eleventh Circuit has held that where a jury finds a defendant guilty of a RICO conspiracy but does not indicate which of the underlying offenses the defendant committed, the defendant's offense level is properly based on the underlying offenses that the court finds are proven beyond a reasonable doubt (rather than the usual preponderance of the evidence standard) as if the court were sitting as trier of fact. *United States v. Nguyen*, 255 F.3d 1335, 1341–42 (11th Cir. 2001).

<sup>232</sup> See USSG §4B1.1; 18 U.S.C. § 924(c), (e). Additionally, the VICAR statute includes, as an underlying crime, threatening to commit a “crime of violence.” 18 U.S.C. § 1959(a)(4). Section 1959 incorporates by reference the definition of a “crime of violence” in 18 U.S.C. § 16(a) that is materially identical to the definition of “crime of violence” in section 924(c)(3)(A). See *Leocal v. Ashcroft*, 543 U.S. 1, 6 (2004) (in section 16, Congress provided a general definition of the term “crime of violence” to be used throughout the Comprehensive Crime Control Act of 1984, including in section 1959's prohibition against threats to commit crimes of violence in aid of racketeering activity).

Some courts have held that federal kidnapping under 18 U.S.C. § 1201(a) is not a predicate offense under statutes requiring “physical force.” See, e.g., *United States v. Walker*, 934 F.3d 375, 379 (4th Cir. 2019) (holding under plain error review that federal kidnapping is not a crime of violence under 18 U.S.C. § 924(c)(3)(A) because it does not require physical force); *United States v. Jenkins*, 849 F.3d 390, 393–94 (7th Cir. 2017) (federal kidnapping is not a crime of violence under § 924(c)(3)(A) because it does not require physical force), *vacated on other grounds*, 584 U.S. 973 (2018); cf., e.g., *United States v. Gillis*, 938 F.3d 1181, 1210 (11th Cir. 2019) (per curiam) (federal kidnapping is not a predicate for soliciting a crime involving physical force under 18 U.S.C. § 373, which uses wording similar to the crime of violence definition in section 924(c)(3)(A)).

Violations of the VICAR statute premised upon various state offenses may also qualify as “crimes of violence” under 18 U.S.C. § 924(c). See, e.g., *United States v. Lassiter*, 96 F.4th 629, 635–37 (4th Cir. 2024) (attempted murder in aid of racketeering, 18 U.S.C. § 1959(a)(5), premised upon an attempted murder under Virginia law—which “necessarily requires the attempted use of force”—is a “crime of violence” for purposes of 18 U.S.C. § 924(c)); *United States v. Davis*, 74 F.4th 50, 52–53 (2d Cir.) (18 U.S.C. § 1959(a)(1), VICAR murder, is divisible; New York intentional second-degree murder conviction is a “crime of violence” for purposes of 18 U.S.C. § 924(c)), *cert. denied*, 144 S. Ct. 436 (2023); *United States v. Morris*, 61 F.4th 311, 319 (2d Cir. 2023) (A VICAR assault offense is divisible into assault with a deadly weapon and assault resulting in serious bodily injury; assault with a deadly weapon is further divisible based on the underlying statute. VICAR assault with a deadly weapon predicated on a state crime that met the definition of a “crime of violence” qualifies under 18 U.S.C. § 924(c)); *United States v. Thomas*, 87 F.4th 267, 270–74 (4th Cir. 2023) (18 U.S.C. § 1959(a)(3) assault with a dangerous weapon is a “crime of violence” under 18 U.S.C. § 924(c)(3) after *United States v. Davis*, 588 U.S. 445 (2019); the district court was therefore not required to look to the elements of the predicate state offense underlying the VICAR conviction), *cert. denied*, No. 23-1168 (U.S. Oct. 7, 2024).

predicate offense under one of these provisions, courts employ a technical framework called the categorical approach for comparing the defendant's offense to the relevant provision.<sup>233</sup>

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<sup>233</sup> See *Mathis v. United States*, 579 U.S. 500, 504–05 (2016); *Descamps v. United States*, 570 U.S. 254, 257–64 (2013). For more detail on how to apply the categorical approach, see U.S. SENT'G COMM'N, PRIMER ON CATEGORICAL APPROACH (2024), <https://www.ussc.gov/guidelines/primers/categorical-approach>. See also, e.g., *United States v. Elmore*, No. 22-16539, 2024 WL 4439477 (9th Cir. Oct. 8, 2024) (remanding where VICAR predicated on California murder not generic federal murder); *Nicholson v. United States*, 78 F.4th 870, 880–81 (6th Cir. 2023) (Conspiracy to commit a violent crime in aid of racketeering, 18 U.S.C. § 1959(a)(6), is not a “crime of violence” for purposes of 18 U.S.C. § 924(c) because mere agreement to use force does not necessitate the “use, attempted use, or threatened use of physical force.” However, aiding and abetting a VICAR assault with a dangerous weapon is a “crime of violence” for purposes of § 924(c) because the government must prove that the underlying assault—which itself is a “crime of violence”—occurred, and there is no distinction between aiding and abetting such a crime and committing it.); *United States v. Delligatti*, 83 F.4th 113, 119–22 (2d Cir. 2023) (Under the modified categorical approach, a conviction for violating 18 U.S.C. § 1959(a)(5) (Violent crimes in aid of racketeering) premised upon an attempted murder under New York law is a “crime of violence” for purposes of 18 U.S.C. § 924(c). Attempted murder under New York law remains a “crime of violence” after *United States v. Taylor*, 596 U.S. 845 (2022), because it requires a substantial step towards the use (not mere threat) of force.), *cert. granted*, 144 S. Ct. 2603 (2024).