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MEMORANDUM

TO: ALL INTERESTED DEFENSE COUNSEL

FROM: NATIONAL LEGAL PROFESSIONAL ASSOCIATES

NAME: HORNE

RE: MANDATORY BASE OFFENSE LEVELS FOR FIREARM OFFENSES: THE IMPORTANCE OF REVIEWING AND ATTACKING CRIMINAL HISTORY. TECHNIQUES FOR STOPPING THE GOVERNMENT'S EFFORTS TO IMPROPERLY ENHANCE A DEFENDANT'S SENTENCE. (U.S.S.G. §2K2.1)

Both the Federal Statutes as well as the specific Federal Sentencing Guidelines provide for mandatory sentence levels based upon prior criminal history for certain drug-related or violent offenses. While first time offenders of a particular offense might carry one base offense level for sentencing purposes, repeat offenders for the same type of crime carry a higher base offense level.

One example of this type of mandatory and progressive enhancement is the Base Offense Level established in U.S.S.G. § 2K2.1. This sentencing guideline addresses firearms offenses. The case of *U.S. v. Horne*, (USDC MD of PA #00-CR-274), is an illustration of how, with proper research assistance, counsel can stop the government's improper attempts to enhance the defendant's sentence.

In this case, with the assistance of NLPA in researching and drafting a full Sentencing Memorandum for counsel of record, defense counsel Charles Murray successfully blocked efforts by the government to add an additional 3 years to Mr. Horne's sentence. Mr. Horne was charged with being a felon in possession of a firearm. He pleaded guilty to the charge and, according to a plea agreement, the Government agreed to recommend a three level reduction in the sentence calculation for acceptance of responsibility and the minimum guideline prison sentence. In addition, the Government contractually agreed to join in the defendant's motion for a downward departure equating to the time already served on related state charges.

Both the Government and the defendant were on the same proverbial page for sentencing until the Probation Department issued its Pre-sentence Investigation Report ("PSI"). In that report, the Probation Department recommended that Mr. Horne's base offense level under U.S.S.G. § 2K2.1 be set at 24. This calculation was based upon an alleged predicate offense. Pursuant to U.S.S.G. § 2k2.1(a)(2), a firearms offense carries a base offense level of 24 if the instant offense was subsequent to two predicate offenses of either crimes of violence or controlled substance offenses. The PSI stated that the Defendant should have such a base offense level because of a 1975 burglary conviction and a 1977 third degree murder conviction. The research and sentencing memorandum prepared by NLPA for, and filed by, Attorney Murray argued that this calculation was in error.

NLPA maintained that the twenty-year-old burglary offense was not a crime of violence. The Sentencing Guidelines define "crimes of violence" as an offense punishable by imprisonment

for a term exceeding one year (a) that has as an element the use or threatened use of physical force against another person, or (b)

of burglary of a dwelling that presents a serious potential risk of injury to another. U.S.S.G. § 4B1.2(a) The subject burglary charge did not fit this definition due to the timing and circumstances of the defendant's actions back in 1974.

Although Mr. Horne was charged with burglary, the sentencing court defined it as a nonviolent felony and sentenced the Defendant to 23 months in an ARD program. The court there found that the conduct represented a crime of property and not one of violence, a theft of property and not one involving the burglary of a dwelling or any other place of habitation. In sum, the facts indicate three mitigating factors in this regard: (1) the theft occurred from a garage and not a dwelling; (2) the state court specifically defined the offense as a nonviolent offense; and (3) the conviction was subsequently modified and reduced to be one of defiant criminal trespass and theft, both nonviolent crimes under the Sentencing Guidelines definitions.

For the reasons cited above it was argued, the prior burglary offense should not be treated as a predicate offense to enhance the Defendant's sentence. Consequently, under U.S.S.G. §2K2.1(a)(4), the defendant's base offense level should be 20.

The Court agreed with this presentation. Rather than facing a sentence of seventy months, which the Probation Department and the Government recommended, Mr. Horne received a sentence of forty-six months, with credit for time served in both state and federal prison systems. His sentence represents, after time served credits and good time credits, a remaining five-six months of prison. **The research of NLPA for counsel and the arguments of Mr. Murray saved Mr. Horne at least three years off of his recommended sentence.**

Base offense levels in the Federal Guidelines are at times based upon prior criminal acts involving violence or drugs. However, unless counsel is aware of how to attack such prior acts, the higher offense level may be imposed. Counsel is urged to be proactive and review all aspects of a PSI.

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