

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
WESTERN DIVISION

UNITED STATES OF AMERICA

vs.

RON A. HORNBAKER

No. 96 CR 50026  
Judge Philip G. Reinhard

UNITED STATES' OBJECTION TO THE  
PRESENTENCE INVESTIGATION REPORT

The UNITED STATES OF AMERICA, by JAMES B. BURNS, United States Attorney for the Northern District of Illinois, objects to the Presentence Investigation Report's ("PSI") use of U.S.S.G. § 2A6.1(a) to determine the base offense level and failure to account for relevant conduct under U.S.S.G. § 3D1.4. [See PSI, lines 176-189]. The United States submits that U.S.S.G. § 2B3.2(a) should be used to determine the base offense level and that because of relevant conduct, U.S.S.G. § 3D1.4 should be applied.

Summary of the Facts of the Offense

Hornbaker, posing as a woman named "Rita," engaged in a sexually explicit conversation on a computer chat room entitled "Married But Looking." After engaging in the sexually provocative conversation, Hornbaker saved the conversation on his computer and printed out a transcript. Hornbaker, then posed as Rita's enraged husband, and mailed an extortionate letter to his intended victim, the other participant in the erotic conversation. As Rita's husband, Hornbaker claimed to have "found" the conversation on Rita's computer and now demanded that the victim pay Hornbaker \$1,000.

In the letter, Hornbaker stated,

I'm bent on revenge here. Upon thinking about what I should do, I came up with two options: one, track you down and hurt you, or two, hit you in another place: the wallet.

Hornbaker claimed that if he wasn't paid off, he would repeatedly mail the transcript to the victim's wife and repeatedly call her "to make sure she gets the message. The letter threatened:

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I don't really know if she'll (victim's wife) be as upset at you as I was at my wife, but at that point I won't really care. Because, you see, I will be on my way to find you and resort to option #1. Believe me when I tell you that you wouldn't want me tracking you down... I will ruin your life. You see, you will pay, one way or the other. I'm a man of my word.

(emphasis in original). The letter claimed that Hornbaker was a police officer and could find anyone, anywhere. Hornbaker told the victim to send the money to a private mail box address addressed to Hornbaker's friend, "Don H.". At the end of the letter, Hornbaker warned that if Don didn't call to say he had received the victim's letter by September 7, 1995, "the letter to your wife is on the way...and so am I!" (emphasis in original).

Hornbaker engaged in nine other such conversations. For each conversation, he sent an extortionate letter to his intended victim. Each extortionate letter was identical except for the difference in the victims' names and addresses and the amount demanded varied between \$500 and \$2,000.

#### Plea Agreement

Hornbaker pleaded guilty to mailing a threatening communication in violation of 18 U.S.C. § 876 (4th paragraph). [¶ 5 of the Plea Agreement]. In the plea agreement, Hornbaker

admitted in general to the conduct described above. He admitted to developing a plan to extort money from married individuals. [¶ 5(c)]. He admitted to sending a letter to the intended victim and that the letter contained a threat to injure the property and reputation of the victim. [¶ 5(g)]. Hornbaker admitted that in the letter he threatened that if he wasn't paid money, he would track the victim down and hurt the victim. [¶ 5(h)].

In paragraph 7(a) of the plea agreement, Hornbaker and his attorney agreed that under U.S.S.G. § 2B3.2(a), the base offense level is 18. Hornbaker further agreed in paragraph 7(b) that the offense involved what could reasonably be interpreted as an express or implied threat of bodily injury and that the offense level should be increased by 2 levels to level 20 pursuant to U.S.S.G. § 2B3.2(b)(1). Finally, in paragraph 7(c) of the plea agreement, Hornbaker agreed that because of his stipulated relevant conduct, the offense level should be increased by 5 levels to level 25.

#### The PSI

The PSI used U.S.S.G. § 2A6.1(a) in determining the base offense level of 12. It then used U.S.S.G. § 2A6.1(b)(1) to enhance the base offense level by 6 levels to level 18. The PSI did not address the stipulated relevant conduct of the other nine extortionate letters sent out by Hornbaker.

#### Base Offense Level

This court is to use the offense guideline section in Chapter Two of the guidelines that is most applicable to the count of conviction. U.S.S.G. § 1B1.2(a). However, where the plea

agreement establishes a more serious offense, the offense guideline section relating to the more serious offense is applied. Id.

The starting point for determining the applicable offense guideline section is Appendix A to the Sentencing Guidelines. For 18 U.S.C. § 876, Appendix A refers to four offense guideline sections: 2A4.2, 2A6.1, 2B3.2, and 2B3.3. See United States v. Johnson, 965 F.2d 460, 468 (7th Cir. 1992) (noting that §§ 2B3.2, 2A6.1, and other sections may be applicable to 18 U.S.C. § 876).

Section 2A4.2 relates to demanding or receiving ransom money and is inapplicable to the defendant's conduct. Section 2B3.3 is for blackmail and similar forms of extortion. However, Application Note 1 to that section notes that this section "applies only to blackmail and similar forms of extortion where there clearly is no threat of violence to person or property." In the extortionate letter the defendant threatened that if he wasn't paid money, he would track down and hurt the victim. Because of the threat of physical violence, Section 2B3.3 is inapplicable.<sup>1</sup>

Section 2A6.1 is described as "Threatening Communications." Section 2B3.2 is described as "Extortion by Force or Threat of Injury or Serious Damage." Section 2A6.1 is more appropriate where

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<sup>1</sup> In United States v. Frost, 61 F.3d 1518, 1529 (11th Cir. 1995), the court held that § 2B3.3, rather than § 2B3.2, was applicable. However, there the threat involved clearly was non-violent: the victim was warned to resign from the city council or copies of a videotape of the council member in a compromising moment would be available to the mayor and to the council member's wife. Hornbaker's threats cannot be interpreted as a case "where there is clearly no threat of violence to person or property." U.S.S.G. § 2B3.3, comment. (n. 1) (emphasis added). Rather, Hornbaker's letter contained physical threats of tracking down and hurting the victim.

the prosecution is based upon the mailing or communication of threats that did not involve either ransom money (§ 2A4.2) or extortion (§§ 2B3.2 and 2B3.3). Compare United States v. Nilsen, 967 F.2d 539, 544 (11th Cir.) cert. denied, 113 S.Ct. 1856 (1992) (affirming the use of § 2B3.2 instead of § 2A6.1 where letters threatened physical violence if victim testified against defendant in bank robbery prosecution) with United States v. Fonner, 920 F.2d 1330, 1331 (7th Cir. 1990) (§ 2A6.1 applied where death threats were made but without extortionate demand).

The critical distinction between § 2A6.1 and § 2B3.2 is that the latter is to be used in the event of an extortionate motive and purpose coupled with intimidation or use or threat of force. See Johnson, 965 F.2d at 468 (§ 2B3.2 applicable rather than § 2A6.1 where extortionate demand coupled with threats of physical violence and property damage); and United States v. Marino, 835 F.Supp. 1501, 1534 (N.D.Ill. 1993) (extortion and threats of force in collecting street tax).

Application Note 2 to § 2B3.2 states that the guideline is to be used "if there was any threat, express or implied, that reasonably could be interpreted as one to injure a person...."<sup>2</sup> In his extortionate letter, the defendant described himself as "furious" (emphasis in original), "angry," and "bent on revenge."

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<sup>2</sup> The commentary states that even if the threat does not imply violence, the guideline applies where the possibility of violence "may be inferred from the circumstances of the threat...." Thus, § 2B3.2 does not require the threat of serious bodily injury in order to apply. United States v. Boggel, 74 F.3d 470, 475 (3rd Cir. 1996).

He described his first option as tracking the victim down and hurting the victim and later stated that if the money wasn't forthcoming, he would be on his way to find the victim and "resort to option #1." In light of this threat of injuring the victim, § 2B3.2 applies. This is not the case of a simple threatening communication. It is part of a scheme to extort and the threat was one of physical violence towards the victim.<sup>3</sup>

While Hornbaker may state that he never intended to carry out his threats, such a claim is irrelevant to the offense and does not change the applicable offense section. United States v. Bigelow, 914 F.2d 966, 974 (7th Cir. 1990), cert. denied, 498 U.S. 1121 (1991) (quoting United States v. Rosen, 896 F.2d 789, 791 (3rd Cir. 1990)); United States v. Bruce, 78 F.3d 1506, 1510 (10th Cir. 1996).

#### Relevant Conduct

As stipulated to in paragraph 6 of the plea agreement, in late August 1995, Hornbaker sent out nine other extortionate letters to nine other intended victims. Each letter contained the same type of threats as contained in the letter sent to the Rockford victim. Hornbaker stipulated that this conduct constitutes relevant conduct under U.S.S.G. § 1B1.3. However, the PSI fails to account for this relevant conduct.

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<sup>3</sup> Even had the threat been less specific, § 2B3.2 would still apply. "An ambiguous threat, such as "pay up or else," ... ordinarily should be treated under this section." U.S.S.G. § 2B3.2, comment. (n. 2).

The offense and relevant conduct, whether under Section 2A6.1 or Section 2B3.2, are not subject to grouping under § 3D1.2. Each offense involves its own victim (excluding application of § 3D1.2(a) and (b)), and the offense of conviction does not embody the stipulated relevant conduct as a specific offense characteristic (excluding application of § 3D1.2(c)). Both Section 2A6.1 and Section 2B3.2 are specifically excluded from grouping under § 3D1.2. See also United States v. Morgano, 39 F.3d 1358, 1380 (7th Cir. 1994) (addressing extortionate conduct under § 2B3.2).

Treating each letter as an offense, under either Section 2A6.1 or Section 2B3.2, the combined offense level should be increased by 5 levels pursuant to U.S.S.G. § 3D1.4. Utilizing the government's position, the combined offense level would be level 25.

Conclusion

For the reasons set forth above, the government objects to the PSI's determination of the base offense level and its failure to account for stipulated relevant conduct.

Respectfully submitted,

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