

The following amendments go into effect Nov. 1, 2009.

We have not done a full deconstruction effort on these (though some weak spots are noted below) because of the press of other work and how few cases they impact. The record provides ample deconstruction arguments:

- Go here [http://www.fd.org/pub\\_SentenceLetters.htm](http://www.fd.org/pub_SentenceLetters.htm), for the Defenders' letters dated 12/8/08, and the written comments and testimony dated anytime in March 2009.
- The official Reasons for Amendment are in Appendix C, and in the Federal Register notices, here <http://www.ussc.gov/NOTICE.HTM>.
- The March 2009 hearing transcript and written testimony from Defenders and other witnesses are here:  
<http://www.ussc.gov/AGENDAS/20090317/Agenda.htm>.

### ***Undue Influence of a Minor***

Application Note 3(B) to § 2A3.2 and Application Note 3(B) to § 2G1.3 have been amended to explicitly state that the enhancement for unduly influencing a minor to engage in prohibited sexual conduct “does not apply in a case in which the only ‘minor’ (as defined in Application Note 1) involved in the offense is an undercover law enforcement officer.” In other words, “sting” cases are no longer eligible for the enhancement. This changes the law in the Eleventh Circuit, and also changes what many district courts have done in other circuits. The Commn said the enhancement “should not apply in a case involving only an undercover law enforcement officer because, unlike other enhancements in the sex offense guidelines, the undue influence enhancement is properly focused on the effect of the defendant’s actions on the minor’s behavior.”

The Commission also clarified that the enhancement can apply in a case involving attempted sexual conduct by amending Application Notes 3(B) to § 2A3.2 and § 2G1.3 to state that “[t]he voluntariness of the minor’s behavior may be compromised without prohibited sexual conduct occurring.” This expands the enhancement’s applicability in the Seventh Circuit.

Whether this amendment should be made retroactive was raised at the Commission’s September 16, 2009 public meeting, but failed for lack of a motion.

If you have a client who would benefit from retroactive application, you can file a motion under 3582(c) for re-sentencing, arguing that 1B1.10 is not binding, as in the attached motion and appellee brief by Mike Holley in *US v. Horn*. Based on Mike’s arguments in the district court, the judge granted relief based on a change to the related cases guideline that rendered the defendant not a career offender. *See United States v. Horn*, 590 F.Supp.2d 976 (M.D. Tenn. 2008). The case is on appeal to the Sixth Circuit. *Horn* involved an amendment pertaining to criminal history, whereas this amendment pertains to offense conduct. Therefore, you must omit the argument that “§ 994(u) applies only when the amended guideline pertains to a ‘category of offenses,’ *id.*, not where, as here, the amended guideline pertains to a ‘categor[y] of defendants.’”

***Ryan Haight Online Pharmacy Act.*** The Act contained a directive to the Sentencing Commission that it “should not construe any change in the maximum penalty for a violation involving a controlled substance in a particular schedule as being the sole reason to amend, or establish a new, guideline or policy statement.”

1) The amendment refers violations of new 21 U.S.C. § 841(h), which prohibits the delivery, distribution or dispensing of controlled substances over the Internet without a valid prescription, to § 2D1.1, and refers violations of new 21 U.S.C. § 843(c)(2)(A), which prohibits the use of the Internet to advertise for sale a controlled substance, to § 2D3.1.

2) The amendment creates two new alternative base offense levels for offenses involving Schedule III controlled substances in which death or serious bodily injury results. It increases the base offense level to 26 for anyone convicted under 21 U.S.C. §§ 841(b)(1)(E) or 960(b)(5) if death or serious bodily injury resulted from use of the substance, or to 30 if the defendant has one or more prior convictions for a similar offense.

3) ALL Hydrocodone offenses – this arguably violates the directive, but the Reason for Amendment says it’s because of emergency room admissions, etc.; Defender comments make good arguments why no increase was warranted, and to do so would violate the directive.

- Increased BOL cap from 20 to 30 in Drug Quantity Table
- Removed hydrocodone from Drug Equivalency Table for Schedule III substances

***ID Theft:***

- 1) In cases involving means of identification, there will no longer be any requirement that an individual suffer pecuniary harm to be counted as a “victim.” The Commission expanded the definition of “victim” under § 2B1.1 so that in a case involving means of identification (as defined at 18 U.S.C. § 1028(d)(7) and belonging to an actual person), a victim for purposes of the victim table at subsection (b)(2) includes “any individual whose means of identification was used unlawfully and without authority.” As its reason, the Commission explained that an individual whose personal information is compromised “even if fully reimbursed, must often spend significant time resolving credit problems and related issues.” This is contrary to the relevant data presented to the Commission, compiled by the Federal Trade Commission and which demonstrated that the majority of individuals who know about the misuse of their identifying information spend minimal time resolving problems, with the median time spent of four hours. We should be vigilant in challenging this definition, as it is not based on empirical evidence, national experience, or any feedback from courts suggesting that the change was necessary to achieve just punishment.
- 2) Computer crimes: A § 1030 offense involving the intent to obtain personal information will now be subject to a cumulative two-level enhancement. The Commission moved the two-level enhancement for computer offenses under 18 U.S.C. § 1030 if the offense involved “intent to obtain personal information” to

- create a new, free-standing specific offense characteristic. As a result, a defendant can be subject to enhancements for both “intent to obtain personal information” (two levels) and any relevant enhancement relating to computer offenses (if the offense involved a computer system used to maintain or operate a critical infrastructure or government computer (two levels), involved intentional damage to such a computer (four levels), or caused substantial disruption of a critical infrastructure (six levels)).
- 3) Added a two-level enhancement applicable to all cases sentenced under § 2B1.1 “if the offense involved the unauthorized public dissemination of personal information.” The Commission does not define “public dissemination.”
  - 4) Made changes regarding the calculation of loss in cases involving proprietary information.

***Threat Offenses.*** New two-level enhancement at USSG § 2A6.1(b) for threat offenses under 18 U.S.C. § 115 if the defendant made a “public threatening communication” and “knew or should have known that the public threatening communication created a substantial risk of inciting others to violate 18 U.S.C. § 115.” This amendment purportedly responds to a congressional directive, but is far broader than the directive and covers hypothetical offense conduct that has apparently never happened. So much for basing sentencing policy on empirical data and national experience!

***Alien Harboring Offenses.*** The amendment adds an alternative two-level enhancement to § 2L1.1(b)(8) in cases where the defendant was convicted of alien harboring, the alien harboring was for the purpose of prostitution, and the defendant receives an aggravating role adjustment under §3B1.1 (the enhancement is six levels if the alien engaging in prostitution was under the age of 18). The amendment also revises Application Note 6 to § 2L1.1 to make clear that an enhancement under § 3A1.3 may apply in cases sentenced under either of the new enhancements. The Reason for Amendment states that it is in response to a directive contained in the Act that the Commission “review and, if appropriate, amend the sentencing guidelines and policy statements applicable to persons convicted of alien harboring to ensure conformity with the sentencing guidelines applicable to persons convicted of promoting a commercial sex act” in cases where the harboring offense was committed in furtherance of prostitution and the defendant is an organizer, leader, manager or supervisor of the criminal activity. Note that the amendment may have sufficiently enhanced sentences under § 2L1.1 to provide a viable alternative to charges under 18 U.S.C. § 1591 for sex trafficking cases involving minors.

***New Human Trafficking Offenses.*** The amendment refers violations of new 18 U.S.C. § 1351, which prohibits fraud in foreign labor contracting, to § 2B1.1. It refers violations of new 18 U.S.C. § 1593A, which prohibits benefiting financially from participating in a venture that engages in peonage, slavery, or trafficking in persons, to § 2H4.1. It also amends the commentary to § 2H4.1 to provide that a downward departure may be warranted in cases where the defendant is convicted under § 1593A or under 18 U.S.C. § 1589(b) (benefiting financially from participating in a venture that engages in forced labor violations) “without knowing that (*i.e.*, in reckless disregard of the fact that) the venture had engaged in the criminal activity described in those sections.” The Reason for

Amendment acknowledges that the downward departure provision recognizes that such a defendant “may be less culpable than a defendant who acts with knowledge of that fact.”

***Bleached Notes.*** This amendment markedly expands the definition of “counterfeit” as used in § 2B5.1. Since the guidelines’ inception, § 2B5.1’s higher offense levels have been imposed only in those cases involving “an instrument that purports to be genuine but is not, because it has been falsely made or manufactured in its entirety. Offenses involving genuine instruments that have been altered are covered under §2B1.1 (Theft, Property Destruction, and Fraud.” *See* U.S.S.G. § 2B5.1, comment. (n.3). The amendment will eliminate this historic distinction between “counterfeit” and “altered” instruments. It deletes Application Note 3 and adds a new definition of “counterfeit” at Application Note 1 to § 2B5.1 that includes “an instrument that has been falsely made, manufactured, or altered. For example, an instrument that has been falsely made or manufactured in its entirety is ‘counterfeit,’ as is a genuine instrument that has been falsely altered (such as a genuine \$5 bill that has been altered to appear to be a genuine \$100 bill)” (emphasis added).

The stated reason for the amendment is to “clarify” that offenses involving “‘bleached notes’ (that is, genuine U.S. currency that has been stripped of its original image through the use of solvents or other chemicals and then reprinted to appear to be a note of a higher denomination) are sentenced under §2B5.1, and not under §2B1.1.” The Commission claims that this “clarification” is in response to “concerns expressed by federal judges and members of Congress regarding which guideline to apply to offenses involving bleached notes.” It further states that “[c]ourts in different circuits have resolved differently the question of whether an offense involving bleached notes should be sentenced under § 2B5.1 or § 2B1.1,” citing decisions of the Seventh and Eleventh Circuits as holding that bleached note offenses should be sentenced under § 2B1.1, and citing two Louisiana district court decisions (by the same judge) as holding that these offenses should be sentenced under § 2B5.1.

In truth, the amendment is not a “clarification” at all, but rather a major (and unfortunate) policy reversal that will result in markedly increased sentences for all cases involving altered notes. Even more unfortunate, there appears to be no empirical reason for the Commission to have reversed its policy on this issue. There is no data to suggest that sentences in “altered notes” cases are inadequate to serve the purposes of punishment. In fact, every circuit to have reached this issue has found that “bleached notes” cases are more properly sentenced under § 2B1.1. Even more disturbing, none of the public comments received by the Commission on the proposed amendment were from federal judges or members of Congress, *see* [http://www.ussc.gov/pubcom\\_200903/PC200903.htm](http://www.ussc.gov/pubcom_200903/PC200903.htm), so the “concerns” referred to by the Commission in its Reason for Amendment have not been publicly disseminated.

Moreover, less than two weeks after the proposed amendment was sent to Congress, the Fifth Circuit held that, under the pre-amendment Guidelines, bleached notes offenses should be sentenced under § 2B1.1, reversing the Louisiana district court’s decision referred to by the Commission as an example of differing resolutions. *United States v.*

*Dison*, 2009 U.S. App. LEXIS 10501 (5th Cir. May 14, 2009). As a result, every court of appeals to have considered the question has come to a conclusion contrary to the Commission's current action.

The amendment also expands the two-level enhancement in § 2B5.1(b)(2)(B) to apply in any case where the defendant controlled or possessed genuine United States currency from which the ink or other distinctive counterfeit deterrent has been completely or partially removed," and strikes the reference to § 2B1.1 for two offenses (18 U.S.C. §§ 474A and 476) because they "do not involve elements of fraud."

These changes appear to be yet another guideline decision based on ill-conceived policy, and thus should be ripe for challenge as an unsound judgment lacking empirical basis under *Rita v. United States*, 127 S. Ct. 2456 (2007), *Kimbrough v. United States*, 128 S. Ct. 558 (2007) and *Spears v. United States*, 129 S. Ct. 840 (2009).

***Intermittent Confinement.*** The Commission has taken a cautious first step toward expanding the availability of non-prison alternative sanctions under the guidelines by adding a new guideline at §5F1.8. The new guideline authorizes courts to impose intermittent confinement as a condition of probation during the first year of the probation period, and as a condition of supervised release during the first year supervised release period if imposed for a violation of a supervised release condition and if facilities are available.

***Child Pornography Guidelines Expansion.*** Congress recently expanded the reach of the child pornography statutes, and the Commission has now imported those statutory expansions into the guidelines. Explaining that "[t]he changes relate primarily to cases in which child pornography is transmitted over the Internet" [are there any other types of child pornography cases anymore?], the Commission amended § 2G2.1 and § 2G2.2 to include "the purpose of transmitting a live visual depiction" wherever the guidelines reference "the purpose of producing a visual depiction." It included "accessing with intent to view" material wherever the guidelines reference "possessing" material. It added the term "transmission" to the definition of "distribution." And it expanded the definition of "material" to cover any visual depiction, as now defined by 18 U.S.C. § 2256, which includes data that is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format.

***"Morphed images" Offenses.*** The Commission rejected DOJ's attempt to ensure that child pornography cases involving "morphed images"— that is, a picture of an identifiable minor that has been adapted or modified to make it appear as though the minor were engaging in sexual conduct – are punished higher than straight possession cases. Instead, the Commission agreed with the Defenders that the lower penalty structure for these offenses (no mandatory minimum and a 15-year statutory maximum) and the fact that they do not involve the actual sexual abuse of a minor render them less serious. All morphed images offenses, including production, are referred to § 2G2.2(a)(1).

***Submersible and Semi-Submersible Vessels.***

New two-level enhancement, with a minimum offense level of 26, under USSG § 2D1.1(b)(2) if the offense involved “a submersible vessel or semi-submersible vessel as described in 18 U.S.C. § 2285.”

New guideline at USSG § 2X7.2 governing convictions under 18 U.S.C. § 2285, which makes it a crime to operate, with the intent to evade detection, a submersible vessel or semi-submersible vessel without nationality and in international waters. The Commission set the base offense level at 26, explaining that this level is intended to “promote proportionality” with the new minimum offense level of 26 in drug cases involving a submersible vessel. As a result, the sentence for a person convicted under § 2285 has the same minimum offense level as for a drug offense, but *without* any requirement that the government plead and prove that the defendant violated a drug law.