

Proposed Commentary Amendment 1: LaBonte Fix

Synopsis of Proposed Amendment: This amendment responds to United States v. LaBonte, ___ S.Ct. ___, 1997 WL 273644 (May 27, 1997). In LaBonte, the Supreme Court held that the way in which the Commission defined "maximum term authorized", for purposes of fulfilling the requirement under 28 U.S.C. § 994(h) to specify sentences for certain categories of career offenders at or near the maximum term authorized for those offenders, is inconsistent with § 994(h)'s plain and unambiguous language and is therefore invalid. The Commission defined "maximum term authorized" to mean the maximum term authorized for the offense of conviction not including any sentencing enhancement provisions that apply because of the defendant's prior criminal record. The Supreme Court held that under § 994's plain and unambiguous language, "maximum term authorized" must be read to include all applicable statutory sentencing enhancements. The proposed amendment makes a straightforward change to the commentary to §4B1.1, the career offender guideline, to reflect the LaBonte decision. Specifically, the definition of "maximum term authorized" is proposed to be changed to reflect that the "maximum term authorized" includes all sentencing enhancements that apply because of the defendant's prior criminal record.

4B1.1. Career Offender

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Commentary

Application Notes:

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2. "Offense Statutory Maximum," for the purposes of this guideline, refers to the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or controlled substance offense, ~~not~~ including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record (such sentencing enhancement provisions are contained, for example, in 21 U.S.C. § 841(b)(1)(A), ~~(b)(1)(B)~~, ~~(b)(1)(C)~~, and ~~(b)(1)(D)~~). For example, ~~wherein a case in which~~ the statutory maximum term of imprisonment under 21 U.S.C. § 841(b)(1)(C) is increased from twenty years to thirty years because the defendant has one or more qualifying prior drug convictions, the "Offense Statutory Maximum" ~~for that defendant~~ for the purposes of this guideline is ~~twenty~~thirty years and not ~~thirty~~twenty years. If more than one count of conviction is of a crime of violence or controlled substance offense, use the maximum authorized term of imprisonment for the count that ~~authorizes~~has the greatest maximum term of imprisonment ~~offense statutory maximum~~.

Background: Section 994(h) of Title 28, United States Code, mandates that the Commission assure that certain "career" offenders receive a sentence of imprisonment "at or near the maximum term authorized." Section 4B1.1 implements this directive, with the definition of a career offender tracking in large part the criteria set forth in 28 U.S.C. § 994(h). However, in accord with its general guideline

promulgation authority under 28 U.S.C. § 994(a)-(f), and its amendment authority under 28 U.S.C. § 994(o) and (p), the Commission has modified this definition in several respects to focus more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate and to avoid "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct" 28 U.S.C. § 991(b)(1)(B). The Commission's refinement of this definition over time is consistent with Congress's choice of a directive to the Commission rather than a mandatory minimum sentencing statute ("The [Senate Judiciary] Committee believes that such a directive to the Commission will be more effective; the guidelines development process can assure consistent and rational implementation for the Committee's view that substantial prison terms should be imposed on repeat violent offenders and repeat drug traffickers." S. Rep. No. 225, 98th Cong., 1st Sess. 175 (1983)).

~~—————The legislative history of this provision suggests that the phrase "maximum term authorized" should be construed as the maximum term authorized by statute. See S. Rep. No. 225, 98th Cong., 1st Sess. 175 (1983); 128 Cong. Rec. 26,511-12 (1982) (text of "Career Criminals" amendment by Senator Kennedy); *id.* at 26,515 (brief summary of amendment); *id.* at 26,517-18 (statement of Senator Kennedy).~~

Proposed Commentary Amendment 2: Additional Definitions for the New Stalking Guideline

Discussion: The following proposed changes to the new stalking and domestic violence guideline (§2A6.2) incorporate two definitions from §1B1.1 (for "dangerous weapon" and "bodily injury") to the commentary. Unfortunately, the omission of these definitions from the proposal submitted to and approved by the Commission in April was a drafting oversight. If the Commission determines that including these definitions would be appropriate, the commentary amendment that follows could be accomplished without having to be submitted to Congress.

No substantive issues should arise with respect to incorporating the definition of "dangerous weapon" into the commentary. However, with respect to incorporating the definition of "bodily injury", the following issue arises. The definition of "bodily injury" that would be picked up is not the statutory definition of bodily injury that applies to stalking and domestic violence cases. Under the guidelines, "bodily injury" means "any significant injury; e.g., an injury that is painful and obvious, or is of a type for which medical attention ordinarily would be sought.". Under the applicable statutory definition, "bodily injury" means "any act, except one done in self defense, that results in physical injury or sexual abuse.".

However, the failure of the new guideline to use the statutory definition will not affect the ability of guidelines to adequately sentence a defendant convicted of a domestic violence or stalking offense who commits criminal sexual abuse. This is because the Commission adopted this year a change to the "serious bodily injury" guideline which states that "'serious bodily injury' is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.". Therefore, since "serious bodily injury" includes criminal sexual abuse under the guidelines, the "bodily injury" enhancement, at the least, will apply when such conduct occurs. Or, the cross reference to

another, more serious offense guideline most likely will apply if an aggravated form of sexual abuse occurs.

Proposed Change to the Commentary for the Stalking and Interstate Domestic Violence Guideline

§2A6.2. Stalking or Domestic Violence

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Commentary

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Application Notes:

1. *For purposes of this guideline—*

"Bodily injury" and "dangerous weapon" are defined in the Commentary to §1B1.1 (Application Instructions).

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Proposed Commentary Amendment 3: §6A1.3

Synopsis of Amendment: This amendment updates the case law references in the commentary to §6A1.3 to include references to sentencing guideline cases.

§6A1.3 Resolution of Disputed Factors (Policy Statement)

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Commentary

In pre-guidelines practice, factors relevant to sentencing were often determined in an informal fashion. The informality was to some extent explained by the fact that particular offense and offender characteristics rarely had a highly specific or required sentencing consequence. This situation ~~will~~ no longer exist under sentencing guidelines. The court's resolution of disputed sentencing factors ~~will~~ usually ~~have~~has a measurable effect on the applicable punishment. More formality is therefore unavoidable if the sentencing process is to be accurate and fair. ~~Although lengthy sentencing hearings should seldom be necessary, disputes about sentencing factors must be resolved with care. When a reasonable dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information. Written statements of counsel or affidavits of witnesses may be adequate under many circumstances. An evidentiary hearing~~

~~may sometimes be the only reliable way to resolve disputed issues. See United States v. Fatico, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979), cert. denied, 444 U.S. 1073 (1980).~~

Although lengthy sentencing hearings seldom should be necessary, disputes about sentencing factors must be resolved with care. When a reasonable dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information. Written statements of counsel or affidavits of witnesses may be adequate under many circumstances. See, e.g., United States v. Ibanez, 924 F.2d 427 (2d Cir. 1991). An evidentiary hearing may sometimes be the only reliable way to resolve disputed issues. See, e.g., United States v. Jimenez Martinez, 83 F.3d 488, 494-95 (1st Cir. 1996) (finding error in district court's denial of defendant's motion for evidentiary hearing given questionable reliability of affidavit on which the district court relied at sentencing); United States v. Roberts, 14 F.3d 502, 521 (10th Cir. 1993) (remanding because district court did not hold evidentiary hearing to address defendants' objections to drug quantity determination or make requisite findings of fact regarding drug quantity); see also, United States v. Fatico, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979), cert. denied, 444 U.S. 1073 (1980).

In determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. See United States v. Watts, 117 U.S. 633, 635 (1997) (holding that lower evidentiary standard at sentencing permits sentencing court's consideration of acquitted conduct); Witte v. United States, 115 S.Ct. 2199, 2206-07 (1995) (noting that sentencing courts have traditionally considered wide range of information without the procedural protections of a criminal trial, including information concerning criminal conduct that may be the subject of a subsequent prosecution); Nichols v. United States, 511 U.S. 738, 747-48 (1994) (noting that district courts have traditionally considered defendant's prior criminal conduct even when the conduct did not result in a conviction); 18 U.S.C. § 3661. Any information may be considered, so long as it has sufficient indicia of reliability to support its probable accuracy. United States v. Marshall, 519 F. Supp. 751 (E.D. Wis. 1981), aff'd, 719 F.2d 887 (7th Cir. 1983); United States v. Fatico, 579 F.2d 707 (2d Cir. 1978) cert. denied, 444 U.S. 1073 (1980) Watts, 117 U.S. at 637; Nichols, 511 U.S. at 748; United States v. Zuleta-Alvarez, 922 F.2d 33 (1st Cir. 1990), cert. denied, 500 U.S. 927 (1991); United States v. Beaulieu, 893 F.2d 1177 (10th Cir.); cert. denied, 497 U.S. 1038 (1990). Reliable hearsay evidence may be considered. United States v. Petty, 982 F.2d 1365 (9th Cir. 1993), cert. denied, 510 U.S. 1040 (1994); United States v. Sciarrino, 884 F.2d 95 (3d Cir.), cert. denied, 493 U.S. 997 (1989). Out-of-court declarations by an unidentified informant may be considered "where there is good cause for the nondisclosure/non-disclosure of his the informant's identity and there is sufficient corroboration by other means." United States v. Rogers, 1 F.3d 341 (5th Cir. 1993); see also United States v. Young, 981 F.2d 180 (5th Cir.), cert. denied, 508 U.S. 980 (1993); United States v. Fatico, 579 F.2d at 713 707, 713 (2d Cir. 1978), cert. denied, 444 U.S. 1073 (1980). Unreliable allegations shall not be considered. United States v. Weston, 448 F.2d 626 (9th Cir. 1971) United States v. Ortiz, 993 F.2d 204 (10th Cir. 1993).

Proposed Commentary Amendment 4: Miscellaneous Title 49 Corrections

Synopsis of Amendment: This amendment strikes background commentary in guideline §2K1.5 that is no longer correct because of a recent change in statutory penalties. Specifically, the Antiterrorism Act of 1996 increased the statutory maximum penalty for violations of 49 U.S.C. § 46505(b) from not more than one year to not more than 10 years. This increase changes the classification of an offense under subsection (b) from a class A misdemeanor to a class D felony.

This amendment also makes technical corrections to §2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery), §2N3.1(Odometer Laws and Regulations), §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce), and Appendix A to reflect changes made to statutory references when Congress codified Title 49 (Transportation), United States Code.

a)

§2K1.5 Possessing Dangerous Weapons or Materials While Boarding or Aboard an Aircraft

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Commentary

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Background: ~~Except under the circumstances specified in 49 U.S.C. § 46505(c), the offense covered by this section is a misdemeanor for which the maximum term of imprisonment authorized by statute is one year. An~~ **This guideline provides an** ~~enhancement is provided where the defendant was a person prohibited by federal law from possession of the weapon or material. A decrease is provided in a case of mere negligence where the defendant was otherwise authorized to possess the weapon or material.~~

b)

§2B4.1 Bribery in Procurement of Bank Loan and Other Commercial Bribery

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Commentary

Statutory Provisions: 15 U.S.C. §§ 78dd-1, 78dd-2; 18 U.S.C. §§ 215, 224, 225; 26 U.S.C. §§ 9012(e), 9042(d); 41 U.S.C. §§ 53, 54; 42 U.S.C. §§ 1395nn(b)(1), (2), 1396h(b)(1), (2); 49 U.S.C. ~~§§ 11907(a), (b)~~ **§ 11902**. For additional statutory provision(s), see Appendix A (Statutory Index).

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§2Q1.2 Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully

Transporting Hazardous Materials in Commerce

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Commentary

Statutory Provisions: 7 U.S.C. § 136j-136l; 15 U.S.C. §§ 2614 and 2615; 33 U.S.C. §§ 1319(c)(1),(2), 1321(b)(5), 1517(b); 42 U.S.C. §§ 300h-2, 6928(d), 7413, 9603(b), (c), (d); 43 U.S.C. §§ 1350, 1816(a), 1822(b); 49 U.S.C. ~~§ 1809(b)~~ § 60123(d). For additional statutory provision(s), see Appendix A (Statutory Index).

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§2N3.1 Odometer Laws and Regulations

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Commentary

Statutory Provisions: ~~15 U.S.C. §§ 1983-1988, 1990c~~ 49 U.S.C. §§ 32703-32705, 32709(b).

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APPENDIX A - STATUTORY INDEX

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15 U.S.C. § 1281 49 U.S.C. § 80501	2B1.3
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15 U.S.C. § 1983 49 U.S.C. § 32703(1)	2N3.1
15 U.S.C. § 1984 49 U.S.C. § 32703(2)	2N3.1
15 U.S.C. § 1985 49 U.S.C. § 32703(3)	2N3.1
15 U.S.C. § 1986 49 U.S.C. § 32703(4)	2N3.1
15 U.S.C. § 1987 49 U.S.C. § 32704	2N3.1
15 U.S.C. § 1988 49 U.S.C. § 32705	2N3.1
15 U.S.C. § 1990c 49 U.S.C. § 32709(b)	2N3.1
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49 U.S.C. § 121 § 80116	2F1.1
49 U.S.C. § 1809(b) § 5124	2Q1.2
49 U.S.C. § 11904 § 14904	2B4.1
49 U.S.C. § 11907(a) § 11902	2B4.1
49 U.S.C. § 11907(b) § 11902	2B4.1
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49 U.S.C. App. § 1687(g) § 60123(d)	2B1.3