

COMMENTS OF
THE NEW YORK COUNCIL OF DEFENSE LAWYERS
REGARDING PROPOSED 2000 AMENDMENTS TO
THE SENTENCING GUIDELINES

Respectfully Submitted,

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January 5, 2001

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Once again, we would like to thank the Sentencing Commission for the opportunity to present our views on the proposed amendments. The New York Council of Defense Lawyers ("NYCDL") is an organization comprised of more than 150 attorneys whose principal area of practice is the defense of criminal cases in federal court. Many of our members are former Assistant United States Attorneys, including previous Chiefs of the Criminal Division in the Southern and Eastern Districts of New York. Our membership also includes attorneys from the Federal Defender Services offices in the Eastern and Southern Districts of New York.

Our members thus have gained familiarity with the Sentencing Guidelines both as prosecutors and as a defense lawyers. In the pages that follow, we address the proposed amendments published in the Federal Registry on November 7, 2000 which are of interest to our organization.

I: COMMENTS REGARDING PROPOSED AMENDMENT AS TO UNAUTHORIZED COMPENSATION

We oppose the proposed amendment because of our concern that the proposed addition to the Application Notes of the cross-reference to Guideline §§2C1.1 and 2C1.2, which cover the bribery and gratuity offenses, will likely result in defendants convicted of conflict of interest offenses being sentenced inappropriately under the cross-referenced harsher Guidelines. This concern is based on the Commission's own statement that many of the cases sentenced under Guidelines §§2C1.3 and 2C1.4 involve in some way a bribe or gratuity. However, it does not necessarily follow that "many of these defendants likely could have been charged under a bribery or gratuity statute...." Rather, it seems likely that these defendants were convicted of a conflict of

interest crime either because of a prosecutorial determination that the facts of a case did not warrant bringing charges under 18 U.S.C. § 201 or § 202 or from a jury's finding that the evidence did not warrant conviction under the bribery or gratuity statutes. Under such circumstances, it would be inappropriate to add an Application Note cross-referencing the bribery and gratuity guidelines so that the mere involvement of a bribe or gratuity in the offense compels the court to impose the more serious sentence.

In addition, the proposed amendment may well subject a defendant convicted of a violation of 18 U.S.C. § 209 to being sentenced as though his offense involved a bribe or gratuity which was not charged and, therefore, not subjected to a jury finding, thereby depriving the defendant of his constitutional right to being convicted of such an offense by proof beyond a reasonable doubt, arguably in violation of the United States Supreme Court's recent decision in New Jersey v. Appendi, 530 U.S. 466 (2000). In light of the Appendi decision, this amendment will likely result in burdensome and unnecessary litigation.

Moreover, we do not believe that the application of the enhancements proposed for inclusion at § 2C1.3(b)(1) and (2) to the offenses now covered by § 2C1.4 fairly addresses the Commission's concern that the Guideline at § 2C1.4(a) does not adequately implement the sentencing options for defendants who engaged in willful conduct as set forth at 18 U.S.C. § 216(a)(2). As drafted, the proposed enhancements to be added to § 2C1.3(1)(B) are not limited to willful conduct and could be applied to convictions for non-willful violations of 18 U.S.C. § 209. We are particularly concerned that the proposed two point enhancement for circumstances where the offense involved the promise or receipt of money in consideration for the use of influence will be indiscriminately applied to both willful and non-willful violation. Therefore, at a minimum, it should be made clear that the enhancements should only apply to willful violations eligible for

sentencing under 18 U.S.C. § 216(a)(2).

II: COUNTERFEITING OFFENSES

We oppose the proposed modification of the base offense level in Guideline § 2B5.2 for counterfeiting from level 9 to level 10. The base offense level of 9 currently set forth in § 2B5.1 is already 1 point higher than the offense level of 8 which is applied to those fraud offenses for which the “more than minimal planning” enhancement is added. Given that the base offense level for counterfeiting applies to all individuals who possess and pass counterfeit instruments, regardless of the total value of counterfeit instruments possessed or passed, we question the premise of this amendment which suggests that even this most basic counterfeiting offense warrant sentencing at a level 2 offense levels higher than that applied to the most basic fraud offenses. In light of the enhancements set out at § 2B5.1(b) we believe that the guidelines as currently structured deal adequately with any enhanced conduct relating to the counterfeiting offenses.

As to the amendment which replaces the minimum level of offense level 15 for manufacturing offenses with a 2 level enhancement, we believe that this amendment would foster a fairer approach to the manufacturing of counterfeit instruments for the reasons set forth in the proposed amendment. However, as to the proposal to delete the language in Application Note 4, we do not see why the concern with digital technology should result in the elimination of the application note in its entirety. Rather, we would suggest that the Commission’s concern could be addressed by rewording application note 4 to make clear that the enhancement in subsection B(2) would not apply to persons who photocopy notes to create items that are so obviously counterfeit that they are unlikely to be accepted even if subjected to only minimal scrutiny, regardless of the process used. In this way, it will be clear that the enhancement is applicable to defendants who use digital

technology to create "photocopy notes" that are passable while still making clear that this enhancement should not be applied to persons who photocopy notes in a way that creates notes so obviously counterfeit as to be unlikely to be accepted.

III: TAX PRIVACY

We do not disagree with the decision to refer the listed violations of Title 26 to Guideline § 2H3.1. However, we would suggest that the portion of the amendment which creates a base offense level of 6 should be clarified to make clear that the provision is intended to cover violations of 26 U.S.C. §§ 7213A and 7216.

However, we do object to the addition of a new Application Note 3 advising that the 2 point enhancement for "Abuse of Position of Trust" can be applied to a violation of any of these tax-related offenses. Given that, by definition, the persons who have been in a position to disclose or inspect the tax information in question have the ability to conduct the inspection or disclosure because of their occupying positions of public or private trust, this enhancement would be available in almost every case. As we do not believe that the Commission should create an automatic enhancement akin to the "more than minimal planning" enhancement as applied in the fraud context, we oppose this portion of the proposed amendment.

IV: PROPOSED AMENDMENT: CIRCUIT CONFLICT CONCERNING STIPULATIONS

We agree with the Commission's approach in this proposed Amendment which makes clear that statements made by defendants during plea proceedings are not to be considered stipulations for purposes of Guideline § 1B1.2 unless the statement was agreed to as part of the plea agreement itself. As to the proposal for rewarding the first sentence of the third paragraph of

Application Note 1 to clarify that a stipulation need to have been agreed to as part of the plea agreement before it can increase a defendant's sentence, we suggest that the Commission follow the language used in United States v. Nathan, 188 F.3d 190, 201 (3d Cir. 1999) which would make even clearer the limited circumstances under which a stipulation can bind the defendant. Specifically, the Nathan Court stated that the statement would be considered a "stipulation" only if (i) it is part of a defendant's written plea agreement; (ii) is explicitly annexed thereto; or (iii) both the government and the defendant explicitly agree at a factual basis hearing that the facts being put on the record are stipulations that might subject the defendant to the provisions of § 1B1.2(a). By following this wording, it reduces the possibility of there being any dispute as to what the actual plea agreement was.

V: PROPOSED AMENDMENT: CIRCUIT CONFLICT CONCERNING AGGRAVATED ASSAULT

We oppose both of the proposed options presented in this proposed amendment to the extent that both include language directing that the 4 point enhancement in Guideline § 2A2.2(b)(2) shall be applied in instances where an ordinary object such as a car or a chair is used in an aggravated assault with the intent to cause bodily injury. Although these proposed amendments address the concern expressed in several cases that it is unclear whether the Commission intended for this enhancement to apply to those situations where an ordinary object becomes a dangerous weapon for purposed of Guideline § 2A2.2, the amendments do not address the double counting concern raised first by the Second Circuit in United States v. Hudson, 972 F.2d 504, 506-07 (2d Cir. 1992) and most recently by the Sixth Circuit in United States v. Farrow, 198 F.3d 179, 188-193(6th Cir. 1999). The Farrow Court correctly found that the form of double

counting inherent in the application of the 4 point enhancement to cases involving ordinary objects does not serve any policy underlying Guideline § 2A2.2 and agreed with the Second Circuit decision in Hudson that the application of the 4 point enhancement to situations where an ordinary instrument is used in an aggravated assault is inconsistent with the graduated enhancement scheme set forth at § 2A2.2(b)(2).Id. at 189-90.

The logic of the Hudson and Farrow decisions is clear: a defendant becomes eligible for the base offense level of 15 for an aggravated assault whenever an inherently dangerous weapon is involved in the offense, and the base offense level is then enhanced in a graduated way depending on the risk of harm created by how the dangerous weapon is used. For instance, if the weapon is brandished during an assault, then the offense is enhanced by 3 points while the use of the dangerous weapon enhances the offense by 4 points.

This graduated scheme does not apply, however, when the aggravated assault involves an ordinary instrument used to cause bodily injury. In those circumstances, the mere involvement of an ordinary instrument would not trigger the application of the aggravated assault guideline. Rather, it is only the use of the ordinary instrument, e.g., the car in Hudson and Farrow or the chair in United States v. Williams, 954 F.2d 204 (4th Cir. 1992) or the flashlight in United States v. Johnstone, 107 F.3d 200 (3d Cir. 1997), as the instrument to inflict serious bodily injury which makes the defendant eligible for the base offense level of 15. Thus, as the Hudson and Farrow Courts point out, the use of the ordinary instrument is the precise conduct that both causes the defendant to be eligible for the base offense level of 15 and automatically renders the defendant eligible for the 4 point enhancement under subparagraph B(2) and any defendant using an ordinary instrument as a dangerous weapon will automatically be eligible for the 4 point enhancement and the resulting offense level of 19. As the Farrow Court pointed out, there is no reason to conclude

that the types of cases in which ordinary instruments are used as dangerous weapons mandate what is in effect a base offense level of 19. *Id.* at 194-95. The Guidelines already provide a separate enhancement if serious bodily injury is inflicted irrespective of whether a dangerous weapon was used or not. See § 2A2.2(b)(3).

Those courts that have found the enhancement to apply to situations where an ordinary instrument is used as a dangerous weapon generally acknowledge that they are engaged in a form of double counting but state that such double counting “is permissible because it is explicitly mandated by the clear and unambiguous language of § 2A2.2.” *Johnstone* at 212-13. We believe that the more appropriate approach to double counting is discussed at length by the 6th Circuit in *Farrow* when it interprets Guideline § 1B1.1, Application Note 4 as being inapplicable to the cumulative use of the same conduct to both establish a base offense level and apply an enhancement. *Farrow* at 191-92. Although different guideline sections may be applied cumulatively, it is not appropriate to rely on the exact same conduct both for the establishment of a base offense level and for an enhancement. *Farrow* at 192.

As to the proposal incorporated in Option Two to set a base offense level of 19 if the offense involved serious bodily injury, we believe that the existing guideline is sufficiently clear as to the availability of a serious bodily harm enhancement. That approximately ten cases involving convictions under 18 U.S.C. § 113(a)(6) did not result in a bodily injury enhancement, as the Commission reports in support of the Proposed Amendment, should not automatically cause the Commission to believe that there is a need to create a new base offense level. The sentencing judge is in the best position to have a full appreciation of the true seriousness of the bodily injury inflicted and to determine the appropriateness of the bodily injury enhancement. That the base offense level was enhanced in more than 80% of the cases should suggest that the participants in the sentencing

process are fully aware of the availability and applicability of the enhancement and the no charge is necessary.

VI: PROPOSED AMENDMENT: CIRCUIT CONFLICT CONCERNING CERTAIN FRAUDULENT MISREPRESENTATIONS

We oppose any amendment of the guideline at this time because, as we noted when this issue was first raised in 1998, there is no true conflict among the circuits. The Fourth Circuit has held that the enhancement required by § 2F1.1(b)(3) for misrepresenting that one is acting for a charitable organization applied to a President of a charitable organization that collected money from the public for bingo games but kept 10% of the proceeds for himself and his cronies. United States v. Marcum, 16 F.3d 599 (4th Cir.) cert. denied, 513 U.S. 845 (1994). The decision of the Tenth Circuit in United States v. Frazier, 53 F.3d 1105 (10th Cir. 1995), in which the Court held that the enhancement does not apply to an official of a public agency who steals money that the agency received as grants from the government, is not inconsistent with the Marcum decision because both decisions recognize that the enhancement is appropriately applied whenever the official of a charitable organization, for the purposes of enriching himself, dupes the public into making contributions that it otherwise would not. The proposed amendment is therefore unnecessary and may invite unintended sentence enhancements whenever an offense involves a charitable organization — a result clearly not intended by the Commission.

VII: PROPOSED AMENDMENT: CIRCUIT CONFLICT CONCERNING DRUG DEFENDANTS AND MITIGATING ROLE

We agree that the Commission should make clear that a mitigating role adjustment may be applied to a defendant who is convicted of a drug trafficking offense whose role in the

offense was limited to transporting or storing drugs even if that defendant is only accountable under Guideline § 1B1.3 for the quantity of drugs personally transported or stored by the defendant. In that regard, and in response to the first issue for comment, we have taken the position in the past and still believe that such defendants should have available to them in the appropriate case a minimal role adjustment. It is clear that large drug organizations recruit very poor and very needy people to act as drug couriers for their organizations. Such individuals receive relatively minor amounts of the proceeds of the overall drug organization and their culpability relative to that of the other participants in the organization can in many circumstances be minimal regardless of the precise quantity of drugs attributed to them.

As to the second issue for comment, the NYCDL believes strongly that the adjustments available under § 3B1.2 should be available to any defendant who plays a limited role in a large conspiracy, whether it be a drug conspiracy or a conspiracy to commit a financial crime of some sort. For instance, organizations involved in fraud or theft often involve participants with strictly compartmentalized roles so that relevant conduct attributable to them is less than the entire scope of the conspiracy. See, e.g., United States v. Studley, 47 F.3d 569(2d Cir. 1995). However, such defendants are still in analogous positions to that of a drug courier and are potentially subject to sentences which exceed their actual culpability. Thus, we believe that the sentencing court should have the option, in all appropriate cases, as opposed to merely drug cases mitigate a defendant's sentence to § 3B1.2.