

ELEVENTH CIRCUIT DISTINGUISHES THREATS OF DEATH FROM THREATS OF  
HARM DURING ROBBERIES

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In *United States v. Perez*, the Eleventh Circuit Court of Appeals held that Defendant-Appellant Roberto Arturo Perez's conduct while robbing two banks did not constitute threats of death, vacating Perez's sentence and remanding to the District Court for the Southern District of Florida for resentencing.<sup>1</sup> This case had no bearing on Perez's guilt, as he pled guilty to both charges.<sup>2</sup> Following his guilty plea, Perez was assigned a combined adjusted offense level of twenty-three in his Pre-Sentence Investigation Report which included a two-level enhancement for making threats of death.<sup>3</sup> Based on this offense level and criminal history category, Perez's sentencing guideline range was forty-six to fifty-seven months in prison.<sup>4</sup> Perez appealed, arguing that the district court erred in applying the two-level threat-of-death enhancement during his sentencing.<sup>5</sup> On appeal, the court ultimately agreed with Perez that his conduct would not have generated a fear of death in a reasonable person;<sup>6</sup> therefore, the appeals court remanded the case to the district court for resentencing.<sup>7</sup>

On March 21, 2017, Perez successfully robbed \$5,000 from Chase Bank by handing a demand note to the teller.<sup>8</sup> Perez walked into the bank with no disguise or weapon and gave the teller a note that stated, "[p]ut \$5[,000 in an envelope. Put the note inside as well. Stay calm. Do this and no one will get hurt. Press the alarm after I walk out. I have kids to feed. Thanks."<sup>9</sup> The teller placed \$1,000 installments in the envelope, while Perez continued to point to the note and refused to leave until the teller deposited the full amount.<sup>10</sup> Once the \$5,000 was in the envelope, Perez took the money and walked out of the bank.<sup>11</sup>

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<sup>1</sup> *U.S. v. Perez*, 943 F.3d 1329, 1337 (11th Cir. 2019).

<sup>2</sup> *Id.* at 1331.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* The United States Sentencing Guidelines determine the durations of bank robbery sentences based on the threat of harm expressed or implied by the defendant. U.S.S.G. § 2B3.1(b)(2).

<sup>5</sup> *Perez*, 943 F.3d at 1331.

<sup>6</sup> *Id.* at 1336.

<sup>7</sup> *Id.* at 1337.

<sup>8</sup> *Id.* at 1331.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Perez*, 943 F.3d at 1331.

Six days later, Perez attempted to rob \$20,000 from Wells Fargo Bank, but this time it was to no avail.<sup>12</sup> Again, Perez walked into the bank with no disguise or weapon and handed a note to the teller that said, “act normal and stay calm. [T]ake 20,000\$ [sic] and put it in an envelope and nobody gets hurt[.] [P]lease sound the alarm in 10 minutes[.] I got kids to feed[.] [T]hanks.”<sup>13</sup> This time, though, the bank teller alerted the bank’s alarm system and went into a back room to tell her supervisor about the robbery.<sup>14</sup> The teller then stalled Perez until law enforcement arrested him.<sup>15</sup> Subsequently, the United States charged Perez with robbery and attempted robbery in violation of 18 U.S.C. § 2113(a), and Perez pled guilty to both charges without a plea agreement.<sup>16</sup>

During the Pre-Sentence Investigation, investigators assigned Perez an offense level of twenty-three based on his conduct during the robberies and his criminal history.<sup>17</sup> According to the sentencing guidelines, the “base offense level” for robbery is twenty.<sup>18</sup> This level may be increased when “specific offense characteristics” transpire during the robbery.<sup>19</sup> Based on these characteristics, a two-level increase occurs “if a threat of death was made.”<sup>20</sup> The district court agreed with the report that Perez’s conduct warranted application of the threat-of-death enhancement, concluding that elements of Perez’s conduct could have caused a reasonable person to fear harm “regardless of the absence [of] weapons or threatening non-verbal cues.”<sup>21</sup> As a result of Perez’s increased offense level, he faced a longer prison term than he would have if the investigators and the district court did not apply the threat-of-death enhancement.<sup>22</sup> Perez appealed to the Eleventh Circuit, arguing that the district court “imposed the threat-of-death enhancement based upon a lower finding than necessary” and that, even if the correct legal standard was applied, the court “erred by finding the facts of this case [as] warrant[ing] the imposition of the threat-of-death enhancement.”<sup>23</sup>

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Perez*, 943 F.3d at 1331.

<sup>18</sup> U.S.S.G. § 2B3.1(a).

<sup>19</sup> *Id.* § 2B3.1(b).

<sup>20</sup> *Id.* § 2B3.1(b)(2)(F).

<sup>21</sup> *Perez*, 943 F.3d at 1332.

<sup>22</sup> *See id.* The threat-of-death enhancement resulted in Perez facing forty-six to fifty-seven months’ imprisonment, and the district court sentenced Perez to forty-six months, “because it determined that Perez’s threats were less severe than others that qualify for the enhancement.” *Id.* at 1331–32.

<sup>23</sup> *Id.* at 1332.

On appeal, the Eleventh Circuit agreed with Perez that his “conduct and language did not rise to the level of a threat of death.”<sup>24</sup> In its opinion, the three-judge panel<sup>25</sup> noted that a general threat of harm is inherent in every bank robbery.<sup>26</sup> It is because of this inherent threat that the sentencing guidelines differentiate between “bad robberies” and “worse robberies.”<sup>27</sup> When considering the application of the threat-of-death enhancement, as done in this case, the court applies an objective test to determine “whether the defendant’s overall conduct would have instilled the fear of death in a reasonable person.”<sup>28</sup> The defendant’s intent is not determinative, nor is the victim’s subjective fear.<sup>29</sup> Further, the determination is fact-sensitive and considers the totality of the circumstances.<sup>30</sup>

In its analysis, the court opined that not only did the circumstances surrounding Perez’s robbery not create a threat of death, but Perez’s conduct would actually lessen a reasonable victim’s fear.<sup>31</sup> The court acknowledged that there was indisputably a threat of harm in each of Perez’s robberies, but nothing in his actions or demand notes created “the additional level of fear associated with a threat of death.”<sup>32</sup> Perez wore no disguise, and there was no indication that he carried a weapon.<sup>33</sup> Moreover, Perez did not make any nonverbal communications that he carried a weapon or that he would harm the teller.<sup>34</sup> The court also reasoned that Perez’s demand note stating that he was taking the money to feed his children “suggested that he was not devoid of empathy.”<sup>35</sup> Additionally, the court noted that the tellers in each of the two robberies felt sufficiently safe to not comply with Perez’s demands, suggesting they did not find his conduct imposing enough to create a fear of death.<sup>36</sup> Therefore, the court concluded that a reasonable person would not interpret Perez’s threats as life-threatening.<sup>37</sup>

Finally, the court reinforced the higher standard required to trigger the threat-of-death enhancement. The court concluded that if there was not

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<sup>24</sup> *Id.* at 1337.

<sup>25</sup> *Id.* at 1330.

<sup>26</sup> *Perez*, 943 F.3d at 1335.

<sup>27</sup> *Id.* at 1333.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 1335.

<sup>31</sup> *Id.*

<sup>32</sup> *Perez*, 943 F.3d at 1335.

<sup>33</sup> *Id.* In the Chase Bank robbery, Perez wore “a baseball hat, dark sunglasses, a t-shirt, and pants.” *Id.* at 1331. For the attempted Wells Fargo Bank robbery, Perez wore a baseball hat, sunglasses, a t-shirt, and shorts instead of pants. *Id.*

<sup>34</sup> *Id.* at 1335.

<sup>35</sup> *Id.* at 1335.

<sup>36</sup> *Perez*, 943 F.3d at 1335–36.

<sup>37</sup> *Id.* at 1336.

the additional requirement for the threat-of-death enhancement, then the enhancement would be applicable to every bank robbery due to the inherent threat of harm needed to qualify as a robbery under Section 2113(a).<sup>38</sup> The court noted that if the drafters of the sentencing guidelines wanted this result, they would have expressly done so.<sup>39</sup> In reversing the district court's decision, the Eleventh Circuit deferred to the intent of the drafters and fashioned a bright line between threats of death and mere threats of harm during robberies.

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<sup>38</sup> *Id.* at 1336.

<sup>39</sup> *Id.*