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2009 SENTENCING GUIDELINE AMENDMENTS

On May 1, 2009, the United States Sentencing Commission released its proposed amendments to the guidelines manual, effective November 1, 2009:

ID Theft and Computer Crimes; §2B1.1:

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.”

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)). The Commission also added a two-level enhancement applicable to all cases sentenced under § 2B1.1 “if the offense involved the unauthorized public dissemination of personal information.” Changes were also made regarding the calculation of loss in cases involving proprietary information.

Ryan Height Online Pharmacy Consumer Protection Act of 2008; §§2D1.1; 2D3.1:

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. 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.

The amendment modifies the Drug Quantity Table to increase the base offense level cap for offenses involving Schedule III hydrocodone from 20 to 30. It also removes hydrocodone from the Drug Equivalency Table for Schedule III substances. The Commission stated that the increased cap “is appropriate for Schedule III hydrocodone offenses because of data and testimony indicating a relatively high prevalence of misuse (when compared to other non-marihuana drugs of abuse), an increasing number of emergency room visits involving this drug, and the very large volume of hydrocodone pills illicitly distributed, either over the Internet or in specialized pain clinic.”

Submersible and Semi-Submersible Vessels; §2D1.1, new 2X7.2:

There is a 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.” A new guideline is found 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.

Court Security Act of 2007; §2A6.1:

New two-level enhancement at USSG § 2A6.1(b) exists 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.”

William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008; §§2H4.1, 2L1.1:

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 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 benefitting 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) (benefitting 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.”

“Bleached Notes” and Counterfeit Offenses; §2B5.1:

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 proposed 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 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.”

Undue Influence of a Minor Enhancement; §§2A3.2, 2G1.3

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. 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.”

Miscellaneous Amendments; §2G2.1, 2G2.2, 5F1.8:

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.

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,” 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. All morphed images offenses, including production, are referred to §2G2.2(a)(1).

REVISIONS TO LOCAL CRIMINAL RULES

The Local Rules of Criminal Procedure were revised by the district court judges with an effective date of April 8, 2009. A complete copy of the revisions is posted on the district court website at www.wvnd.uscourts.gov Some of the important changes include:

LR Cr P 2.01 Grand Jury. This new rule allows the government to present matters to a grand jury sitting at one point of holding court that arose from another point of holding court with judicial permission.

LR Cr P 10.01 Magistrate Duties. Defendants may now waive their right to be present at arraignment by submitting written waivers not later than 2 days before the scheduled arraignment.

LR Cr P 16.01 Pretrial Discovery and Inspection.

This rule implements the use of a Standard Discovery form to be used at arraignment by

the AUSA’s and defense counsel. It includes a check-list of all Rule 16 discovery available and requires dates be selected for disclosure; response; and disclosure of impeachment; 404(b) evidence and Giglio materials. The rule calls for the use of a Complex Case Schedule if requested by the either party in a document heavy matter. Use of the form will hopefully result in a more uniform discovery practice within the district; the rule requires the government to file with the clerk a written response noting compliance with defendant’s discovery requests. The new form is available on the district court’s website under “Forms” and will should also be available in court for the arraignment hearing.

LR Cr P 16.06 Rule 404(b); Giglio and Roviaro Evidence.

This amendment incorporates a “no later than fourteen days before trial” deadline for government disclosure of these materials.

LR Cr P 24.01/30.01 Voir Dire, Motions in Limine and Instructions.

In cases where no pre-trial conference is held, these materials must be exchanged no later than 7 days before trial. The materials must be exchanged no later than 7 days before the final pre-trial conference if it is held by the Court.

LR Cr P 50.1 Continuances.

This rule requires the moving party to a continuance request to submit three possible dates to which to continue the deadline or hearing that meet the scheduling needs of all parties involved.

LR Cr P 55.01 Disclosure of Records.

This rule allows United States Probation to deny disclosure of pre-sentence reports, pre-trial services records and/or testimony of a probation officer requested by subpoena if not in compliance with applicable rules. The Court must be notified of such denial, and disclosure of such materials thereafter must be by court order.

LR Cr 55.02 Disclosure of Presentence Reports (PSR).

This rule makes clear that objections to the presentence report shall not be filed electronically on CM/ECF. Rather, counsel must utilize written objections that are forwarded directly to United States Probation with service on opposing counsel.

Sentencing memoranda will be accepted by the Court no later than 3 business days before sentencing. Filing requires either service to the Clerk's Office by mail, fax or email with a request that the document be filed under seal, or counsel may file via CM/ECF using the "Sentencing Memoranda" event.

FINAL REMINDER FOR CJA PANEL ATTORNEY SEMINAR IN JULY

Please mark your calendars for a two day CJA panel attorney seminar that will be held July 23-24, 2009 at the Waterfront Place Hotel in Morgantown, West Virginia. Co-sponsored by the Federal Public Defender Offices for the Northern and Southern Districts of West Virginia, the seminar will include sessions on: Effective Cross-Examination; Use of Capital Mitigation Strategies for Departures and Variances; Defending a Child Pornography Case; Fourth

Circuit and Supreme Court Updates; Traumatic Brain Injury; U.S. Probation Drug Court and Intensive Supervision; CJA Administrative Updates; and an Ethics Issues Panel.

This seminar is available at no cost to all CJA panel attorneys. The West Virginia State Bar has approved the course for 12.0 hours of CLE credits, including 1.8 hours for ethics.

The seminar will take place from 8:30 a.m. to 5:00 p.m. on Thursday, July 23rd, and from 8:30 a.m. to 12:30 p.m. on Friday, July 24th.

To reserve a room at the Waterfront Place Hotel at the government rate of \$83 per night, please call (304) 296-1700 no later than June 24, 2009. Also, to reserve a seat at the seminar, please call CJA Panel Administrator Lisa Coleman at (304) 622-3823.

OPEN ENROLLMENT PERIOD FOR FOURTH CIRCUIT'S CJA APPELLATE AND CAPITAL PANELS

The Fourth Circuit is accepting applications through August 1, 2009, for its CJA Appellate and Capital Appellate Panels. If accepted onto the panel, attorneys would be contacted by the Fourth Circuit for appointment to direct criminal appeals they did not personally handle at the trial level. Application forms are available on the Court's website at www.ca4.uscourts.gov

CJA panel attorneys in NDWV are still required to handle direct appeals in their own trial level cases even if not on the 4th Circuit's Appellate panel.

UPDATE ON DISTRICT'S CRACK COCAINE CASES

On May 18, 2009, the United States Supreme Court denied certiorari in United States v. Dunphy. The Defender Office and the Stanford Law School Supreme Court Litigation Clinic jointly filed the petition seeking to overturn the Fourth Circuit Court of Appeals decision holding that a district court is limited in reducing a crack cocaine sentence to only 2-levels as directed by 18 U.S.C. §3582(c) and U.S.S.G. §1B1.10. Given the continued validity of Dunphy, standard motions are being filed in all remaining crack cocaine resentencing cases here in the district. The Court is being asked to lower the inmate's sentence by these 2-levels, and there appears to be no opposition by the government.

By separate email transmission, CJA panel attorneys should have received copies of a May 1, 2009 memorandum from the Department of Justice concerning policies and procedures for sentencing in crack cocaine offenses, and a May 26, 2009 letter from the NDWV United States Attorney outlining local policy in such cases. To request additional copies, contact the Defender Office at (304) 622-3823.

The Department of Justice now takes an official position that Congress and the Sentencing Commission should eliminate the sentencing disparity between crack cocaine and powder cocaine. Until such revisions are implemented, DOJ directs that prosecutors may indicate they will not object to a reasonable variance in an average case. Unusual circumstances that counsel against a downward variance include use of violence, presence of firearms and risk of recidivism.

According to the NDWV United States Attorney, prosecutors should acknowledge that a sentencing range based on a 1:1 ration (i.e. treating crack cocaine as if it were powder) is the starting point in the sentencing process.

It remains to be seen whether these national and local policies relating to crack cocaine sentencing will result in any real change. However, defense counsel should utilize the language contained in these policies in an effort to convince the Government and the Court that the current crack regime is inherently unfair. In the mean time, we await Congressional action at the prompting of the Obama administration.

CONGRATULATIONS TO RICHARD WALKER FOR PROMOTION TO SENIOR LITIGATOR

L. Richard Walker recently completed his sixth year as an Assistant Federal Public Defender with the Federal Public Defender Office for the Northern District of West Virginia. In addition to his own case-related responsibilities, Mr. Walker has regularly assisted the other attorneys in the office by providing guidance and direction. In recognition of his consistent performance, Mr. Walker was recently promoted to the position of Senior Litigator. Such a position was created by Defender Services and each Defender Office is allowed to have only one Senior Litigator on staff. Please congratulate Richard next time you see him.