

PROPOSED AMENDMENT: AGGRAVATED ASSAULT

Synopsis of Proposed Amendment: *This proposed amendment addresses the circuit conflict regarding whether the four-level enhancement in §2A2.2(b)(2)(B) for use of a dangerous weapon during an aggravated assault is impermissible double counting in a case in which the weapon that was used was a non-inherently dangerous weapon. At the July 7, 2000, meeting the Commission directed the staff to (1) draft the majority view that application of the enhancement in such a case does not constitute impermissible double counting; (2) update outdated background commentary; (3) address the issue of who is the "victim" of the offense; and (4) do a general "cleanup" of the aggravated assault guideline.*

This amendment presents two options. Both options address the circuit conflict by clarifying in the aggravated assault guideline that (1) both the base offense level of level 15 and the weapon enhancement in subsection (b)(2) shall apply to aggravated assaults that involve a dangerous weapon with intent to cause bodily harm; and (2) instruments, such as a car or chair, that ordinarily are not used as weapons may qualify as a dangerous weapon for purposes of subsection (b)(2) when the defendant involves them in the offense with the intent to cause bodily harm. Both options also update the background commentary in the same manner, and pending further Commissioner direction, neither option addresses the "victim" issue for the reasons stated in Paula Biderman's October 18, 2000 memorandum, attached.

The difference between the options is that, unlike Option One, Option Two attempts to do a general "cleanup" of the aggravated guideline by proposing other substantive changes to address problems with the guideline that have arisen over the years.

Specifically, Option Two also does the following. First, it attempts more explicitly and thoroughly than Option One to address one of the key issues underlying the circuit conflict, i.e., what conduct is incorporated in the base offense level. The aggravated assault guideline covers three types of aggravated assault: felonious assaults that involve any one of the following: (1) serious bodily injury; (2) a dangerous weapon with intent to cause bodily harm; and (3) intent to commit another felony. See Application Note 1 of §2A2.2. Unlike the current guideline, which has one base offense level of level 15 for all types of aggravated assault, Option Two provides for each type of aggravated assault a base offense level that is intended to cover that type of assault in its most basic form, unaccompanied by further aggravated conduct. Accordingly, Option Two provides two alternative base offense levels: (1) level 19, if the offense involved serious bodily injury; and (2) level 15, otherwise (i.e., if the offense involved either an intent to commit another felony or a dangerous weapon with the intent to cause bodily injury).

It is important to note that the base offense level of level 19 for offenses under 18 U.S.C. § 113(a)(6) (assaults resulting in serious bodily injury) achieves the same offense level as should be achieved under the current guideline by application of the base offense level and the serious

bodily injury enhancement in subsection (b)(3)(B).¹ However, FY 1999 data show that 16% of 63 cases that involved a conviction under 18 U.S.C. § 113(a)(6) either received no bodily injury enhancement at all or received an enhancement lower than the four-level enhancement required for serious bodily injury. This leads to concerns either that there is confusion about what conduct the base offense level incorporates for these types of aggravated assaults or that application of the serious bodily injury enhancement is being avoided. Incorporating the serious bodily injury enhancement into the base offense level should help to ameliorate both of these concerns.

Second, it proposes to delete the intermediate adjustments currently found in the bodily injury enhancement. Currently, the guideline allows for application of three or five levels if the extent of the injury falls somewhere between bodily injury, serious bodily injury, and permanent or life-threatening bodily injury. As some commentators have noted, however, the problem with this approach is that the definitions of these three terms do not leave an "in-between" into which an injury could fit.

*Third, it proposes a substantive change to the minor assault guideline, §2A2.3, so that the minor and aggravated assault guidelines more fully complement one another. Specifically, Option Two proposes to add a two-level enhancement in the minor assault guideline for bodily injury. There may be instances in which an assault that does not qualify as a aggravated assault under §2A2.2 may nevertheless involve bodily injury. The current alternative base offense level of level three is bracketed for Commissioner consideration regarding whether that base offense level is sufficient for the simplest minor assaults, *i.e.*, those not involving physical contact or the possession and threatened use of a dangerous weapon (which currently receive a base offense level of level 6).*

PROPOSED AMENDMENT:

OPTION 1:

§2A2.2. Aggravated Assault

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 111, 112, 113(a)(2), (3), (6), 114, 115(a), (b)91), 351(e),

¹The same result is achieved by limiting application of the enhancement for bodily injury to cases in which the base offense level of level 15 applies and by providing for application of the additional two-level enhancement for permanent or life-threatening injury only to cases that received the base offense level of level 19.

1751(e). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

"Aggravated assault" means a felonious assault that involved (A) possession of a dangerous weapon with intent to ~~do bodily harm~~ cause bodily injury (i.e., not merely to frighten) with that weapon; (B) serious bodily injury; or (C) an intent to commit another felony.

"Brandished," "bodily injury," "firearm," "otherwise used," "permanent or life-threatening bodily injury," and "serious bodily injury," have the meaning given those terms in §1B1.1, Application Note 1.

"Dangerous weapon" has the meaning given that term in §1B1.1, Application Note 1. For purposes of this guideline, and pursuant to that application note, "dangerous weapon" includes any instrument that is not ordinarily used as a weapon (e.g., a car, a chair, or an ice pick) if such an instrument is involved in the offense with the intent to commit bodily injury.

"More than minimal planning," has the meaning given that term in §1B1.1, Application Note 1.

~~2. Definitions of "more than minimal planning," "firearm," "dangerous weapon," "brandished," "otherwise used," "bodily injury," "serious bodily injury," and "permanent or life-threatening bodily injury," are found in the Commentary to §1B1.1 (Application Instructions):~~

~~3. This guideline also covers attempted manslaughter and assault with intent to commit manslaughter. Assault with intent to commit murder is covered by §2A2.1 (Assault With Intent to Commit Murder). Assault with intent to commit rape is covered by §2A3.1 (Criminal Sexual Abuse):~~

2. Aggravating Factors.—This guideline covers felonious assaults that are more serious than minor assaults because of the presence of certain aggravating factors, i.e., serious bodily injury, the involvement of a dangerous weapon with intent to cause bodily injury, and/or the intent to commit another felony.

An assault that involves the presence of a dangerous weapon is aggravated in form when the presence of the dangerous weapon is coupled with the intent to cause bodily injury. In such a case, the base offense level and the weapon enhancement in subsection (b)(2) take into account different aspects of the offense. The base offense level takes into account the presence of the dangerous weapon (regardless of the manner in which the weapon was involved) and the fact that the defendant intended to cause bodily injury. Subsection (b)(2), on the other hand, takes into account the manner in which the dangerous weapon

was involved in the offense. Accordingly, in a case involving a dangerous weapon with intent to cause bodily injury, the court shall apply both the base offense level and subsection (b)(2).

3. **More than Minimal Planning.**—For purposes of subsection (b)(1), waiting to commit the offense when no witnesses were present would not alone constitute more than minimal planning. However, luring the victim to a specific location or wearing a ski mask to prevent identification would constitute more than minimal planning.

Background: This section applies to serious (aggravated) assaults. Such offenses occasionally may involve planning or be committed for hire. Consequently, the structure follows §2A2.1. This guideline also covers attempted manslaughter and assault with intent to commit manslaughter. Assault with intent to commit murder is covered by §2A2.1 (Assault with Intent to Commit Murder). Assault with intent to commit rape is covered by §2A3.1 (Criminal Sexual Abuse).

There are a number of federal provisions that address varying degrees of assault and battery. ~~The punishments under these statutes differ considerable, even among provisions directed to substantially similar conduct.~~ For example, if the assault is upon ~~certain~~ a federal officers “while engaged in or on account of:— the performance of official duties,” the maximum term of imprisonment ~~under~~ pursuant to 18 U.S.C. § 111(a)(2) is three years. If a deadly or dangerous weapon is used in the assault on a federal officer, or if the assault results in bodily injury, the maximum term of imprisonment is ten years. ~~However, if the same~~ If a dangerous weapon is used to assault a person ~~not otherwise specifically protected,~~ who is not a federal officer, and the weapon was used with the intent to do bodily harm, without just cause or excuse, the maximum term of imprisonment ~~under~~ pursuant to 18 U.S.C. § 113(c)(a)(3) also is ~~five~~ ten years. If an assault results in serious bodily injury, the maximum term of imprisonment ~~under~~ pursuant to 18 U.S.C. § 113(f)(a)(6) is ten years, unless the injury constitutes maiming by scalding, corrosive, or caustic substances ~~under~~ pursuant to 18 U.S.C. § 114, in which case the maximum term of imprisonment is twenty years.

OPTION 2:

§2A2.2. **Aggravated Assault**

- (a) Base Offense Level (Apply the greater): **15**
- (1) **19**, if the offense involved serious bodily injury; or
- (2) **15**, otherwise.
- (b) Specific Offense Characteristics
- (1) If the offense involved more than minimal planning, increase by 2 levels.
- (2) If (A) a firearm was discharged, increase by **5** levels; (B) a dangerous

weapon (including a firearm) was otherwise used, increase by **4** levels; or (C) a dangerous weapon (including a firearm) was brandished or its use was threatened, increase by **3** levels.

~~(3) If the victim sustained bodily injury, increase the offense level according to the seriousness of the injury:~~

| | <u>Degree of Bodily Injury</u> | <u>Increase in Level</u> |
|-----|---|--------------------------|
| (A) | Bodily Injury | add 2 |
| (B) | Serious Bodily Injury | add 4 |
| (C) | Permanent or Life-Threatening Bodily Injury | add 6 |

~~(D) If the degree of injury is between that specified in subdivisions (A) and (B), add **3** levels; or~~

~~(E) If the degree of injury is between that specified in subdivisions (B) and (C), add **5** levels.~~

~~Provided, however, that the cumulative adjustments from (2) and (3) shall not exceed **9** levels.~~

(3) If—

(A) subsection (a)(1) applies, and the victim sustained permanent or life-threatening bodily injury, increase by **2** levels, except that the cumulative enhancements from this subdivision and subsection (b)(2) shall not exceed **5** levels; or

(B) subsection (a)(2) applies, and the victim sustained bodily injury, increase by **2** levels.

(4) If the offense was motivated by a payment or offer of money or other thing of value, increase by **2** levels.

(5) If the offense involved the violation of a court protection order, increase by **2** levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 111, 112, 113(a)(2), (3), (6), 114, 115(a), (b)91), 351(e), 1751(e). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

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2. ~~Definitions of "more than minimal planning," "firearm," "dangerous weapon," "brandished," "otherwise used," "bodily injury," "serious bodily injury," and "permanent or life-threatening bodily injury," are found in the Commentary to §1B1.1 (Application Instructions).~~

3. ~~This guideline also covers attempted manslaughter and assault with intent to commit manslaughter. Assault with intent to commit murder is covered by §2A2.1 (Assault With Intent to Commit Murder). Assault with intent to commit rape is covered by §2A3.1 (Criminal Sexual Abuse).~~

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An assault that involves the presence of a dangerous weapon is aggravated in form when the presence of the dangerous weapon is coupled with the intent to cause bodily injury. In such a case, the base offense level and the weapon enhancement in subsection (b)(2) take into account different aspects of the offense. The base offense level takes into account the presence of the dangerous weapon (regardless of the manner in which the weapon was involved) and the fact that the defendant intended to cause bodily injury. Subsection (b)(2), on the other hand, takes into account the manner in which the dangerous weapon was involved in the offense. Accordingly, in a case involving a dangerous weapon with intent to cause bodily injury, the court shall apply both the base offense level and subsection (b)(2).

3. More than Minimal Planning.—For purposes of subsection (b)(1), waiting to commit the offense when no witnesses were present would not alone constitute more than minimal planning. However, luring the victim to a specific location or wearing a ski mask to prevent identification would constitute more than minimal planning.

Background: This section applies to serious (aggravated) assaults. Such offenses occasionally may involve planning or be committed for hire. Consequently, the structure follows §2A2.1. This guideline also covers attempted manslaughter and assault with intent to commit manslaughter. Assault with intent to commit murder is covered by §2A2.1 (Assault with Intent to Commit Murder). Assault with intent to commit rape is covered by §2A3.1 (Criminal Sexual Abuse).

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§2A2.3 Minor Assault

- (a) Base Offense Level:
- (1) **6**, if the ~~conduct~~ offense involved physical contact, or if a dangerous weapon (including a firearm) was possessed and its use was threatened; or
 - (2) **[3]**, otherwise.
- (b) Specific Offense Characteristics
- (1) If the offense ~~resulted in~~ involved (A) bodily injury, increase by **2** levels; or (B) substantial bodily injury to an individual under the age of 16 years, increase by **4** levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 112, 115(a), 115(b)(1), 351(e), 1751(e). For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Note:

1. *Definitions.—For purposes of this guideline:*

“Minor assault” means a misdemeanor assault or a felonious assault not covered by §2A2.2 (Aggravated Assault).

“Bodily injury,” “dangerous weapon” and “firearm” have the meaning given those terms in §1B1.1, Application Note 1.

“Substantial bodily injury” has the meaning given that term in 18 U.S.C. § 113(b)(1).

Background: This guideline covers offenses involving minor assault and battery.