

## APPENDIX A

*United States v. Gary Paul Karr,*  
No. 21-50219 (5th Cir. May 12, 2022)

United States Court of Appeals  
for the Fifth Circuit

United States Court of Appeals  
Fifth Circuit

**FILED**

May 12, 2022

Lyle W. Cayce  
Clerk

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No. 21-50219  
Summary Calendar

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UNITED STATES OF AMERICA,

*Plaintiff—Appellee,*

*versus*

GARY PAUL KARR,

*Defendant—Appellant.*

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Appeal from the United States District Court  
for the Western District of Texas  
USDC No. 1:99-CR-274-1

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Before JOLLY, WILLETT, and ENGELHARDT, *Circuit Judges.*

PER CURIAM:\*

Gary Paul Karr received a five-count indictment for his role in the deaths of Madalyn Murray O’Hair, Robin Murray O’Hair, and Danny Fry. While the jury convicted Karr on four of the five counts, it acquitted him of conspiracy to kidnap. And most importantly for this appeal, the jury found

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\* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

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that his conduct underlying Count 3—traveling in interstate commerce to commit a crime of violence—did not result in the death of another person. At resentencing however, the district court applied § 2B3.1(c) of the Sentencing Guidelines, which cross-references the offense guideline for murder, U.S.S.G. § 2A1.1. The district court held that a preponderance of the evidence showed that Karr committed murder. To reach this holding, the district court relied in part on a 20-year-old out-of-court statement by Karr’s now-deceased co-conspirator, David Waters.

Karr argues that the district court erred in applying § 2B3.1(c) for two reasons. First, he argues that this was unconstitutional because it relied on acquitted conduct. The jury had acquitted him of conduct resulting in the death of another person, which he argues cannot be reconciled with the district court’s application of the murder guideline. Karr argues that it violates the Fifth and Sixth Amendments to consider acquitted conduct at sentencing. However, Karr concedes that this argument is foreclosed by the Supreme Court’s holding in *United States v. Watts*, 519 U.S. 148, 156–57 (1997), and this court’s holdings in *United States v. Farias*, 469 F.3d 393, 399 (5th Cir. 2006) and *United States v. Preston*, 544 F. App’x 527, 528 (5th Cir. 2013) (per curiam). Karr merely wishes to preserve the issue for further review.<sup>1</sup>

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<sup>1</sup> Distinguished jurists have called *Watts* into question. See, e.g., *United States v. Jones*, 135 S. Ct. 8, 8–9 (2014) (Scalia, J., joined by Thomas, J., and Ginsberg, J., dissenting from denial of certiorari) (encouraging the Court to decide whether the Due Process Clause and the Sixth Amendment’s jury trial right permit judges to sentence defendants based on uncharged or acquitted conduct); *United States v. Sabillon-Umana*, 772 F.3d 1328 (10th Cir. 2014) (Gorsuch, J., majority) (citing Justice Scalia’s dissent in *Jones*); *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing en banc) (“Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial.”).

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Additionally, Karr argues that the district court erred by relying on Waters's statement, which was unreliable because Waters was more culpable and had an incentive to inculcate Karr to secure a more favorable plea agreement. The district court only had to find that § 2B3.1(c) applied based on "a preponderance of the relevant and sufficiently reliable evidence" — not beyond a reasonable doubt. *United States v. Barfield*, 941 F.3d 757, 762 (5th Cir. 2019). The district court concluded that even disregarding Waters's statement, other evidence in the record supported application of U.S.S.G. § 2B3.1(c). Karr only objects to the district court's reliance on Waters's statement and failed to challenge the sufficiency of the other information the district court relied on. Because Karr abandoned any objection to the district court's alternative bases for applying § 2B3.1(c), he would not be entitled to the relief he seeks even if he is right that Waters's statement was unreliable. *See United States v. Elashyi*, 554 F.3d 480, 494 n.6 (5th Cir. 2008).

AFFIRMED.

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Karr argues that *Watts* never actually decided whether relying on acquitted or uncharged conduct violates the Fifth and Sixth Amendments. Instead, Karr argues that *Watts* focused only on whether the sentencing guidelines and applicable statutes allowed district courts to do so. Nevertheless, as Karr concedes, our court has held that *Watts* also bars challenges based on the Fifth and Sixth Amendments. *See Farias*, 469 F.3d at 399; *Preston*, 544 F. App'x at 528.

## APPENDIX B

U.S.S.G. §2A1.1

## CHAPTER TWO

# OFFENSE CONDUCT

### Introductory Commentary

Chapter Two pertains to offense conduct. The chapter is organized by offenses and divided into parts and related sections that may cover one statute or many. Each offense has a corresponding base offense level and may have one or more specific offense characteristics that adjust the offense level upward or downward. Certain factors relevant to the offense that are not covered in specific guidelines in Chapter Two are set forth in Chapter Three, Parts A (Victim-Related Adjustments), B (Role in the Offense), and C (Obstruction and Related Adjustments); Chapter Four, Part B (Career Offenders and Criminal Livelihood); and Chapter Five, Part K (Departures).

*Historical  
Note*

Effective November 1, 1987. Amended effective November 1, 2011 (amendment 758).

## PART A — OFFENSES AGAINST THE PERSON

### 1. HOMICIDE

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#### §2A1.1. First Degree Murder

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- (a) Base Offense Level: 43

#### Commentary

**Statutory Provisions:** 18 U.S.C. §§ 1111, 1841(a)(2)(C), 1992(a)(7), 2113(e), 2118(c)(2), 2199, 2282A, 2291, 2332b(a)(1), 2340A; 21 U.S.C. § 848(e). For additional statutory provision(s), *see* Appendix A (Statutory Index).

#### Application Notes:

1. **Applicability of Guideline.**—This guideline applies in cases of premeditated killing. This guideline also applies when death results from the commission of certain felonies. For example, this guideline may be applied as a result of a cross reference (*e.g.*, a kidnapping in which death occurs, *see* §2A4.1(c)(1)), or in cases in which the offense level of a guideline is calculated using the underlying crime (*e.g.*, murder in aid of racketeering, *see* §2E1.3(a)(2)).
2. **Imposition of Life Sentence.**—
  - (A) **Offenses Involving Premeditated Killing.**—In the case of premeditated killing, life imprisonment is the appropriate sentence if a sentence of death is not imposed. A downward departure would not be appropriate in such a case. A downward departure from a mandatory statutory term of life imprisonment is permissible only in cases in which the government files a motion for a downward departure for the defendant's substantial assistance, as provided in 18 U.S.C. § 3553(e).

(B) **Felony Murder.**—If the defendant did not cause the death intentionally or knowingly, a downward departure may be warranted. For example, a downward departure may be warranted if in robbing a bank, the defendant merely passed a note to the teller, as a result of which the teller had a heart attack and died. The extent of the departure should be based upon the defendant’s state of mind (*e.g.*, recklessness or negligence), the degree of risk inherent in the conduct, and the nature of the underlying offense conduct. However, departure below the minimum guideline sentence provided for second degree murder in §2A1.2 (Second Degree Murder) is not likely to be appropriate. Also, because death obviously is an aggravating factor, it necessarily would be inappropriate to impose a sentence at a level below that which the guideline for the underlying offense requires in the absence of death.

3. **Applicability of Guideline When Death Sentence Not Imposed.**—If the defendant is sentenced pursuant to 18 U.S.C. § 3591 *et seq.* or 21 U.S.C. § 848(e), a sentence of death may be imposed under the specific provisions contained in that statute. This guideline applies when a sentence of death is not imposed under those specific provisions.

<i>Historical Note</i>	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 82); November 1, 1990 (amendment 310); November 1, 1993 (amendment 476); November 1, 2002 (amendment 637); November 1, 2004 (amendment 663); November 1, 2006 (amendment 685); November 1, 2007 (amendments 699 and 700); November 1, 2010 (amendment 746).
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**§2A1.2. Second Degree Murder**

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(a) Base Offense Level: **38**

**Commentary**

**Statutory Provisions:** 18 U.S.C. §§ 1111, 1841(a)(2)(C), 2199, 2282A, 2291, 2332b(a)(1), 2340A. For additional statutory provision(s), *see* Appendix A (Statutory Index).

**Application Note:**

1. **Upward Departure Provision.**—If the defendant’s conduct was exceptionally heinous, cruel, brutal, or degrading to the victim, an upward departure may be warranted. *See* §5K2.8 (Extreme Conduct).

<i>Historical Note</i>	Effective November 1, 1987. Amended effective November 1, 2002 (amendment 637); November 1, 2004 (amendment 663); November 1, 2006 (amendment 685); November 1, 2007 (amendments 699 and 700).
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**§2A1.3. Voluntary Manslaughter**

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(a) Base Offense Level: **29**

## APPENDIX C

U.S.S.G. §2B3.1



<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

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#### §2B3.1. Robbery

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- (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 <b>2</b>
(B) Serious Bodily Injury	add <b>4</b>
(C) Permanent or Life-Threatening Bodily Injury	add <b>6</b>
(D) If the degree of injury is between that specified in subdivisions (A) and (B),	add <b>3</b> levels; or
(E) If the degree of injury is between that specified in subdivisions (B) and (C),	add <b>5</b> 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

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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 <b>1</b>
(C) More than \$95,000	add <b>2</b>
(D) More than \$500,000	add <b>3</b>
(E) More than \$1,500,000	add <b>4</b>
(F) More than \$3,000,000	add <b>5</b>
(G) More than \$5,000,000	add <b>6</b>
(H) More than \$9,500,000	add <b>7</b> .

### (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**

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- (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).