

STATEMENT
of the
FEDERAL PUBLIC AND
COMMUNITY DEFENDERS

on
Proposed Amendments to
the Sentencing Guidelines
published on November 7, 2000

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PROPOSED AMENDMENT 1

Proposed amendment 1 affects three guidelines – §§ 2C1.3 (conflict of interest), 2C1.4 (payment or receipt of unauthorized compensation), and 2C1.5 (payments to obtain public office). The synopsis of proposed amendment indicates that the proposed amendment is responding to increased statutory maximums enacted more than 11 years ago for offenses set forth in 18 U.S.C. §§ 203, 204, 205, 207, 208, and 209.

The offenses set forth in those provisions all relate to conflicts of interest involving, and unlawful payments to, public officials. All of the offenses except the offense set forth in section 209 had been felonies for which the maximum prison term was two years.¹ The maximum prison term under section 209 had been one year.

Congress changed the maximum prison term for these offenses in title IV of the Ethics Reform Act of 1989, Pub. L. No. 101-194, §§ 101(a), 402-06, 103 Stat. 1716. That Act added 18 U.S.C. § 216, which sets forth the penalties for those offenses.² Section 216 calls for a maximum prison term of one year (18 U.S.C. § 216(a)(1)), unless the offense is committed willfully, in which case the maximum prison term is five years (18 U.S.C. § 216(a)(2)). Under *Apprendi v. New Jersey*, __ U.S. __, 120 U.S. 2348 (2000), the government must plead and prove that the defendant acted willfully before the sentencing court can impose a sentence in excess of one year.

The proposed amendment would make three changes. First, § 2C1.3 would be designated as the offense guideline applicable to the offenses set forth in sections 203-05 and 207-09. Second, § 2C1.3(b)(1) would be revised by adding an alternative basis for enhancement. The new enhancement (of two levels) would be applicable if the offense involved (1) payment, offer, or promise of money or thing of value in consideration for the use, or promised use, of influence to procure an appointive position for any person, or (2) the solicitation or receipt of money or thing of value in consideration for a promise of support, or use of influence, in obtaining an appointive federal position. We do not object to these changes.

The third change would add a cross-reference provision in § 2C1.3. The cross reference would call for the use of § 2C1.1 (bribery) if the offense involved a bribe and §

¹In addition, an offense under sections 203 and 204 carried lifetime disqualification from holding an office of honor, trust, or profit under the United States.

²Ethics Reform Act of 1989, Pub. L. No. 101-194, § 407, 103 Stat. 1716.

2C1.2 (unlawful gratuity) if the offense involved an unlawful gratuity. For example, the sentencing court would use the § 2C1.1 if the court, applying the relevant conduct rules of § 1B1.3 and using a preponderance standard, determined that the offense involved a bribe – thereby relieving the government of the burden of proving beyond a reasonable doubt all of the elements of a bribery offense. Thus, whether the defendant acted corruptly in making or receiving a payment would be determined by the court, based upon information that does not have to qualify as admissible under the Federal Rules of Evidence, using the lowest-possible burden of persuasion. We oppose this change.

We have been concerned for a long time that the increased use of cross references alters the nature of the guidelines, moving from a mixed charge-offense, real-offense system to closer to a pure real-offense system. The original Commission, for good reasons, rejected a pure real-offense system. After attempting to fashion a pure real-offense system, the Commission decided that such a system was impractical and “risked return to wide disparity in sentencing practice.” *See* U.S.S.G. Ch. 1, Pt. A(4)(a). We believe that the Commission should not, ad hoc, abandon that decision.

PROPOSED AMENDMENT 2

Proposed amendment 2 would make three changes in § 2B5.1 (offenses involving counterfeit bearer obligations of the United States). First, the amendment would increase the base offense level from 9 to 10. Second, the amendment would revise the enhancement of subsection (b)(2) to call for a two-level increase instead of a minimum offense level of 15. Third, the amendment would revise application note 4 to eliminate the phrase “merely photocopy notes or otherwise.”

The synopsis of proposed amendment indicates that the purpose of the amendment is to “promote[] proportionality in sentencing for counterfeiting vis-a-vis other, similar economic crimes,” citing fraud offenses. The base offense level under § 2B5.1, however, already is greater than the base offense levels for the two principal economic crimes. The base offense level for an offense under § 2B5.1 is 9. The base offense level under the theft guideline is 4 and under the fraud guideline is 6. Even adding two levels for more-than-minimal planning does not make the offense level under the theft or fraud guideline greater than the base offense level under § 2B5.1.³ We believe that the present base

³We note that one of the options in the Commission’s economic crime package proposes to drop the enhancement for more-than-minimal planning.

offense level under § 2B5.1 is appropriately proportional to the base offense levels of similar economic offenses. We oppose that part of the amendment that would increase the base offense level of § 2B5.1.

We do not oppose the change to subsection (b)(2) or to the language of application note 4.

PROPOSED AMENDMENT 3

Proposed amendment 3 would designate § 2H3.1 (interception of communications or eavesdropping) as the offense guideline applicable to several offenses dealing with unlawful disclosure or inspection of tax return information. The amendment would also add a specific offense characteristic calling for a three-level decrease if the offense involved (1) inspection, but not disclosure, of a tax return information or (2) knowing or reckless disclosure of information furnished to a tax-return preparer in connection with preparation of a tax return.

We have no objection to the proposed amendment.

PROPOSED AMENDMENT 4

Proposed amendment 4 addresses the meaning of the term "stipulation" as used in § 1B1.2(a). The amendment would revise the phrase "plea agreement containing a stipulation" in the first paragraph of application note 1 to read "plea agreement (written or made orally on the record) containing a stipulation." The amendment would similarly revise the first two sentences of the third paragraph of application note 1. We support the proposed amendment.

This is not the first time that the Commission has visited this issue. The Commission, effective November 1, 1991, added language to the second paragraph of application note 1 referring to a stipulation "set forth in a written plea agreement or made between the parties on the record during a plea proceeding."⁴ Effective November 1, 1992, the Commission amended § 1B1.2(a) itself, changing the phrase "in the case of a

⁴U.S.S.G. App. C, amend. 434.

conviction by plea of guilty or nolo contendere” to read “in the case of a plea agreement (written or made orally on the record).⁵ In both instances, the Commission stated that it was clarifying the meaning of the term “stipulation.”

The Commission intends the stipulation method of determining the applicable guideline to be a “limited” exception to the general rule of § 1B1.2.⁶ We believe that the addition of the proposed language should ensure that the exception to the general rule is applied in a limited way. We support the proposed amendment.

PROPOSED AMENDMENT 5

Proposed amendment 5 presents two options for addressing a circuit split concerning the applicability of the dangerous weapon enhancement of § 2A2.2(b)(2) in a case in which the defendant’s use of a dangerous weapon with intent to do bodily harm triggers application of § 2A2.2. The proposal presents two options. Option 1 addresses that matter only; option 2 would make numerous additional changes in § 2A2.2. We do not support either option.

For reasons set forth at length by the court in *United States v. Farrow*, 198 F.3d 179 (6th Cir. 1999), we recommend that the Commission add the following new application note to § 2A2.2:

- “4. If the ‘dangerous weapon’ is not an inherently dangerous object, a single aspect of a defendant’s conduct may not be used for two different guideline-calculation purposes. For example, if a defendant’s use of a pencil with intent to cause bodily injury makes an assault aggravated, then that use (an aspect of the defendant’s conduct) has been taken into consideration in determining that this guideline is the applicable offense guideline and cannot be the basis for applying subsection (b)(2).”

⁵U.S.S.G. App. C, amend. 438.

⁶See U.S.S.G. § 1B1.2, comment. (n.1); U.S.S.G App. C, amend. 591 (sentencing court must apply offense guideline set forth in Appendix A “unless the case falls within the limited ‘stipulation’ exception set forth in § 1B1.2(a)”).

PROPOSED AMENDMENT 6

Subsection (b)(4)(A) of § 2F1.1 calls for a two-level enhancement (with a floor of 10) if the offense involved “a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency.” The purpose of the enhancement is to recognize that “defendants who exploit victims’ charitable impulses or trust in government create particular social harm.”⁷

Proposed amendment 6 would amend application note 5 to § 2F1.1 to state that subsection (b)(4)(A) applies if

(A) the defendant represented that the defendant was an employee or authorized agent of a charitable, educational, religious, or political organization, or government agency when, in fact, the defendant was not such an employee or agent; or (B) the defendant was an employee or agent of the organization or agency and represented that the defendant was acting solely to obtain a benefit for the organization or agency, when in fact, the defendant intended to divert all or part of that benefit (e.g., for the defendant’s personal gain).

The new application note would further provide that “[e]mbezzlement of funds alone is not sufficient to warrant application of subsection (b)(4)(A). The embezzled funds must have been solicited pursuant to a misrepresentation that the defendant was acting to obtain a benefit for the organization or agency.”

We agree with the Commission that an enhancement is appropriate for conduct that seeks to exploit a person’s charitable instinct. We also believe that the enhancement should not apply simply because the victim of the offense is a charity (or a government agency). Charities no longer operate by relying solely upon gifts and donations. Not-for-profit organizations have entered the marketplace and, like for-profit organizations, sell goods and services. The purchaser of a teddy bear with screen printed t-shirt for \$12.99 from the Rock and Roll Hall of Fame and Museum or a CD recording of George Szell conducting Brahms’ Second and Third Symphonies for \$16.00 from The Cleveland Orchestra is motivated principally by marketplace considerations. Likewise, a person who attends a bingo game sponsored by a not-for-profit organization is motivated primarily by the opportunity to win some money. We do not believe that the enhancement is appropriate when a not-for-profit organization behaves like a for-profit

⁷U.S.S.G. § 2F1.1, comment. (backg’d).

organization by being involved in the sale of goods or services or when the not-for-profit organization is conducting a gambling operation. It is simply unrealistic that a person falsely claiming to represent a not-for-profit organization who sells phony lottery tickets has taken advantage of the purchasers' charitable impulse or trust in government.

Revised application note 5 seems to recognize this concern by stating that "[e]mbezzlement of funds alone is not sufficient to warrant application of subsection (b)(4)(A)." We believe that the Commission should strengthen proposed application note 5 in this regard. We recommend that the quoted sentence be revised to read: "Embezzlement of funds *from a charity alone* is not sufficient, *by itself*, to warrant application of subsection (b)(4)(A)." We also recommend the addition of language indicating that the enhancement applies only to conduct related to soliciting donations to a charity, and not to quid pro quo or gambling transactions.

PROPOSED AMENDMENT 7

Proposed amendment 7 addresses whether a drug courier is precluded from receiving a mitigating role adjustment under § 3B1.2 if the courier is being held accountable only for the quantity of drugs that the courier personally handled. We support most of the changes made by the proposed amendment.

As originally promulgated, § 3B1.2 was ambiguous about whether it was to be applied based upon the offense of conviction – the approach of those who hold a courier ineligible for a role reduction if the courier is held accountable only for the drugs personally handled – or upon relevant conduct. The opening sentence of the guideline referred to (and still refers to) "the offense." At the time the guidelines were promulgated, the Commission had not defined the phrase "the offense," so that phrase might have been read to limit consideration to the offense of conviction. On the other hand, § 1B1.3(a) has always stated that the principles of relevant conduct apply to determinations made under the guidelines of chapter 3. Further, subdivisions (a) and (b) of the guideline used (and continue to use) the phrase "any criminal activity," which suggests a broader approach to determinations under § 3B1.2 than offense of conviction.

The Commission resolved the ambiguity, effective November 1, 1990, in an amendment to the introductory commentary to part B of chapter 3.⁸ The amendment

⁸U.S.S.G App. C, amend. 345.

added to that commentary a sentence stating that “[t]he determination of a defendant’s role in the offense is to be made on the basis of all conduct within the scope of § 1B1.3 (Relevant Conduct) . . . and not solely on the basis of elements and acts cited in the count of conviction.”⁹ A literal reading of § 3B1.2, therefore, requires the sentencing court, in determining if a defendant is entitled to a role reduction, to compare the defendant’s relevant conduct to the total relevant conduct engaged in by all of the participants. Thus, precluding a courier accountable only for drugs personally handled from receiving a role reduction is, in our view, inconsistent with the letter and spirit of § 3B1.2.

The policy behind applying § 3B1.2 in this way is sound. A courier has few skills, is paid a relatively small amount, and is easily replaced. For purposes of deterrence, a lower penalty is sufficient to deter a courier who is paid, say, \$3,500 to deliver a drug, while a higher penalty is required to deter a person who expects to profit substantially (say, \$300,000) from the drugs so delivered. For purposes of preventing crime, incapacitating the drug profiteer will have a greater impact than incapacitating the courier, who is easily replaced.

The goal of proposed amendment 7 is to ensure that a courier held accountable only for drugs personally handled “is not precluded from receiving a mitigating role adjustment.” We endorse that goal. We support the changes to application notes 1 and 3 and their redesignation as application notes 4 and 5, and we support adoption of new application notes 1 and 2. We support the deletion of current application notes 2 and 4 and of the background commentary. We believe, however, that proposed application note 3 needs revision.

Application note 3 consists of three parts. Part A carries forward, in modified form, language from the current background commentary and current application note 4. Part B adds new language relating to determining if a role reduction applies. Part C adds new language stating that a drug defendant held accountable only for drugs personally handled is not precluded from receiving a role reduction under this guideline. We recommend that part A be revised, that part B be deleted, and that part C be promulgated as drafted.

⁹The Commission reinforced this when it added, effective November 1, 1991, a definition of the term “offense” to the commentary to § 1B1.1. U.S.S.G. App. C, amend. 388. The Commission has defined the term “offense” to mean “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 first sentence of part A carries forward language from the background commentary stating that § 3B1.2 “provides a range of adjustments for a defendant who plays a part in committing the offense that makes him *substantially less culpable* than the average participant” (emphasis added). That statement suggests that a minor participant must be substantially less culpable and creates an inconsistency with redesignated application note 4 (current application note 3). Redesignated application note 4 states that a minor participant is “any participant who is *less culpable* than most other participants, but whose role could not be described as minimal” (emphasis added). In view of the deletion of the background commentary, we recommend that the first sentence of part A be revised to read: “This section provides a range of adjustments for a defendant who is less culpable than the average participant.”¹⁰

The first sentence of the second paragraph of part A, derived from current application note 4, states that a role reduction ordinarily is not warranted if the defendant “has received an offense level lower than the offense level warranted by the defendant’s *actual criminal conduct* (because, for example, the defendant was convicted of a less serious offense or was held accountable for a quantity of drugs less than what the defendant otherwise would have been accountable under § 1B1.3 (Relevant Conduct))” (emphasis added). We find that statement to be confusing and inconsistent with the goal of proposed amendment 7.

One problem centers on the term “actual criminal conduct.” Is “actual criminal conduct” different from relevant conduct? The term “actual criminal conduct” should not be broader than relevant conduct because the sentencing court, in applying the guidelines, cannot use conduct that goes beyond the scope of relevant conduct. It does not make sense for the term “actual criminal conduct” to be narrower than relevant conduct because the sentencing court, by considering the defendant’s relevant conduct, will always take the defendant’s actual criminal conduct into account (the greater includes the lesser). It would seem, then, that “actual criminal conduct” must mean relevant conduct.

If “actual criminal conduct” means relevant conduct, then the first sentence of the second paragraph of part A states a logical impossibility. That sentence refers to a defendant who “has received an offense level lower than the offense level warranted by the defendant’s actual criminal conduct (because, for example, the defendant . . . was held accountable for a quantity of drugs less than what the defendant otherwise would have been accountable under § 1B1.3 (Relevant Conduct)).” That cannot occur when applying

¹⁰We also recommend deleting “substantially” in the second and third sentences of the second paragraph of part A.

the guidelines. A sentencing court, when determining the guideline sentence, can never hold a defendant accountable for less than what the defendant's relevant conduct calls for.¹¹ The court must select the offense level warranted by the drug quantity determined by application of the relevant conduct rules.¹²

A second problem with the first sentence of part A is the failure to carry forward an important concept in current application note 4 – that the lower offense level be due to the defendant having been convicted of an offense “significantly less serious” than warranted by the defendant's actual criminal conduct. The first sentence of part A drops the adjective “significantly.” The deletion of “significantly” would seem to be at odds with the purpose of the amendment. A role reduction is not appropriate if the defendant is convicted of a significantly less serious offense than warranted by the defendant's relevant conduct because the much lower offense level for the significantly less serious offense serves as something of a proxy for the role reduction. Thus, in the example used

¹¹U.S.S.G. § 1B1.2(b) requires the sentencing court, “[a]fter determining the appropriate offense guideline section . . . [to] determine the applicable guideline range in accordance with § 1B1.3 (Relevant Conduct).”

¹²After determining the applicable guideline range, the sentencing court can, of course, depart downward, resulting in a sentence less than that called for by the drug quantity for which the defendant is accountable under § 1B1.3. That determination, however, does not involve application of the guidelines but is a departure from the guidelines and must be justified under 18 U.S.C. § 3553(b).

A sentence called for by a plea agreement under Rule 11(e)(1)(C) may call for a sentence that is less than the sentence warranted by the drug quantity for which the defendant is accountable under § 1B1.3. Before the sentencing court can accept a plea agreement under Rule 11(e)(1)(C), however, the court must determine that either the sentence called for by the agreement is within the applicable guideline range or else departs from that range for “justifiable reasons.” U.S.S.G. § 6B1.2(c). To make that determination, the court must first determine the guideline range, and that will be determined based upon the defendant's relevant conduct.

In the case of a plea agreement under Rule 11(e)(1)(B), the court must make similar findings – that the recommended sentence is within the applicable guideline range or departs from that range for justifiable reasons. Again, to make that determination, the court must first determine the guideline range, and the guideline range will be determined based upon the defendant's relevant conduct.

For a plea under rule 11(e)(1)(A), the court must determine if the remaining charges “adequately reflect the seriousness of the actual offense behavior and that accepting the agreement will not undermine the statutory purposes of sentencing or the sentencing guidelines.” To make such a determination, the court must determine the applicable guideline range based upon the defendant's relevant conduct.

in the second paragraph of part A, a role reduction for the defendant is unnecessary, and inappropriate, because an offense level 14 drug trafficker is being sentenced at offense level 6, 4 levels less than the defendant's offense level would have been had the defendant been convicted of the offense level 14 offense and received a 4-level reduction under § 3B1.2.

We recommend that the second paragraph of part A of proposed application note 3 carry forward the substance of current application note 4, rather than attempt to expand current application note 4. We suggest, therefore, that the first sentence of the second paragraph of part A be revised to read as follows: "However, a reduction for mitigating role under this section ordinarily is not warranted if the defendant has received an offense level that is significantly lower than the offense level warranted by the defendant's relevant conduct because the defendant has been convicted of an offense significantly less serious than warranted by the defendant's relevant conduct."

The first sentence of part B of proposed application note 3 states a truism. The second sentence of part B unnecessarily and gratuitously impugns the common sense and fact-finding ability of federal judges. The commentary to § 3B1.1, the aggravating-role guideline, contains no similar statement (such as, "As with any other factual issue, the court, in weighing the totality of the circumstances, is not required to find, based solely on the government's bare assertion, that an aggravating-role adjustment is warranted"). Moreover, in our experience, federal judges do not find facts based upon a bare assertion by any party. There is no reason to expect federal judges to behave differently when determining whether a defendant qualifies for a mitigating-role reduction. We recommend deletion of part B of proposed application note 3.

Here is redlined version of proposed application note 3 reflecting our recommendations (material we suggest adding in *italic*; material we suggest deleting struck through):

3. Applicability of Adjustment.—

(A) *Substantially Less Culpable than Average Participant.*— This section provides a range of adjustments for a defendant who is less culpable than the average participant.

However, a reduction for mitigating role under this section ordinarily is not warranted if the defendant has received an offense level that is significantly lower than the offense level warranted by the defendant's relevant conduct

because the defendant has been convicted of an offense significantly less serious than warranted by the defendant's relevant conduct. In such a case, the defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense. For example, if a defendant whose actual conduct involved a minimal role in the distribution of 25 grams of cocaine (an offense having a Chapter Two offense level of level 14 under § 2D1.1) is convicted of simple possession of cocaine (an offense having a Chapter Two offense level of level 6 under § 2D2.1), no reduction for a mitigating role is warranted because the defendant is not substantially less culpable than a defendant whose only conduct involved the simple possession of cocaine.

~~(B) Fact-Based Determination.—The determination whether to apply subsection (a) or subsection (b), or an intermediate adjustment, involves a determination that is heavily dependent upon the facts of the particular case. As with any other factual issue, the court, in weighing the totality of the circumstances, is not required to find, based solely on the defendant's bare assertion, that such a role adjustment is warranted.~~

~~(C)~~(B) Applicability to Certain Defendants.— A defendant who is convicted of a drug trafficking offense , whose role in that offense was limited to transporting or storing drugs and who, based on the defendant's criminal conduct, is accountable under § 1B1.3 (Relevant Conduct) only for the quantity of drugs the defendant personally transported or stored is not precluded from receiving an adjustment under this guideline.

Issues for Comment

Issue 1. For reasons set forth above, we believe that a courier should be eligible for a role reduction under § 3B1.2 and that a courier can be a minimal participant as well as a minor participant.

Issue 2. Proposed application note 3(C) addresses a problem that affects a large number of cases and responds to a problem that has occurred with some frequency. We are unaware at this time of similar problems in other guidelines. However, we do not oppose adding language that is more general as long as the drug-courier language remains. The issue that has provoked the need for this proposed amendment ought to be addressed specifically.