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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 <u>less</u> 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.