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Honorable Richard H. Hinojosa
Acting Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 2002-8002

Re: Comments on Proposed Amendments Related to Bleached Notes

Dear Judge Hinojosa,

Thank you for the opportunity to provide public comments from the Federal Public and Community Defenders on the Commission's proposal to expand the definition of "counterfeit" in §2B5.1 to include cases involving bleached notes.

At the public hearing on March 17, 2009, we submitted written testimony on this issue. In that testimony, we pointed out that the Commission's proposal is not supported by past practice, empirical data, or the purposes of sentencing. Specifically, we noted that the guidelines' current definition of "counterfeit" was derived from Title 18 and has been in place for twenty years. We are not aware of, and the Commission has not identified, any empirical reason to expand that definition now. And while the Commission appears to want to resolve a circuit split, no such split exists. As noted in our testimony, every circuit to have addressed the issue has ruled that "bleached notes" cases are more properly sentenced under §2B1.1.[1] We have attached and incorporated our written testimony as part of this public comment.

We write briefly to further address some of the issues raised in our initial comment, and also to respond to some issues that were raised during and after the March 17th hearing on this issue.

[1] *See United States v. Schreckengost*, 384 F.3d 922, 923 (7th Cir. 2004); *United States v. Inclema*, 363 F.3d 1177, 1180 (11th Cir. 2004).

1. The Distinction Drawn By the Initial Commission Between Counterfeits and Altered or Forged Instruments Was Not Based on Whether the Instrument Was a "Note."

Section 2B5.1 currently defines a "counterfeit" instrument as one that was "falsely made or manufactured in its entirety." *See* USSG §2B5.1 comment. (n. 3). That definition has been in place for the past twenty years. It was added to the guidelines by the original Commission in 1989 at the same time that the Commission inserted the word "bearer" into §2B5.1's title. *See* U.S.S.G., App. C., Amend. 115 (1989). The Commission stated its Reason for Amendment as follows:

> The purpose of this amendment is to clarify the coverage and operation of this guideline. The amendment revises the title of §2B5.1 to make the coverage of the guideline clear from the title, and adopts the definition of "counterfeit" used in 18 U.S.C. § 513. *"Altered" obligations (e.g., the corner of a note of one denomination pasted on a note of a different obligation) are covered under §2B5.2.*

See USSG App. C, Amend. 115 (1989) (emphasis added). At the time, §2B5.2 covered "Forgery, Offenses Involving Altered or Counterfeit Instruments Other Than Counterfeit Bearer Obligations of the United States."

The Commission's decision to amend §2B5.1's title to cover "Offenses Involving Counterfeit Bearer Obligations of the United States" should not be interpreted to suggest that it intended the guideline to cover all offenses involving "bearer obligations of the United States" for two reasons. First, such a reading ignores the Commission's intent, made clear in Amendment 115, that cases involving altered notes – e.g., notes that had been cut and pasted on top of other notes – would be sentenced under §2B5.2, not §2B5.1. The conduct involved in bleaching a note and reprinting it to look like it is worth more is indistinguishable from cutting one note and pasting it on top of a different note to make it look like it is worth more – both involve altering genuine note paper in order to make it appear to be worth more than it is. The original Commission clearly intended such cases to be sentenced under §2B5.2. Second, such a reading ignores the word "counterfeit" in the title.

Section 2B5.2 no longer exists. Its history, however, demonstrates a consistent policy decision by the Commission to treat "altered" notes differently than "counterfeit" notes. Section 2B5.2 was deleted in 1993 as part of a guidelines overhaul that consolidated 25 offense guidelines with other guidelines. According to the Commission, the overhaul was designed to shorten and simplify the manual, reduce the likelihood of inconsistent phraseology and definitions between sections, "reduce possible confusion and litigation as to which guideline applies to particular conduct," and "aid the development of case law because cases involving similar or identical concepts and definitions can be referenced under one guideline rather than different guidelines." *See*

USSG, App. C, Amend. 481 (1993). The Commission chose to send the soon-to-be-deleted guidelines to "other offense guidelines *that cover similar offense conduct and have identical or very similar base offense levels and adjustments.*" *See id.* (emphasis added). Importantly, with regard to §2B5.2 offenses, the Commission chose not to refer anything to §2B5.1. Instead, it referred all §2B5.2 offenses to §2F1.1, which at the time covered "Fraud and Deceit."

In 2001, the Commission again overhauled the guidelines as part of the Economic Crime Package, which was designed by the Commission to reflect "the result of Commission study of economic crime issues over a number of years." *See* USSG, App. C, Amend. 617 (2001). Section 2F1.1 was deleted as part of the Economic Crime Package. Again, however, the Commission did not send any §2F1.1 offenses to §2B5.1. Instead, they were all referred to §2B1.1 – including those offenses involving altered or forged notes. The Commission explained its Reason for Amendment as follows:

> Consolidation [of §2B1.3 and §2F1.1 into §2B1.1] will provide similar treatment for similar offenses for which pecuniary harm is a major factor in determining the offense level and, therefore, decrease unwarranted sentencing disparity that may be caused by undue complexity in the guidelines. Consolidation addresses concerns raised over several years by probation officers, judges, and practitioners about the difficulties of determining for particular cases, whether to apply §2B1.1 or §2F1.1

Id. As this history shows, for twenty years, the Commission has not treated altered or forged instruments – including notes – the same as counterfeits. No reason justifies adding yet another complication in an already complex system by doing so now.

2. *The Distinction Drawn By the Initial Commission between Counterfeits and Altered or Forged Instruments Was Not Based on How Deceptive the Instrument Was Likely to Be*

While it is not entirely clear why the Commission chose to follow Congress in adopting this distinction, it is clear that it did not distinguish between the two types of offenses based on the likelihood that the instrument in question would prove deceptive.

We know this because the definition of "counterfeit" that Congress used in § 513 was intended to break from the tradition of defining counterfeit instruments by how similar they appeared to the genuine instrument, and thus how "deceptive" the instrument was likely to be. At the time Congress passed § 513, courts had developed the common law "similitude test" to compensate for the lack of a statutory definition for the term "counterfeit." *See United States v. Prosperi*, 201 F.3d 1335, 1342 (11th Cir. 2000). Under the "similitude test," an instrument was deemed counterfeit if it "bears such a likeness or resemblance to any of the genuine obligations or securities issued under the authority of the United States as is calculated to deceive an honest, sensible and

unsuspecting person of ordinary observation and care when dealing with a person supposed to be upright and honest." *See id.* (*citing United States v. Lustig*, 159 F.2d 798, 802 (3rd Cir. 1947)). With the passage of § 513, however, "Congress broke from the tradition established in §§ 472, 473, and 474 by incorporating its own definition of the term 'counterfeited:' a document that purports to be genuine but is not, because it has been falsely made or manufactured in its entirety." *Id.*

It was this definition – and not the common law similitude test – that the original Commission adopted in §2B5.1:

> Although § 513's definition of "counterfeited" is unique among counterfeiting statutes, §2B5.1 of the United States Guidelines defines "counterfeited" in precisely the same terms, and courts interpreting the "purports to be genuine" language in §2B5.1 have not required a finding of similitude.

Id. (citations omitted). Clearly this change was intentional. The Commission adopted it expressly "to clarify the coverage and operation of this guideline." *See* USSG App. C, Amend. 115 (1989). Application Note 4 to §2B5.1 expressly excludes enhanced sentences for people who "produce items that are so obviously counterfeit that they are unlikely to be accepted even if subjected to minimal scrutiny." Such items would not qualify as "counterfeit" at all if the Commission had intended §2B5.1 to incorporate the similitude test.

In fact, §2B5.1's definition expands criminal liability for "counterfeiting" because it reaches people who created obviously phony instruments in their entirety – people who would have been excluded under the similitude test from receiving the higher sanctions meted out for "counterfeiting." If the Commission adopts the proposed amendment, it would be widening the net even more by selectively applying the similitude test to capture a particular class of offender that otherwise falls outside the guidelines' already expansive definition. Yet there is no empirical evidence that the guidelines as written result in sentences that fail to serve the purposes of punishment in "bleached notes" cases. In any event, the present Commission should not presume that the original Commission acted without care in rejecting the similitude test in favor of precise statutory language. *Accord Prosperi*, 201 F.3d at 1343 ("when Congress speaks clearly on an issue, and when the language chosen comports with the statutory purpose, the legislative definition supplants the preexisting common law definition"). Without empirical evidence demonstrating a need to take this action, the proposed amendments should be rejected.

3. *Bleached Notes Offenses and the Technology Necessary to Commit Them Existed at the Time that the Commission Adopted the Current Definition of Counterfeit*

To the extent that the Commission is under the impression that bleached notes cases are new, or that they depend on new technology, the Commission is mistaken. In our testimony, we cited to bleached notes cases from as far back as the 1940s. *See, e.g., United States v. Guida*, 792 F.2d 1087, 1095 (1986) (noting expert witness's testimony that "the counterfeit notes were printed on genuine Federal Reserve Notes, which had been bleached and then reprinted in a higher denomination"); *McKinney v. United States*, 172 F.2d 781, 783 (9th Cir. 1949) (discussing defendant's bleaching of notes).

Moreover, according to the Secret Service, "[c]olor computer printers are the most common devices used to transfer counterfeit images to the genuine 'bleached' paper, but a counterfeiter can also accomplish this through the more traditional 'offset' printing method."[2] Obviously, the "more traditional methods" are not new. As for color computer printers, the government has been studying the use of technology to commit counterfeiting and forgery crimes since 1978, and has been aware of the role color computer printers play since at least 1990. *See* Sen. Rep. 101-460 (Sept. 12, 1990) (discussing the history of the government's knowledge of the use of "computers, laser printers, color copiers, color laser printers, and optical scanners" in counterfeiting and forgery offenses, beginning in 1978 with the Advance Counterfeit Deterrence Program and including numerous congressional hearings involving testimony from the U.S. Treasury Department, the Secret Service, and others).

4. Possessing a Bleached Note Does Not Necessarily Indicate that the Person Holding It Either Altered It or Used It to Forge Other Notes.

The Secret Service testified at the Commission's public hearing that to alter bleached notes to look as though they are worth more, a person needs either "specialized equipment, such as a printing press, plates and negatives," or "access to scanners and printers."[3] Possessing a bleached note, without additional equipment, does not necessarily indicate that the person holding it is the person who altered it. The proposed enhancement, however, would apply to anyone who "controlled or possessed" bleached notes without also requiring evidence that the person in possession also possessed a printing press, plates and negatives, or scanners and printers.

The proposed enhancement would include people who receive bleached notes, hold them, or pass them. This is directly contrary to the principle underlying §2B5.1(b)(2). *See* U.S.S.G. §2B5.1, comment. (backg'd) (the enhancement "is provided for a defendant who *produces*, rather than merely passes, the counterfeit items") (emphasis added). Even if it were appropriate to sentence "bleached notes" cases under §2B5.1, which it is not, there is absolutely no reason to also abandon the principle

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[2] *See* Testimony of Craig D. Magaw, Deputy Assistant Director, Office of Investigations, U.S. Secret Service, Presented to the U.S. Sentencing Commission Public Hearing on Counterfeiting and "Bleached Notes" (March 17, 2009) ("Magaw Testimony") at 3.

[3] *See* Magaw Testimony at 2.

underlying §2B5.1(b)(2) by applying it to defendants who merely possess a bleached note. Once again, there is no empirical, historical, or policy justification for the proposed amendment, and we oppose it.

As always, we very much appreciate the opportunity to submit comments on this and all of the Commission's proposed amendments. We look forward to continue working with the Commission on all matters related to federal sentencing policy.

Very truly yours,

J. Sands/mc

JON M. SANDS
Federal Public Defender, District of Arizona
Chair, Federal Defender Sentencing Guidelines Committee

cc: Hon. Ruben Castillo, Vice Chair
Hon. William K. Sessions III, Vice Chair
Commissioner William B. Carr, Jr.
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Commissioner *Ex Officio* Edward F. Reilly, Jr.
Commissioner *Ex Officio* Jonathan Wroblewski
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Written Statement of Jon Sands
Chair, Federal Defender Sentencing Guidelines Committee

Before the United States Sentencing Commission
Public Hearing on Proposed Amendments for 2009

March 17-18, 2009

Re: Counterfeiting and "Bleached Notes"

Thank you for the opportunity to provide this testimony on behalf of the Federal Public and Community Defenders on the Commission's proposal to amend the guidelines with respect to offenses involving bleached notes. The Commission proposes to "clarify" that such cases should be sentenced under §2B5.1 and to revise the definition of "counterfeit" to include "a genuine instrument that has been falsely altered." It also proposes to enhance sentences in "bleached notes" cases by amending the enhancement at §2B5.1(b)(2)(B) to cover a case in which the defendant controlled or possessed genuine United States currency paper from which the ink or other distinctive counterfeit deterrent has been completely or partially removed. Finally, it proposes to strike §2B1.1 as an alternative guideline for offenses under 18 U.S.C. §§ 474A and 476.

The proposed "clarification" is no clarification at all, but a sea change in how the guidelines define what is and is not a "counterfeiting" offense. The suggested changes are not supported by past practice, empirical data, the purposes of sentencing, or even an actual circuit split. For the following reasons, we recommend that the Commission not act on any of the proposed amendments.

1. "Counterfeit" Instruments Have Always Correctly Been Defined as Instruments Falsely Made or Manufactured in Their Entirety.

Section 2B5.1 has always distinguished between counterfeiting offenses and all other forgeries by looking at whether the false instrument was "falsely made or manufactured in its entirety." *See* U.S.S.G. §2B5.1, cmt. n.3 (emphasis added). Offenses involving such conduct are properly sentenced under §2B5.1, while "[o]ffenses involving genuine instruments that have been altered are covered by §2B1.1."[1]

This distinction comes directly from the U.S. Code. 18 U.S.C. § 513 defines a "counterfeited" document as one that "purports to be genuine but is not, because it has been falsely made or manufactured in its entirety." *See* 18 U.S.C. § 513(c)(1) (emphasis added). In contrast, a "forged" document is one that "purports to be genuine but is not because it has been falsely altered, completed, signed, or endorsed, or contains a false addition thereto or insertion therein, or is a combination of parts of two or more genuine

[1] Forgery offenses were initially referred to §2B5.2. That guideline was consolidated with §2F1.1 in 1993, which was then consolidated with §2B1.1.

documents." *Id.* at § 513(c)(2). The Commission explicitly relied on § 513 when it defined "counterfeit" for purposes of §2B5.1 twenty years ago. *See* U.S.S.G., App. C., Amend. 115 (1989). For this reason, we are somewhat confused by the statement in the request for comments that the proposed amendments are intended to "more closely parallel relevant counterfeiting statutes." The two statutes cited, 18 U.S.C. §§ 471 and 472, do not define "counterfeit" at all; rather, they criminalize certain conduct involving U.S. obligations and securities, regardless of whether those obligations or securities were "falsely made, forged, counterfeited, or altered." *See* 18 U.S.C. §§ 471, 472. The only definition of "counterfeit" is in § 513, and that definition matches (and indeed, was the basis for) §2B5.1's current definition.

2. *There Is No Reason to Expand the Definition of Counterfeiting to Encompass "Bleached Notes" Cases.*

Cases involving a dollar bill that has been stripped of its original image through the use of bleach or some other chemical solvent are not cases where the bill was "manufactured or made in its entirety." Rather, the person making the bleached note starts and ends with the same bill, but alters it to make it look like it is worth more. *See United States v. Inclema*, 363 F.3d 1177, 1180 (11th Cir. 2004) (remanding for resentencing under §2B1.1 because the defendant "started with Federal Reserve Notes and ended up with Federal Reserve Notes of a higher denomination"). Indeed, bleached notes, even when altered, retain the watermark and security strip of the original note. *See United States v. Schreckengost*, 384 F.3d 922, 923 (7th Cir. 2004). Falsely altered notes are thus not "counterfeits" as a matter of law; they are *forgeries*. *See* 18 U.S.C. § 513(c).

By proposing to amend the definition of "counterfeit" to encompass bleached notes, the Commission implicitly recognizes that bleached notes are not currently "counterfeits" as a matter of law. No policy reason justifies amending the guidelines to treat them as though they are. Bleaching dollar bills and reprinting them to appear as though they are worth more is not a sophisticated process. *Cf.* U.S.S.G. § 2B5.1, background cmt. (approving of enhanced sentences for possessing copying devices because of "the sophistication and planning involved in manufacturing counterfeit obligations"). Bleaching notes is actually less egregious than wholesale manufacturing of bills by other means because bleached notes cannot be mass produced. Nor is this a new form of crime that relies on new technology. To the contrary, people have been altering dollars by bleaching them for over fifty years. *See, e.g., United States v. Guida*, 792 F.2d 1087, 1095 (1986) (noting expert witness's testimony that "the counterfeit notes were printed on genuine Federal Reserve Notes, which had been bleached and then reprinted in a higher denomination"); *McKinney v. United States*, 172 F.2d 781, 783 (9th Cir. 1949). The original Commission was surely aware of this type of crime when it created the guidelines, including §2B5.1 and its definition of "counterfeit."

The request for comments gives no empirical reason to break from past practice and expand the definition of counterfeit to reach this one discrete type of crime. The only asserted reason for the proposed amendment is that "[c]ircuit courts have resolved differently the question of whether offenses involving bleached notes should be

sentenced under §2B5.1 or §2B1.1." This is simply not true. Every circuit to have reached the issue has held – correctly – that bleached notes do not fit the definition of a "counterfeit" and thus are properly sentenced under §2B1.1. *See Inclema*, 363 F.3d at 118; *Schreckengost*, 384 F.3d at 923.[2]

In fact, the request for comments cites only two recent cases from the same judge in the Western District of Louisiana in support of the asserted circuit split, one of which is currently on appeal in the Fifth Circuit. *See United States v. Dison*, 2008 WL 351935 (W.D. La. Feb. 8, 2008) (deciding that §2B5.1 and not §2B1.1 is proper guideline to apply to "bleached notes" case); *United States v. Vice*, 2008 WL 113970 (W.D. La. Jan. 3, 2008) (same); *see also United States v. Dison*, 2008 WL 924941 (W.D. La. April 2, 2009) (mentioning pending appeal before the Fifth Circuit). In both *Dison* and *Vice*, the district court rejected *Inclema* and *Schreckengost* only because they "are not binding on this court," and instead followed an earlier unpublished decision from the district to hold that §2B5.1 applies to bleached notes cases. *See Dison*, 2008 WL 351935 at *2; *Vice*, 2008 WL 113970 at *1 (citing *United States v. Jacobs*, no. 07-50020).[3] Neither decision mentioned §2B5.1's definition of "counterfeit" or discussed how the conduct at issue met that definition.

Importantly, even the *Dison/Vice* court does not appear to believe that §2B1.1 ranges are generally too low to serve the purposes of sentencing in bleached notes cases. To the contrary, in *Dison*, the court actually departed downward from the sentencing range calculated under §2B5.1. *See Dison*, 2008 WL 924941 at *2. Even more telling, it stated that had it found § 2B1.1 to be the proper guideline, "it is likely that the court would have sentenced Dison to the low end of the applicable guideline range under §2B1.1." *Id.*

We are not aware of – and the Commission has not identified – *any* empirical data suggesting that sentences under §2B1.1 for this type of conduct generally fail to serve the purposes of punishment. The Department of Justice may be "dissatisfied" with the sentence ranges under §2B1.1 for these cases, *see Schreckengost*, 384 F.3d at 923, but that hardly constitutes the "careful study" and "extensive empirical evidence" upon which the guidelines are supposed to be based. *See Gall v. United States*, 128 S.Ct. 586,

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[2] Nine years ago, the Ninth Circuit affirmed a sentence that had been imposed under §2B5.1 in a "bleached notes" case, but the parties did not raise and the court did not analyze the issue of whether the district court had applied the correct guideline. *See United States v. Wilson*, 246 F.3d 678 (9th Cir. 2000).

[3] On appeal in *Jacobs*, the government argued that the sentence should be affirmed as an exercise of the court's discretion "even if §2B5.1 was improperly applied." *See United States v. Jacobs*, 282 Fed. Appx. 337, 338 (5th Cir. 2008). The Fifth Circuit agreed, declined to reach the issue of whether §2B5.1 or §2B1.1 is the appropriate guideline for a bleached notes case, and affirmed the sentence because "[t]he district court made it obvious that it would have imposed the same sentence even if §2B1.1 were applicable." *Id.*

594 (2007). Out of forty-one Chapter 25 offenses listed in Appendix A, thirty-nine are referred to §2B1.1. Only seventeen are referred to §2B5.1, and only two of those are not also referred to §2B1.1 as an alternative guideline. We see no reason to amend the guidelines to treat "bleached notes" cases differently than the vast majority of Chapter 25 offenses and oppose the proposed amendment.

3. A Sentence Should Not Be Enhanced Merely Because the Defendant Possessed a Bleached Note.

Even if it were appropriate to revise the definition of "counterfeit" in order to encompass "bleached notes" cases, which it is not, the Commission should not advise courts to enhance sentences in those cases under §2B5.1(b)(2) simply for mere possession of a bleached note, as it has proposed to do. Anyone can bleach a note – mere washing can do it. But a bleached note cannot be altered to appear as if it were a higher denomination without a plate. *See* U.S. Army Field Manual No.19-20, Law Enforcement Investigations. The plate is the key to the offense – not the bleached dollar. For this reason, possessing a bleached note does not necessarily indicate that the person holding it is the person who altered it. The proposed enhancement, however, would apply to anyone who "controlled or possessed" bleached notes. This would include people who receive them, hold them, or pass them. This is directly contrary to the principle underlying the enhancement. *See* U.S.S.G. §2B5.1, background cmt. (the enhancement "is provided for a defendant who *produces*, rather than merely passes, the counterfeit items") (emphasis added). Here again, there is no empirical, historical, or policy justification for the proposed amendment, and we oppose it.

4. 18 U.S.C. §§ 474A and 476 Are Already Referred to §2B5.1.

The Commission proposes to refer violations of 18 U.S.C. §§ 474A and 476 to §2B5.1 for sentencing because those offenses "do not involve elements of fraud." Both §§ 474A and 476 are already referred to §2B5.1 in Appendix A. They are also referred to §2B1.1, so the practical effect of the amendment would be to remove §2B1.1 as an alternative guideline in appropriate cases.

Violations of §§ 474A and 476 are not referred to §2B1.1 as an alternative guideline because they potentially involve fraud. They are referred to §2B1.1 because the Commission anticipated there may be cases under those statutes that involve "forgeries" rather than "counterfeits." In this way, they are like the vast majority of Chapter 25 offenses listed in Appendix A, all but two of which are referred to §2B1.1 solely or as an alternative. In contrast, only two Chapter 25 offenses are referred exclusively to §2B5.1.

We question the need for the proposed amendment. There is no reason to amend the guidelines to treat offenses under §§ 474A and 476 differently than virtually every other Chapter 25 offense. Sentences under them do not appear insufficient; in fact, the statutes do not appear to be critical tools for fighting counterfeiting. A Westlaw search reveals only one prosecution under 18 U.S.C. § 474A, which was based on possession of

"replicas of the Treasury Department's latest security strip," and no prosecutions under § 476. *See United States v. Zaccaria*, 240 F.3d 75, 77 (1st Cir. 2001). *Zaccaria* does not mention under which guideline the defendant was sentenced, but based on the description of the conduct ("a scheme to counterfeit United States currency through the use of a state-of-the-art color copier") and the other charges, we suspect he was sentenced under §2B5.1. *Id.* In any event, there was no complaint in that case, or in any other of which we are aware, that the guideline range was insufficient to serve the purposes of sentencing. We see no reason for the proposed change and thus oppose it.