

which there are no aggravating circumstances)?

Are there any other application issues pertaining to the assault guidelines that the Commission should address?

4. Should the base offense level in § 2A1.4 for involuntary manslaughter be increased, and if so, to what extent? Should additional specific offense characteristics be added for involuntary manslaughter offenses, including: (A) A four-level increase if death occurred while the defendant was driving intoxicated or under the influence of alcohol or drugs, or if alcohol and/or drugs otherwise were involved in the offense; (B) a two-level increase if the actions of the defendant resulted in multiple homicides; and (C) a two-level increase if the offense involved the use of a dangerous weapon?

The amendment proposes to add a special instruction in the involuntary manslaughter guideline to treat offenses involving multiple persons as if the conduct with respect to each person had been contained in a separate count of conviction. Should the Commission add this special instruction to each of the homicide guidelines?

5. Should specific offense characteristics be added in § 2A1.3 for voluntary manslaughter, including (A) a two-level increase for use of a weapon; and (B) a four-level increase for use of a firearm?

Proposed Amendment 8: Miscellaneous Amendments

Synopsis of Proposed Amendment: This proposed amendment makes changes to various sentencing guidelines as follows:

(A) Clarifies that the application of § 2B1.1(b)(7)(C) in the fraud/theft guideline, regarding a violation of a prior judicial order, is defendant based. Current Application Note 6(C) states that “[s]ubsection (b)(7)(C) provides an enhancement if the defendant commits a fraud in contravention of a prior, official judicial or administrative warning * * *”. The note, however, seemingly conflicts with the language of the enhancement itself, at § 2B1.1(b)(7)(C), which uses a relevant conduct construct (*i.e.*, “if the offense involved”). Given that the underlying principle of the enhancement is to provide increased punishment for an individual who demonstrates aggravated criminal intent by knowingly ignoring a prior warning not to engage in particular conduct, see USSG § 2B1.1, comment. n. 6(C), the proposed amendment restructures § 2B1.1(b)(7) to clarify that application of the prior judicial order enhancement is defendant based. The proposed amendment also makes

necessary technical and conforming amendments to the commentary.

(B) Expands the special multiple victim rule in the fraud/theft guideline, § 2B1.1, Application Note 4(B)(ii), for offenses involving stolen U.S. mail to include mail collection and delivery units that serve multiple postal customers (*e.g.*, apartment bank boxes). The special rule is that any offense that involves stolen mail from a Postal Service mail box, cart, or satchel shall be considered to have involved 50 or more victims. The Commission has been informed, however, that the rule as currently written does not apply in cases in which mail is stolen from privately owned mail boxes such as those found in apartment complexes or other multiple dwelling communities. The proposed amendment uses language suggested by the Postal Service to include privately owned mail boxes within the special rule.

(C) Modifies § 2B1.1(b)(9), which provides a two-level enhancement and a minimum offense level of level 12, in response to the SAFE ID Act (section 607 of the PROTECT Act, Pub. L. 108–21). That Act created a new offense at 18 U.S.C. § 1028(a)(8) prohibiting the trafficking of authentication features (*e.g.*, a hologram or symbol used by a government agency to determine whether a document is counterfeit, altered, or otherwise falsified), and amended 18 U.S.C. 1028 to prohibit the transfer or possession of authentication features. The proposed amendment makes § 2B1.1(b)(9) applicable to offenses involving authentication features.

(D) Addresses a new offense provided at 18 U.S.C. 25 (Use of minors in crimes of violence), which was created by section 601 of the PROTECT Act. Section 25 of title 18, United States Code, prohibits any person who is 18 years of age or older from intentionally using a minor to commit a crime of violence or to assist in avoiding detection or apprehension for such offense. The penalties for committing the offense are, for the first conviction, “subject to twice the maximum term of imprisonment * * * that would otherwise be authorized for the offense”, and for each subsequent conviction, “subject to 3 times the maximum term of imprisonment * * * that would otherwise be authorized for the offense.”

The guidelines currently address the use of a minor to commit an offense in § 3B1.4 (Using a Minor To Commit a Crime). That guideline provides a two-level adjustment and applies to any offense in which a defendant used or attempted to use a minor to commit the

offense or assist in avoiding detection of, or apprehension for, the offense. Given that the PROTECT Act created a new substantive offense for the use of a minor in crimes of violence, the proposed amendment creates a new guideline for 18 U.S.C. § 25 offenses rather than build on § 3B1.4. The proposed guideline at § 2X6.1 (Use of a Minor to Commit a Crime of Violence) directs the court to increase by [2][4][6] levels the offense level from the guideline applicable to the offense of which the defendant is convicted of using a minor. A base offense level of [2], however, would be consistent with the offense level increase currently provided by § 3B1.4. An issue for comment follows the amendment regarding whether, if the Commission were to adopt an offense level increase of [4] or [6], the Commission also should amend § 3B1.4 to provide consistent penalties.

The proposed amendment also (i) provides application notes addressing the interaction of the new guideline with § 3B1.4 and the grouping of multiple counts; and (ii) amends Appendix A (Statutory Index) to reference the new offense.

(E) Corrects typographical error in Application Note 4 of § 3C1.1 (Obstruction or Impeding the Administration of Justice).

(F) Conforms the definition of “crime of violence” in § 4B1.2 (Definitions of Terms Used in Section 4B1.1) to the definition provided in § 2L1.2 (Unlawfully Entering or Remaining in the United States), effective November 1, 2003, by including specific reference to statutory rape and sexual abuse of a minor.

The proposed amendment also adds to the definition of “crime of violence” possession of a sawed-off shotgun and other firearms of the type described in 26 U.S.C. 5845(a). Congress determined that such firearms are inherently dangerous and, when possessed unlawfully, serve only violent purposes. Accordingly, Congress passed The National Firearms Act, Public Law 90–618, which in part requires such firearms to be registered with National Firearms Registration and Transfer Record. See 26 U.S.C. 5861(d). Notwithstanding that Application Note 1 of § 4B1.2 excludes from the definition of “crime of violence” the offense of unlawful possession of a firearm by a felon, several circuit courts have held that possession of a sawed-off shotgun is a “crime a violence” because under § 4B1.2(a)(2) the offense “otherwise involves conduct that presents a serious potential risk of physical injury to another”. *See, e.g., United States v.*