

not apply to a conviction for an offense committed before the defendant was eighteen years of age, unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted. This provision is consistent with the approach in Chapter Four of the guidelines.

The amendment also makes other minor technical and clarifying changes.

8. Amendment: Chapter Three, Part B, is amended by adding at the end the following new guideline:

“§ 3B1.5. Use of Body Armor in Drug Trafficking Crimes and Crimes of Violence

If—

(1) The defendant was convicted of a drug trafficking crime or a crime of violence; and

(2) (Apply the greater)—

(A) The offense involved the use of body armor, increase by 2 levels; or

(B) The defendant used body armor during the commission of the offense, in preparation for the offense, or in an attempt to avoid apprehension for the offense, increase by 4 levels.

Commentary

*Application Notes:*

1. Definitions.—For purposes of this guideline:

‘Body armor’ means any product sold or offered for sale, in interstate or foreign commerce, as personal protective body covering intended to protect against gunfire, regardless of whether the product is to be worn alone or is sold as a complement to another product or garment. *See* 18 U.S.C. 921(a)(35).

‘Crime of violence’ has the meaning given that term in 18 U.S.C. 16.

‘Drug trafficking crime’ has the meaning given that term in 18 U.S.C. 924(c)(2).

‘Offense’ has the meaning given that term in Application Note 1 of the Commentary to § 1B1.1 (Application Instructions).

‘Use’ means (A) active employment in a manner to protect the person from gunfire; or (B) use as a means of bartering. ‘Use’ does not mean mere possession (*e.g.*, ‘use’ does not mean that the body armor was found in the trunk of the car but not used actively as protection). ‘Used’ means put into ‘use’ as defined in this paragraph.

2. Application of Subdivision (2)(B).—Consistent with § 1B1.3 (Relevant Conduct), the term ‘defendant’, for purposes of subdivision (2)(B), limits the accountability of the defendant to the defendant’s own conduct and conduct that the defendant

aided or abetted, counseled, commanded, induced, procured, or willfully caused.

Background: This guideline implements the directive in the James Guelff and Chris McCurley Body Armor Act of 2002 (section 11009(d) of the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. 107–273).’.

Reason for Amendment: This amendment responds to the directive in section 11009 of the 21st Century Department of Justice Appropriations Authorization Act (the “Act”), Pub. L. 107–273. The directive requires the Sentencing Commission to review and amend the guidelines, as appropriate, to provide an appropriate sentencing enhancement for any crime of violence (as defined in 18 U.S.C. 16) or drug trafficking crime (as defined in 18 U.S.C. 924(c)) (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) in which the defendant used body armor. The Act included a sense of Congress that any such enhancement should be at least two levels.

In response to the directive, the amendment creates a new Chapter Three adjustment at § 3B1.5 (Use of Body Armor in Drug Trafficking Crimes and Crimes of Violence). The new adjustment provides for the greater of a two level adjustment if the defendant was convicted of a crime of violence or a drug trafficking crime and the offense involved the use of body armor, or a four level adjustment if the defendant used body armor in preparation for, during the commission of, or in an attempt to avoid apprehension for, the offense.

An application note defines “drug trafficking crime” (as defined in 18 U.S.C. 924(e)(2)). This definition includes any felony punishable under the Controlled Substances Act. The application note also defines “crime of violence” (as defined in 18 U.S.C. 16). This definition includes offenses that involve the use or attempted use of physical force against property as well as persons. Both of these definitions are somewhat broader than the definitions of “crime of violence” and “drug trafficking offense” used in a number of other guidelines. The definition of “body armor” is the same as the statutory definition provided in 18 U.S.C. 921(a)(35).

An application note makes clear that in order for § 3B1.5 to apply, the body armor must be used, *i.e.*, actively employed either in a manner to protect the person from gunfire or as a means

of bartering. Mere possession is insufficient to trigger the adjustment.

Another application note explains that in order for the heightened, four level adjustment to apply, the defendant must have used the body armor or aided, abetted, counseled, commanded, induced, procured, or willfully caused someone else to use the body armor.

9. Amendment: Section 5G1.3(b) is amended to read as follows:

“(b) If subsection (a) does not apply, and a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of § 1B1.3 (Relevant Conduct) and that was the basis for an increase in the offense level for the instant offense under Chapter Two (Offense Conduct) or Chapter Three (Adjustments), the sentence for the instant offense shall be imposed as follows:

(1) The court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and

(2) The sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment.”.

Section 5G1.3(c) is amended by inserting “involving an undischarged term of imprisonment” after “case”.

The Commentary to § 5G1.3 captioned “Application Notes” is amended by striking Notes 2 through 7 and inserting the following:

“2. Application of Subsection (b).—

(A) In General.—Subsection (b) applies in cases in which all of the prior offense (i) is relevant conduct to the instant offense under the provisions of subsection (a)(1), (a)(2), or (a)(3) of § 1B1.3 (Relevant Conduct); and (ii) has resulted in an increase in the Chapter Two or Three offense level for the instant offense. Cases in which only part of the prior offense is relevant conduct to the instant offense are covered under subsection (c).

(B) Inapplicability of Subsection (b).—Subsection (b) does not apply in cases in which the prior offense increased the Chapter Two or Three offense level for the instant offense but was not relevant conduct to the instant offense under § 1B1.3(a)(1), (a)(2), or (a)(3) (*e.g.*, the prior offense is an aggravated felony for which the defendant received an increase under § 2L1.2 (Unlawfully Entering or Remaining in the United States), or the prior offense was a crime of violence for which the defendant received an increased base offense level