

victim, a sentence at or near the upper limit of the applicable guideline range (which will include a 3-level enhancement from subsection (a)) typically will be appropriate.

Background: Subsection (a) reflects the directive to the Commission, contained in Section 280003 of the Violent Crime Control and Law Enforcement Act of 1994, to provide an enhancement of not less than three levels for an offense when the finder of fact at trial determines beyond a reasonable doubt that the defendant had a hate crime motivation (i.e., a primary motivation for the offense was the race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of the victim). To avoid unwarranted sentencing disparity based on the method of conviction, the Commission has broadened the application of this enhancement to include offenses that, in the case of a plea of guilty or nolo contendere, the court at sentencing determines are hate crimes.”.

The Introductory Commentary to Chapter Two, Part H, Subpart I and §§ 2H1.1, 2H1.3, 2H1.4, and 2H1.5 are deleted in their entirety and the following inserted in lieu thereof:

“§ 2H1.1. Offenses Involving Individual Rights

(a) Base Offense Level (Apply the greatest):

(1) the offense level from the offense guideline applicable to any underlying offense;

(2) 10, if the offense involved (A) the use or threat of force against a person; or (B) property damage or the threat of property damage; or (C) two or more participants; or

(3) 6, otherwise.]

(2) 12, if the offense involved two or more participants; or

(3) 10, if the offense involved (A) the use or threat of force against a person; or (B) property damage or the threat of property damage; or

(4) 6, otherwise.]

(b) Specific Offense Characteristics

(1) If (A) the defendant was a public official at the time of the offense; or (B) the offense was committed under color of law, increase by [2][3][4] levels. If the resulting offense level is less than level 10, increase to level 10.

Commentary

Statutory Provisions: 18 U.S.C. § 241, 242, 245(b), 246, 247, 248, 1091; 42 U.S.C. § 3631.

Application Notes:

1. ‘Offense guideline applicable to any underlying offense’ means the offense guideline applicable to any conduct established by the offense of conviction

that constitutes an offense under federal, state, or local law (other than an offense that is itself covered under Chapter Two, Part H, Subpart 1).

In certain cases, conduct set forth in the count of conviction may constitute more than one underlying offense (e.g., two instances of assault, or one instance of assault and one instance of arson). In such cases, determine the number and nature of underlying offenses by applying the procedure set forth in Application Note 5 of § 1B1.2 (Applicable Guidelines). If the Chapter Two offense level for any of the underlying offenses under subsection (a)(1) is the same as, or greater than, the alternative base offense level under subsection [(a)(2) or (3)] [(a)(2), (3), (4)], as applicable, use subsection (a)(1) and treat each underlying offense as if contained in a separate count of conviction. Otherwise, use subsection [(a)(2) or (3)] [(a)(2), (3), (4)], as applicable, to determine the base offense level.

2. ‘Participant’ is defined in the Commentary to § 3B1.1 (Aggravating Role).

3. The burning or defacement of a religious symbol with an intent to intimidate shall be deemed to involve the threat of force against a person for the purposes of subsection (a)[(2)][(3)](A).

4. If the finder of fact at trial or, in the case of a plea of guilty or nolo contendere, the court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person, an additional 3-level enhancement from § 3A1.1(a) will apply.

5. If subsection (b)(1) applies, do not apply § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).”.]

[Option 2: Section 2H1.1(b) is amended by inserting the following additional subdivision:

“(2) If proof of the conspiracy requires a showing that a defendant acted for an improper purpose as defined in 18 U.S.C. §§ 245, or 247, or 42 U.S.C. § 3631, increase by [1] level.”.

Section 2H1.3(a) is amended—

(1) in subdivision (1) by deleting “10” and inserting in lieu thereof “[11]”;

(2) in subdivision (2) by deleting “15” and inserting in lieu thereof “[16]”;

(3) in subdivision (3) by deleting “2” and inserting in lieu thereof “[3]”.

Chapter Three, Part A, is amended by adding the following additional section:

§ 3A1.4. Hate Crime Motivation

If the finder of fact at trial or, in the case of a plea of guilty or nolo contendere, the court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person, increase by [3] levels.

Commentary

Application Notes:

1. Do not apply this adjustment if the offense guideline specifically incorporates this factor. For example, do not apply this adjustment if § 2H1.1(b)(2) or § 2H1.3 applies. Similarly, do not apply this adjustment on the basis of gender in the case of a sexual offense. In such cases, this factor is taken into account by the offense level established by the Chapter Two offense guideline.

2. Note that special evidentiary requirements govern the application of this subsection.

Background: This section reflects the directive to the Commission in section 280003 of the Violent Crime Control and Law Enforcement Act of 1994, to provide an enhancement of not less than three levels for an offense when the finder of fact at trial determines beyond a reasonable doubt that the defendant had a hate crime motivation (i.e., that the defendant intentionally selected a victim or property as the object of the offense because of a factor listed in this section). To avoid unwarranted sentencing disparity based on the method of conviction, the Commission has broadened the application of this enhancement to include offenses that, in the case of a plea of guilty or nolo contendere, the court at sentencing determines are hate crimes.”.

Additional Issue for Comment: If Option 2 is adopted, the Commission seeks comment on how it should implement the penalty provisions of the Freedom of Access to Clinic Entrances Act of 1994.]

Chapter Two, Part K (Offenses Involving Public Safety)

15. Synopsis of Proposed Amendment:

Section 110102 of the Violent Crime Control and Law Enforcement Act of 1994 amends 18 U.S.C. § 922 to add subsection (v), making it unlawful to manufacture, transfer, or possess “semiautomatic assault weapons.” Previously, only importation and possession (pursuant to 18 U.S.C. § 925(d)(3)) and assembly of imported parts (pursuant to 18 U.S.C. § 922(r)) of semiautomatic assault rifles