

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

NCHOLEION KASHANA HOLLIE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the
Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under Section 2B3.1(b)(4)(A) of the United States Sentencing Guidelines (“USSG”), courts apply a four-level increase to the offense level for Robbery if any person was abducted to facilitate commission of the offense or to facilitate escape. Comment 1 for USSG § 2B3.1 directs courts to Section 1B1.1 for the definition of “abducted.” Comment 1(A) to section 1B1.1 says, “‘Abducted’ means that a victim was forced to accompany an offender to a different location. For example, a bank robber’s forcing a bank teller from the bank into a getaway car would constitute an abduction.”

A circuit split has long existed on whether “accompany an offender to a different location” requires moving a person to a place separate from the site of the robbery (i.e., store or bank being robbed). The Third, Fourth, Fifth, and Tenth Circuits have held the answer is “no,” while the Sixth, Seventh, and Eleventh Circuits have held the answer is “yes.”

The question presented is:

Whether the Robbery guideline “abduction” enhancement under USSG § 2B3.1(b)(4)(A) requires moving a person to a place separate from the site of the robbery.

LIST OF PARTIES

All parties to the petitioner's Fifth Circuit proceedings are named in the caption of the case before this Court.

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PRAYER

Petitioner Ncholeion Kashana Hollie (“Ms. Hollie”) prays that a writ of certiorari be granted to review the judgment entered by the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is reported at No. 20-10638, 2021 WL 278334 (5th Cir. January 27, 2021). No petition for rehearing was timely filed. The district court did not issue a written opinion on the question presented.

JURISDICTION

The United States Court of Appeals entered a decision was January 27, 2021.

The petition is timely filed within 150 days of the January 27, 2021 order of the court of appeals denying Ms. Hollie's appeal. *See* Sup. Ct. R. 13.3 & Order Regarding Filing Deadlines (Mar. 19, 2020).

This Court has jurisdiction under 28 U.S.C. § 1254(1).

**UNITED STATES SENTENCING GUIDELINE
INVOLVED**

Section 2B3.1 of the United States Sentencing Guidelines, and its commentary, are reprinted in Appendix B (Pet. App. 3-5).

DIRECTLY RELATED PROCEEDINGS

United States District Court for the Northern District of Texas

United States of America v. Ncholeion Kashana Hollie,
No. 4:19-CR-352-3 (June 19, 2020)

United States Court of Appeals for the Fifth Circuit

United States of America v. Ncholeion Kashana Hollie,
No. 20-10638 (January 27, 2021)

United States v. Hollie, 834 F. App'x 122 (5th Cir. 2021)

STATEMENT OF THE CASE

A. The indictment and plea.

On December 3, 2019, a federal grand jury returned a single-count indictment charging Ncholeion Kashana Hollie (“Ms. Hollie”) with *Interference with Commerce by Robbery* (Violation of 18 U.S.C. § 1951(a)). On January 15, 2020, Ms. Hollie pleaded “Guilty” without a plea agreement to the charged offense. On January 30, 2020, the district court adjudged Hollie guilty of the charged offense.

B. The presentence report.

A United States Probation Officer prepared a presentence report (“the PSR”). The guideline for a violation of 18 U.S.C. § 1951(a) is USSG § 2B3.1. Section 2B3.1(b)(4)(A) says, “[i]f any person was abducted to facilitate commission of the offense or to facilitate escape,” the guideline range for the crime of robbery should be “increase[d] by 4 levels.” The PSR applied the Section 2B3.1(b)(4)(A) enhancement (“the Abduction Enhancement”). To support the Abduction Enhancement, the PSR said, “During the commission of the June 14, 2019, robbery, [a codefendant] forced employee J.M., to accompany him to the back room [of the store].”

Ms. Hollie objected to application of the Abduction Enhancement. Specifically, Ms. Hollie argued that abduction requires movement to a “different location.” The back room of the store being robbed was not a “different location.”

Thus, Ms. Hollie's codefendant did not move the victim to a different location. Following Fifth Circuit precedent, the district court overruled Ms. Hollie's objection.

C. The appeal.

On appeal, Ms. Hollie argued the district court erred by applying the Abduction Enhancement because the robber forced a store clerk to another room within the same store rather than a "different location." Ms. Hollie alerted the Fifth Circuit to the circuit split on the issue. However, Ms. Hollie acknowledged the issue was foreclosed by Fifth Circuit precedent (*see, e.g., United States v. Smith*, 822 F.3d 755 (5th Cir. 2016)).

The Government moved for summary affirmance citing the Fifth Circuit's binding authority. On January 27, 2021, the Fifth Circuit granted the Government's motion and issued an unpublished opinion. The opinion indicated the issue was foreclosed because the Fifth Circuit has repeatedly construed the Abduction Enhancement as applicable when a victim is forced from one part of a building to another. *United States v. Hollie*, 834 F. App'x 122 (5th Cir. 2021) *citing United States v. Buck*, 847 F.3d 267, 276-77 (5th Cir. 2017).

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to resolve the acknowledged and entrenched circuit split on whether the “different location” requirement in the abduction enhancement to the Robbery sentencing guideline (USSG § 2B3.1(b)(4)(A)) requires the offender to move a person to a place separate from the site of the robbery (*i.e.*, store or bank being robbed).

A. The circuits have been split on the issue of whether moving a person from one room to another in the same building constitutes enough of a change in location to sustain the 4-point enhancement under USSG §2B3.1(4)(a).

Section 2B3.1 of the Sentencing Guidelines provides that, “[i]f any person was abducted to facilitate commission of the offense or to facilitate escape,” the guideline range for the crime of robbery should be “increase[d] by 4 levels.” USSG § 2B3.1(b)(4)(A). Comment 1 to that section directs us to Section 1B1.1 for the definition of “abducted.” *Id.* § 2B3.1, comment. (n.1). Comment 1(A) to section 1B1.1 says, “‘Abducted’ means that a victim was forced to accompany an offender to a different location. For example, a bank robber's forcing a bank teller from the bank into a getaway car would constitute an abduction.” *Id.* § 1B1.1, comment. (n.1(A)).

The Court should grant certiorari because several United States courts of appeals have entered decision in conflict with the decisions of other United States courts of appeals on the same important matter. Sup. Ct. R. 10(a). Notwithstanding

that factual determination should usually be left to a district court, guidance for applying the law to common factual scenarios tends to “unify precedent” and ensure defendants are treated alike. *See Ornelas v. United States*, 517 U.S. 690, 697–98 (1996) (applying de novo review to determination of probable cause and reasonable suspicion). The federal circuits are split as to whether the definition of “abduction” may include forcing a victim to move between different areas within a single robbery site.

Several courts have held movement of a victim within a building does not constitute forcing the victim to a “different location.” *See e.g., United States v. Hill*, 963 F.3d 528, 536 (6th Cir. 2020) (“abduction” generally will refer to a place separate from the store or bank being robbed). The Sixth Circuit examines the whole text and structure in deciding how a “normal speaker of English” would understand the words “different location” in the circumstances in which they were used. *Id.* at 533. Typically reference of the “location” that has been robbed, a person is referring to the store, bank, or business that was robbed. *Id.* Ordinary speakers would not mean that the person robbed the “sales floor” or “point of sale” for a particular location. *Id.* The Eleventh Circuit relies upon substantially same reasoning. *See e.g., United States v. Whatley*, 719 F.3d 1206, 1223 (11th Cir. 2013) (applying ordinary meaning of the term “different location” to hold that forcing bank employees to move around at gunpoint did not constitute an abduction).

The Seventh Circuit has held the same but relies on more ad hoc evaluation of the facts. *See e.g., United States v. Eubanks*, 593 F.3d 645, 653 (7th Cir. 2010). The Eighth Circuit has not expressed a direct holding but applies the same rule as set out by the Seventh Circuit. *See e.g., United States v. Strong*, 826 F.3d 1109, 1117 (8th Cir. 2016) (“Merely dragging a victim from one room to another is not abduction.”) *citing United States v. Cooper*, 360 Fed. Appx. 657, 659 (7th Cir. 2010).

In contrast, the Fifth Circuit has held the Abduction Enhancement is proper even if the victim remains within a single building. *United States v. Johnson*, 619 F.3d 469, 474 (5th Cir. 2010). The Fifth Circuit has “repeatedly construed the ‘abduction’ enhancement as applicable when a victim is forced from one part of a building to another.” *United States v. Buck*, 847 F.3d 267, 276-77 (5th Cir. 2017). Several other courts agree with this expansive view of “abduction.” *United States v. Reynos*, 680 F.3d 283, 289 (3d Cir.), *reh'g en banc granted, opinion vacated*, 682 F.3d 1053 (3d Cir. 2012), *and opinion reinstated*, 700 F.3d 690 (3d Cir. 2012); *United States v. Osborne*, 514 F.3d 377, 389 (4th Cir. 2008); *United States v. Archuleta*, 865 F.3d 1280, 1288 (10th Cir. 2017) (change a victim’s “position” is the central issue).

B. The issue is important, and this case is an ideal vehicle for resolving it.

Presently, Robbery is the sixth most common crime for which federal offenders are sentenced. U.S. SENTENCING COMM’N, OVERVIEW OF FEDERAL CRIMINAL CASES, FISCAL YEAR 2020, at 4 (April 2021).¹ Approximately two percent of offenders sentenced in federal court are charged with Robbery. *Id.* Courts are applying the Abduction Enhancement more frequently:

2017 – applied to 6.9% of offenders²

2018 – applied to 6.4% of offenders³

2019 – applied to 8.4% of offenders⁴

2020 – applied to 9.2% of offenders⁵

¹ Found at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/FY20_Overview_Federal_Criminal_Cases.pdf (last accessed on June 24, 2021).

² U.S. SENTENCING COMM’N, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS OFFENDER BASED FISCAL YEAR 2017, found at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2017/Use_of_SOC_Offender_Based.pdf (Last accessed June 24, 2021).

³ U.S. SENTENCING COMM’N, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS OFFENDER BASED FISCAL YEAR 2018, found at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2018/Use_of_SOC_Offender_Based.pdf (Last accessed June 24, 2021).

⁴ U.S. SENTENCING COMM’N, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS OFFENDER BASED FISCAL YEAR 2019, found at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2019/Use_of_SOC_Offender_Based.pdf (Last accessed June 24, 2021).

⁵ U.S. SENTENCING COMM’N, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS OFFENDER BASED FISCAL YEAR 2020, found at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/Use_of_SOC_Offender_Based.pdf (Last accessed June 24, 2021).

On average, circuits following the Fifth Circuit Rule are applying higher sentences in Robbery cases compared to courts following the Sixth Circuit Rule.⁶

Ms. Hollie’s case provides the quintessential fact scenario contemplated by the split among circuits. Specifically, during the commission of the store robbery an offender forced a store employee to accompany him to the back room of the store. This distilled factual scenario is the mine run for disputes about application of USSG § 2B3.1(b)(4)(A). *See, e.g., United States v. Buck*, 847 F.3d 267, 276-77 (5th Cir. 2017) *compared to United States v. Hill*, 963 F.3d 528, 536 (6th Cir. 2020). Ms. Hollie’s case provides an opportunity for this Court to announce a rule that is unifying, clear, and easily applied.

C. The Fifth Circuit’s decision is incorrect.

The Fifth Circuit considers practically any movement to result in a victim arriving at a “different location.” Despite claiming to apply a flexible understanding of “different location,” this flexibility has not bent in any case to exclude any movement inside a single building from the definition of “abduction.” *See e.g. United States v. Shofner*, 810 F. App’x 367, 368 (5th Cir. 2020); *United States v. Alexander*, 809 F. App’x 269 (5th Cir. 2020); *United States v. Burns*, 802 F. App’x 860, 861 (5th Cir. 2020); *United States v. Mosley*, 782 F. App’x 353, 354 (5th Cir.

⁶ U.S. SENTENCING COMM’N, 2020 FEDERAL SENTENCING STATISTICS, OCTOBER 1, 2019, THROUGH SEPTEMBER 30, 2020, found at <https://www.ussc.gov/research/data-reports/geography/2020-federal-sentencing-statistics> (Last accessed on June 24, 2021).

2019), *cert. denied*, 140 S. Ct. 2537, 206 L. Ed. 2d 478 (2020); *United States v. McCain-Sims*, 695 F. App'x 762, 767 (5th Cir. 2017); *United States v. Buck*, 847 F.3d 267, 277 (5th Cir. 2017). Indeed, rather than the understanding of “abduction” being “flexible,” it might be better understood to be all-encompassing. The Fifth Circuit has allowed the meaning to embrace every permutation within the dictionary. But a dictionary is “a museum of words, an historical catalog rather than a means to decode the work of legislatures.” *United States v. Hill*, 963 F.3d 528, 533 (6th Cir. 2020) *citing* TEXT, HISTORY, AND STRUCTURE IN STATUTORY INTERPRETATION, 17 HARV. J. L. & PUB. POL'Y 61, 67 (1994).

In the context of the offenders, “different location” does not contemplate different sections of the store. When a defendant is responsible for a codefendant’s conduct in furtherance of a crime, the guideline analysis centers on the foreseeability of that conduct. USSG § 1B1.3. That is one reason the Court should give ordinary meaning to terms used in the Guidelines. In the context of Section 2B3.1, “location” can mean the place of activity, and the activity in this case is a robbery. *Hill*, 963 F.3d at 533–34. From the perspective of all persons involved, the robbed “location” was the business location being robbed. *See id.* None of the robbers or the victim would consider the robbery to have occurred in two discrete locations. *See id.*

In the context of the guideline’s commentary, a store is a single location. Courts should also assign a meaning to “different location” that comports with the

example given in the commentary. *Hill*, 963 F.3d at 534–35. Included in the definition of “abducted” is an example, “[A] bank robber’s forcing a bank teller from the bank into a getaway car would constitute an abduction.” USSG § 1B1.1, comment. n. 1(A). This example has the hypothetical actors exiting the robbed location and entering a second location, the getaway car. One location is the bank. The “different” location is outside of the bank and in the getaway car.

In the context of the word “abducted,” merely moving around within the store does not constitute movement to a “different location.” Abduction is closely related and often synonymous with kidnapping. *Whatley*, 719 F.3d at 1223. The ideas of abduction and kidnapping do not include merely shuffling people around from room to room within the same store. *See id.*

In the context of the other enhancement provision contained in the same subsection, “abducted” should not include directing a victim to go into a different room within the same store. In addition to the four-level Abduction Enhancement, Section 2B3.1(b)(4) has a second enhancement for physical restraint of a victim. USSG § 2B3.1(b)(4)(B). The Fifth Circuit has held, “physical restraint enhancements are appropriate in cases where defendants force their victims to move into confined spaces at gunpoint and instruct the victims not to leave.” *United States v. Garcia*, 857 F.3d 708, 712 (5th Cir. 2017). This is the exact conduct the expanded view of “abducted” subsumes. To give meaning to the “physical restraint”

enhancement, the Abduction Enhancement cannot mean the same thing. *Hill*, 963 F.3d at 535.

For all of these reasons, the Fifth Circuit's entrenched caselaw construing the "abduction" enhancement as applicable when a victim is forced from one part of a building to another is incorrect. This Court should grant review on this important issue, and it should reverse.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

January 27, 2021

Lyle W. Cayce
Clerk

No. 20-10638
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

NCHOLEION KASHANA HOLLIE,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:19-CR-352-3

Before CLEMENT, HIGGINSON, and ENGELHARDT, *Circuit Judges.*

PER CURIAM:*

Ncholeion Kashana Hollie appeals the 108-month sentence imposed following her conviction for interference with commerce by robbery. She argues that the district court erred in applying the abduction enhancement under U.S.S.G. § 2B3.1(b)(4)(A) because the term “different location” does

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

not include movement from one room to another in the same building. She recognizes that her argument is foreclosed by this court's precedent but raises the issue to preserve it for further review. The Government moves for summary affirmance, asserting that Hollie's argument is foreclosed.

The parties are correct that Hollie's argument is foreclosed as we have "repeatedly construed the 'abduction' enhancement as applicable when a victim is forced from one part of a building to another." *United States v. Buck*, 847 F.3d 267, 276-77 (5th Cir. 2017). Accordingly, the Government's motion for summary affirmance is GRANTED, *see Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969), the Government's alternative motion for an extension of time to file a brief is DENIED as unnecessary, and the judgment of the district court is AFFIRMED.

APPENDIX B

<i>Historical Note</i>	Effective November 1, 1987. Amended effective November 1, 1989 (amendments 108 and 109); November 1, 1997 (amendment 551); November 1, 2001 (amendment 617); November 1, 2002 (amendment 637); November 1, 2003 (amendment 654); November 1, 2007 (amendments 699 and 703); November 1, 2013 (amendment 777); November 1, 2015 (amendment 791).
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3. ROBBERY, EXTORTION, AND BLACKMAIL

§2B3.1. Robbery

- (a) Base Offense Level: **20**
- (b) Specific Offense Characteristics
 - (1) If the property of a financial institution or post office was taken, or if the taking of such property was an object of the offense, increase by **2** levels.
 - (2) (A) If a firearm was discharged, increase by **7** levels; (B) if a firearm was otherwise used, increase by **6** levels; (C) if a firearm was brandished or possessed, increase by **5** levels; (D) if a dangerous weapon was otherwise used, increase by **4** levels; (E) if a dangerous weapon was brandished or possessed, increase by **3** levels; or (F) if a threat of death was made, increase by **2** levels.
 - (3) If any victim sustained bodily injury, increase the offense level according to the seriousness of the injury:

DEGREE OF BODILY INJURY	INCREASE IN LEVEL
(A) Bodily Injury	add 2
(B) Serious Bodily Injury	add 4
(C) Permanent or Life-Threatening Bodily Injury	add 6
(D) If the degree of injury is between that specified in subdivisions (A) and (B),	add 3 levels; or
(E) If the degree of injury is between that specified in subdivisions (B) and (C),	add 5 levels.

Provided, however, that the cumulative adjustments from (2) and (3) shall not exceed **11** levels.

- (4) (A) If any person was abducted to facilitate commission of the offense or to facilitate escape, increase by **4** levels; or (B) if any person was

physically restrained to facilitate commission of the offense or to facilitate escape, increase by **2** levels.

- (5) If the offense involved carjacking, increase by **2** levels.
- (6) If a firearm, destructive device, or controlled substance was taken, or if the taking of such item was an object of the offense, increase by **1** level.
- (7) If the loss exceeded \$20,000, increase the offense level as follows:

LOSS (APPLY THE GREATEST)	INCREASE IN LEVEL
(A) \$20,000 or less	no increase
(B) More than \$20,000	add 1
(C) More than \$95,000	add 2
(D) More than \$500,000	add 3
(E) More than \$1,500,000	add 4
(F) More than \$3,000,000	add 5
(G) More than \$5,000,000	add 6
(H) More than \$9,500,000	add 7 .

(c) Cross Reference

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

Commentary

Statutory Provisions: 18 U.S.C. §§ 1951, 2113, 2114, 2118(a), 2119. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. “**Firearm**,” “**destructive device**,” “**dangerous weapon**,” “**otherwise used**,” “**brandished**,” “**bodily injury**,” “**serious bodily injury**,” “**permanent or life-threatening bodily injury**,” “**abducted**,” and “**physically restrained**” are defined in the Commentary to §1B1.1 (Application Instructions).

“**Carjacking**” means the taking or attempted taking of a motor vehicle from the person or presence of another by force and violence or by intimidation.

2. Consistent with Application Note 1(E)(ii) of §1B1.1 (Application Instructions), an object shall be considered to be a dangerous weapon for purposes of subsection (b)(2)(E) if (A) the object closely resembles an instrument capable of inflicting death or serious bodily injury; or (B) the defendant used the object in a manner that created the impression that the object was an instrument capable of inflicting death or serious bodily injury (*e.g.*, a defendant wrapped a hand in a towel during a bank robbery to create the appearance of a gun).

3. “**Loss**” means the value of the property taken, damaged, or destroyed.
4. The combined adjustments for weapon involvement and injury are limited to a maximum enhancement of 11 levels.
5. If the defendant intended to murder the victim, an upward departure may be warranted; *see* §2A2.1 (Assault with Intent to Commit Murder; Attempted Murder).
6. “A threat of death,” as used in subsection (b)(2)(F), may be in the form of an oral or written statement, act, gesture, or combination thereof. Accordingly, the defendant does not have to state expressly his intent to kill the victim in order for the enhancement to apply. For example, an oral or written demand using words such as “Give me the money or I will kill you”, “Give me the money or I will pull the pin on the grenade I have in my pocket”, “Give me the money or I will shoot you”, “Give me your money or else (where the defendant draws his hand across his throat in a slashing motion)”, or “Give me the money or you are dead” would constitute a threat of death. The court should consider that the intent of this provision is to provide an increased offense level for cases in which the offender(s) engaged in conduct that would instill in a reasonable person, who is a victim of the offense, a fear of death.

Background: Possession or use of a weapon, physical injury, and unlawful restraint sometimes occur during a robbery. The guideline provides for a range of enhancements where these factors are present.

Although in pre-guidelines practice the amount of money taken in robbery cases affected sentence length, its importance was small compared to that of the other harm involved. Moreover, because of the relatively high base offense level for robbery, an increase of 1 or 2 levels brings about a considerable increase in sentence length in absolute terms. Accordingly, the gradations for property loss increase more slowly than for simple property offenses.

The guideline provides an enhancement for robberies where a victim was forced to accompany the defendant to another location, or was physically restrained by being tied, bound, or locked up.

<i>Historical Note</i>	Effective November 1, 1987. Amended effective June 15, 1988 (amendments 14 and 15); November 1, 1989 (amendments 110 and 111); November 1, 1990 (amendments 314, 315, and 361); November 1, 1991 (amendment 365); November 1, 1993 (amendment 483); November 1, 1997 (amendments 545 and 552); November 1, 2000 (amendment 601); November 1, 2001 (amendment 617); November 1, 2010 (amendment 746); November 1, 2015 (amendment 791); November 1, 2018 (amendment 805).
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§2B3.2. Extortion by Force or Threat of Injury or Serious Damage

- (a) Base Offense Level: **18**
- (b) Specific Offense Characteristics
 - (1) If the offense involved an express or implied threat of death, bodily injury, or kidnapping, increase by **2** levels.
 - (2) If the greater of the amount demanded or the loss to the victim exceeded \$20,000, increase by the corresponding number of levels from the table in §2B3.1(b)(7).

PART B — GENERAL APPLICATION PRINCIPLES

§1B1.1. Application Instructions

- (a) The court shall determine the kinds of sentence and the guideline range as set forth in the guidelines (*see* 18 U.S.C. § 3553(a)(4)) by applying the provisions of this manual in the following order, except as specifically directed:
- (1) Determine, pursuant to §1B1.2 (Applicable Guidelines), the offense guideline section from Chapter Two (Offense Conduct) applicable to the offense of conviction. *See* §1B1.2.
 - (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.
 - (3) Apply the adjustments as appropriate related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three.
 - (4) If there are multiple counts of conviction, repeat steps (1) through (3) for each count. Apply Part D of Chapter Three to group the various counts and adjust the offense level accordingly.
 - (5) Apply the adjustment as appropriate for the defendant's acceptance of responsibility from Part E of Chapter Three.
 - (6) Determine the defendant's criminal history category as specified in Part A of Chapter Four. Determine from Part B of Chapter Four any other applicable adjustments.
 - (7) Determine the guideline range in Part A of Chapter Five that corresponds to the offense level and criminal history category determined above.
 - (8) For the particular guideline range, determine from Parts B through G of Chapter Five the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution.
- (b) The court shall then consider Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence. *See* 18 U.S.C. § 3553(a)(5).

- (c) The court shall then consider the applicable factors in 18 U.S.C. § 3553(a) taken as a whole. *See* 18 U.S.C. § 3553(a).

Commentary

Application Notes:

1. The following are definitions of terms that are used frequently in the guidelines and are of general applicability (except to the extent expressly modified in respect to a particular guideline or policy statement):
 - (A) “**Abducted**” means that a victim was forced to accompany an offender to a different location. For example, a bank robber’s forcing a bank teller from the bank into a getaway car would constitute an abduction.
 - (B) “**Bodily injury**” means 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.
 - (C) “**Brandished**” with reference to a dangerous weapon (including a firearm) means that all or part of the weapon was displayed, or the presence of the weapon was otherwise made known to another person, in order to intimidate that person, regardless of whether the weapon was directly visible to that person. Accordingly, although the dangerous weapon does not have to be directly visible, the weapon must be present.
 - (D) “**Court protection order**” means “protection order” as defined by 18 U.S.C. § 2266(5) and consistent with 18 U.S.C. § 2265(b).
 - (E) “**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).
 - (F) “**Departure**” means (i) for purposes other than those specified in subdivision (ii), imposition of a sentence outside the applicable guideline range or of a sentence that is otherwise different from the guideline sentence; and (ii) for purposes of §4A1.3 (Departures Based on Inadequacy of Criminal History Category), assignment of a criminal history category other than the otherwise applicable criminal history category, in order to effect a sentence outside the applicable guideline range. “**Depart**” means grant a departure.

“**Downward departure**” means departure that effects a sentence less than a sentence that could be imposed under the applicable guideline range or a sentence that is otherwise less than the guideline sentence. “**Depart downward**” means grant a downward departure.

“**Upward departure**” means departure that effects a sentence greater than a sentence that could be imposed under the applicable guideline range or a sentence that is otherwise greater than the guideline sentence. “**Depart upward**” means grant an upward departure.
 - (G) “**Destructive device**” means any article described in 26 U.S.C. § 5845(f) (including an explosive, incendiary, or poison gas — (i) bomb, (ii) grenade, (iii) rocket having a propellant charge of more than four ounces, (iv) missile having an explosive or incendiary charge of more than one-quarter ounce, (v) mine, or (vi) device similar to any of the devices described in the preceding clauses).

- (H) **“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. A weapon, commonly known as a “BB” or pellet gun, that uses air or carbon dioxide pressure to expel a projectile is a dangerous weapon but not a firearm.
 - (I) **“Offense”** means the offense of conviction and all relevant conduct under §1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context. The term **“instant”** is used in connection with “offense,” “federal offense,” or “offense of conviction,” as the case may be, to distinguish the violation for which the defendant is being sentenced from a prior or subsequent offense, or from an offense before another court (*e.g.*, an offense before a state court involving the same underlying conduct).
 - (J) **“Otherwise used”** with reference to a dangerous weapon (including a firearm) means that the conduct did not amount to the discharge of a firearm but was more than brandishing, displaying, or possessing a firearm or other dangerous weapon.
 - (K) **“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. 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.
 - (L) **“Physically restrained”** means the forcible restraint of the victim such as by being tied, bound, or locked up.
 - (M) **“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. In addition, “serious bodily injury” is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.
2. Definitions of terms also may appear in other sections. Such definitions are not designed for general applicability; therefore, their applicability to sections other than those expressly referenced must be determined on a case by case basis.

The term **“includes”** is not exhaustive; the term **“e.g.”** is merely illustrative.

3. The list of “Statutory Provisions” in the Commentary to each offense guideline does not necessarily include every statute covered by that guideline. In addition, some statutes may be covered by more than one guideline.
4. (A) **Cumulative Application of Multiple Adjustments within One Guideline.**—The offense level adjustments from more than one specific offense characteristic within an offense guideline are applied cumulatively (added together) unless the guideline specifies that only the greater (or greatest) is to be used. Within each specific offense characteristic subsection, however, the offense level adjustments are alternative; only the one that best describes the conduct is to be used. For example, in §2A2.2(b)(3), pertaining to degree of bodily injury, the subdivision that best describes the level of bodily injury is used; the adjustments for different degrees of bodily injury (subdivisions (A) – (E)) are not added together.

§1B1.2

- (B) **Cumulative Application of Multiple Adjustments from Multiple Guidelines.**—Absent an instruction to the contrary, enhancements under Chapter Two, adjustments under Chapter Three, and determinations under Chapter Four are to be applied cumulatively. In some cases, such enhancements, adjustments, and determinations may be triggered by the same conduct. For example, shooting a police officer during the commission of a robbery may warrant an injury enhancement under §2B3.1(b)(3) and an official victim adjustment under §3A1.2, even though the enhancement and the adjustment both are triggered by the shooting of the officer.
5. Where two or more guideline provisions appear equally applicable, but the guidelines authorize the application of only one such provision, use the provision that results in the greater offense level. *E.g.*, in §2A2.2(b)(2), if a firearm is both discharged and brandished, the provision applicable to the discharge of the firearm would be used.
6. **Use of Abbreviated Guideline Titles.**—Whenever a guideline makes reference to another guideline, a parenthetical restatement of that other guideline’s heading accompanies the initial reference to that other guideline. This parenthetical is provided only for the convenience of the reader and is not intended to have substantive effect. In the case of lengthy guideline headings, such a parenthetical restatement of the guideline heading may be abbreviated for ease of reference. For example, references to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) may be abbreviated as follows: §2B1.1 (Theft, Property Destruction, and Fraud).

Background: The court must impose a sentence “sufficient, but not greater than necessary,” to comply with the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2). *See* 18 U.S.C. § 3553(a). Subsections (a), (b), and (c) are structured to reflect the three-step process used in determining the particular sentence to be imposed. If, after step (c), the court imposes a sentence that is outside the guidelines framework, such a sentence is considered a “*variance*”. *See Irizarry v. United States*, 553 U.S. 708, 709–16 (2008) (describing within-range sentences and departures as “sentences imposed under the framework set out in the Guidelines”).

<i>Historical Note</i>	Effective November 1, 1987. Amended effective January 15, 1988 (amendment 1); November 1, 1989 (amendments 69–72 and 303); November 1, 1990 (amendment 361); November 1, 1991 (amendment 388); November 1, 1993 (amendment 497); November 1, 1997 (amendments 545 and 546); November 1, 2000 (amendments 591 and 601); November 1, 2001 (amendment 617); October 27, 2003 (amendment 651); November 1, 2003 (amendment 661); November 1, 2006 (amendment 684); November 1, 2010 (amendment 741); November 1, 2014 (amendment 789); November 1, 2018 (amendment 805).
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§1B1.2. Applicable Guidelines

- (a) Determine the offense guideline section in Chapter Two (Offense Conduct) applicable to the offense of conviction (*i.e.*, the offense conduct charged in the count of the indictment or information of which the defendant was convicted). However, in the case of a plea agreement (written or made orally on the record) containing a stipulation that specifically establishes a more serious offense than the offense of conviction, determine the offense guideline section in Chapter Two applicable to the stipulated offense.