

two-level enhancement). The Commission invites comment as to whether it should implement section 140008 by creating (1) a generally applicable departure policy statement in Chapter Five, Part K (Departures), or (2) a Chapter Three adjustment. The Commission also invites comment as to whether, if a Chapter Three adjustment is appropriate, the adjustment should be two levels, commensurate with the adjustment for abuse of position of trust, or a higher or lower number of levels.

(B). Synopsis of Proposed Amendment: This proposed amendment, published at the request of the Department of Justice, sets forth Chapter Three adjustments for using a minor to commit a crime.

Proposed Amendment: Part B of Chapter Three is amended by redesignating § 3B1.4 as § 3B1.5 and by inserting the following new section:

“§ 3B1.4. Using a Minor to Commit a Crime

(a) If a defendant 21 years of age or older used or attempted to use any person less than 18 years of age with the intent that the minor would commit an offense or assist in avoiding detection of or apprehension for an offense, increase by 2 levels.

(b) If the defendant used or attempted to use 5 or more minors, increase by 1 additional level; if the defendant used or attempted to use 15 or more minors, increase by 2 additional levels.

Commentary

Application Notes:

1. To ‘use a person less than 18 years of age’ includes soliciting, procuring, recruiting, counseling, encouraging, training, directing, commanding, intimidating, or otherwise using such a person.

2. Do not apply this adjustment if the offense guideline specifically incorporates this factor. However, if the adjustment under this section is greater, apply this section in lieu of the adjustment under the offense guideline.”

26(A). Issue for Comment: Section 150001 of the Violent Crime Control and Law Enforcement Act of 1994 creates a new section, 18 U.S.C. § 521, that provides a statutory sentence enhancement of up to ten years if a person commits a specified felony controlled substance offense or crime of violence and participates in, intends to further the felonious activities of, or seeks to maintain or increase his or her position in, a criminal street gang. Section 150001 defines a “criminal street gang” as an ongoing group, club, organization, or association of five or more persons: (A) that has as one of its

primary purposes the commission of one or more of the following offenses: a federal felony involving a controlled substance for which the maximum penalty is not less than five years, a federal felony crime of violence that has as an element the use or attempted use of physical force against another, and the corresponding conspiracies; (B) whose members engage (or have engaged during the past five years) in a continuing series of these same offenses; and (C) the activities of which affect interstate or foreign commerce.

The Commission invites comment on whether, and how, it should incorporate into the sentencing guidelines the statutory sentence enhancement described above. Specifically, the Commission invites comment as to whether it should implement section 150001 by creating a generally applicable departure policy statement in Chapter Five, Part K (Departures) providing that if the enhancement contained in 18 U.S.C. § 521 (Criminal Street Gangs) is determined to apply, the court may increase the sentence above the authorized guideline range. Alternatively, the Commission could create a Chapter Three adjustment that would apply to all Chapter Two offenses and that would provide a specific enhancement.

(B). Synopsis of Proposed Amendment: This proposed amendment is published at the request of the Department of Justice. The proposed amendment would increase the offense level provided under §§ 2K2.1 and 2K2.5 by four levels if the defendant committed the offense in connection with a criminal street gang. In addition, the amendment would increase the offense level provided under § 2K2.5 by two to seven levels, depending on the nature of the possession or use of the firearm involved in the offense. With respect to the amendment to § 2K2.1, the enhancement would apply in addition to the existing four-level enhancement for an offense involving a firearm that was used or possessed in connection with another felony offense, or with knowledge or reason to believe it would be used or possessed in such connection. If a Chapter Three adjustment is adopted that provides a general enhancement for offenses related to criminal street gangs, that amendment would replace the portion of this amendment dealing with criminal street gangs.

Proposed Amendment: Section 2K2.1(b) is amended by inserting the following additional subdivision:

“(7) If the defendant committed the offense as a member of, on behalf of, or

in association with a criminal street gang, increase by 4 levels.”

The Commentary to § 2K2.1 captioned “Application Notes” is amended by inserting the following additional Note:

“20. ‘Criminal street gang’ is defined as a group, club, organization, or association of five or more persons whose members engage, or have engaged within the past five years, in a continuing series of crimes of violence and/or controlled substance offenses as defined in § 4B1.2 (Definitions of Terms Used in Section 4B1.1).”

Section 2K2.5(b) is amended by inserting the following additional subdivision:

“(2) If the defendant was convicted of violating 18 U.S.C. § 922(q) and (A) the firearm was discharged, increase by 7 levels; (B) the firearm was otherwise used, increase by 6 levels; (C) the firearm was brandished, increased by 5 levels; (D) the firearm was loaded, increase by 3 levels; (E) an express threat of death was made or ammunition was possessed, increase by 2 levels.

(3) If the defendant was convicted of violating 18 U.S.C. § 922(q) and committed the offense as a member of, on behalf of, or in association with a criminal street gang, increase by 4 levels.”

The Commentary to § 2K2.5 captioned “Application Notes” is amended in Note 4 by deleting “federal facility, federal court facility, or school zone” and inserting in lieu thereof “federal facility or federal court facility.”

The Commentary to § 2K2.5 captioned “Application Notes” is amended by inserting the following additional Note:

“5. ‘Criminal street gang’ is defined as a group, club, organization, or association of five or more persons whose members engage, or have engaged within the past five years, in a continuing series of crimes of violence and/or controlled substance offenses as defined in § 4B1.2 (Definitions of Terms Used in Section 4B1.1).”

Chapter Three, Part A (Victim-Related Adjustments)

27(A). Issue for Comment: Section 240002 of the Violent Crime Control and Law Enforcement Act of 1994 directs the Commission to ensure that the guidelines provide sufficiently stringent punishment for a defendant convicted of a “crime of violence” against an “elderly victim.” The directive requires that the guidelines: (1) provide for increasingly severe punishment commensurate with the degree of physical harm caused to the elderly victim; (2) take appropriate account of the vulnerability of the victim; and (3) provide enhanced punishment for a