

PROPOSED AMENDMENT: RECEIVING STOLEN PROPERTY

Synopsis of Proposed Amendment: *This proposed amendment addresses an issue that has arisen in case law -- considered by some to be a circuit conflict -- regarding what conduct qualifies a defendant for the 4-level enhancement under §2B1.1(b)(4)(B) if the offense involved receiving stolen property and the defendant was in the business of receiving and selling stolen property. The conflict pertains to the definition of “in the business of.”*

In determining what “in the business of” means, three circuits apply what has been coined the “fence test” in which the court must consider (1) if the stolen property was bought and sold, and (2) to what extent the stolen property transactions encouraged others to commit property crimes. Three other circuits have adopted the “totality of the circumstances test” that focuses on the “regularity and sophistication” of the defendant’s operation. Though the factors considered by all of these circuits are similar, the approaches are different.

The fence test involves making an ultimate determination of whether (1) the stolen property was bought and sold, and (2) the stolen property transactions encouraged others to commit property crimes. In making this determination, the court considers factors such as the regularity of the defendant’s operation, the volume of the business, the quick turnover of the stolen items, the value of the stolen items, the sophistication of the defendant’s operation, any use of a legitimate business to facilitate the turnover of the stolen items, the defendant’s connections with thieves and purchasers of the stolen items, and the use of technology and communications.

The totality of the circumstances test involves consideration of the circumstances in each case with particular emphasis on the regularity and sophistication of the defendant’s operation, looking at such factors as the amount of income generated through fencing activities, the value of the property handled, the defendant’s past activities, the defendant’s demonstrated interest in continuing or expanding the operation, the use of technology and communication, and the defendant’s connections with thieves and purchasers of stolen property.

By adopting the totality of the circumstances test, the Commission will make explicit that which is implicit in the fence test. The determination “in the business of” will be made based on the circumstances surrounding the defendant and his business as opposed to the effect the fencing operation has in encouraging others to commit crimes. Both tests ultimately use parallel considerations. However, where the fence test focuses on the effect of the fencing operation to promote crime, the totality of the circumstances test focuses on the defendant’s conduct.

Proposed Amendment:

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property

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Commentary

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Application Notes:

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16. Enhancement for Business of Receiving and Selling Stolen Property.—

(A) *In General.*—The court shall consider the totality of the circumstances to determine whether a defendant was in the business of receiving and selling stolen property for purposes of subsection (b)(4)(B).

(B) *Factors to Consider.*—The following are some factors that the court may consider in determining whether the defendant was in the business of receiving and selling stolen property for purposes of subsection (b)(4)(B):

(i) the regularity or sophistication of the defendant’s activities;

(ii) the value and size of the inventory of stolen property maintained by the defendant;

(iii) the extent to which the defendant’s activities encouraged or facilitated other crimes; or

(iv) the defendant's past activities involving stolen property.