

REVISED PROPOSED AMENDMENT: CIRCUIT CONFLICT CONCERNING AGGRAVATED ASSAULT (Amendment 5 in User Friendly, Volume One)

Synopsis of Proposed Amendment: *This revised proposed amendment addresses the circuit conflict regarding whether the four-level enhancement in subsection (b)(2)(B) of §2A2.2 (Aggravated Assault) 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. Compare e.g., United States v. Williams, 954 F.2d 204, 205-08 (4th Cir. 1992) (applying the dangerous weapon enhancement for defendant's use of a chair did not constitute impermissible double counting even though the use of the chair increased the defendant's offense level twice: first by triggering application of the aggravated assault guideline and second as the basis for the dangerous weapon enhancement), with United States v. Hudson, 972 F.2d 504, 506-07 (2d Cir. 1992) (in a case in which the use of an automobile caused the crime to be classified as an aggravated assault, the court may not enhance the base offense level under §2A2.2(b) for use of the same non-inherently dangerous weapon).*

The proposed amendment addresses the circuit conflict by clarifying in the aggravated assault guideline that (A) both the base offense level of level 15 and the weapon use enhancement in subsection (b)(2) shall apply to aggravated assaults that involve a dangerous weapon with intent to cause bodily harm (See redlined Application Note 2 and last paragraph of the Background Commentary); and (B) instruments, such as a car or chair, that ordinarily are not used as weapons may qualify as a dangerous weapon for purposes of the use of the aggravated assault guideline and the application of subsection (b)(2) when the defendant involves them in the offense with the intent to cause bodily harm (See redlined definition of "dangerous weapon" in Application Note 1).

The proposed amendment also makes updates statutory references in the Background Commentary and expands the Background Commentary to describe the types of aggravated assaults covered by the guideline.

In 1999, 85 of 305 cases (27.9%) sentenced under §2A2.2 did not receive the weapon enhancement in (b)(2)(B). This establishes the maximum number of cases that could be impacted should the Commission find that enhancements for non-inherently dangerous weapons are appropriate under this guideline. Applying the four level increase to these cases results in a increase of 28.3 percent to their average sentence (from 60 months to 77 months) and will require 126 additional prison beds.

Proposed Amendment:

§2A2.2. Aggravated Assault

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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:

"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. Application of Subsection (b)(2).—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. 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 the intent to commit another felony. 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.

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, even if application of the base offense level and the weapon enhancement is based on the same conduct.