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March 26, 2001

United States Sentencing Commission
One Columbus Circle, N.E., Suite 2-500
Washington, D.C. 20002
Attention: Public Comment

Re: Comment on Proposed Amendments Constituting the "Economic Crime Package"

To the Commissioners:

I write to comment upon the proposed amendments constituting the "economic crime package" (amendment 12 in the Federal Register notice of January 2001). I recommend that the Commission reject these proposed amendments as unwise.

I comment solely in my personal capacity, primarily as an academic interested in sentencing law and policy. I have published a number of articles on the Commission and its work, and I have occasionally been engaged to provide consultative or representation services to federal criminal defendants. I also am a former staff member at the Commission, having served as Deputy Chief Counsel in 1987-88 and Consulting Counsel in 1988-89. In those capacities, I was involved in the early development of the guidelines' concept of "loss" as used in the guidelines governing fraud, theft, and related offenses.

As I understand the currently proposed amendments, they envision three basic changes from current law: (1) consolidation of the separate fraud and theft guidelines; (2) a revised and unified loss table for those offenses and tax offenses; and (3) modification of the definition of loss for all property offenses, most notably including (a) an expanded concept of "consequential" loss, and (b) expanded responsibility for "inchoate" loss. In my opinion, no aspect of this proposed package of changes is well-considered, and in every case, the proposed modifications are likely to make the guidelines both more difficult to apply in practice and less effective in meeting the statutory purposes of sentencing.

All of the proposed amendments appear to be motivated by a dissatisfaction in some quarters with supposed inconsistencies or discontinuities with the definitions of "loss" set forth in the commentary to the various guidelines. I am most familiar with the critique set forth by

Professor Bowman in various sources, most notably in his article *Coping with "Loss": A Re-Examination of Sentencing Federal Economic Crimes under the Guidelines,* 51 Vand. L. Rev. 461 (1998). I understand that Professor Bowman also has acted as an adviser to the Commission in connection with these proposed amendments, and I obtained a better understanding of the underlying issues by participating in a breakout session with Professor Bowman during the Commission's conference on economic crimes and new technology offenses last October.

As I understand the content of Professor Bowman's critique of "loss," it focuses on four main points: (1) the loss-defining instructions scattered throughout the commentary to the several guidelines sections use a "hodgepodge" of terminology, including some concepts borrowed from civil contract or tort law; (2) the computation of loss for a fraud offense may differ from, say, a theft offense; (3) the loss definitions exclude indirect harms in most instances, but allow them in some cases, which is argued to be inconsistent; and (4) the handling of "inchoate" loss is unclear. In my opinion, most of these criticisms simply miss the point of including a "loss" concept in the guidelines, and some of them attack the more fundamental structure of the guidelines as a "charge offense" system with only limited "real offense" factors.

When the initial guidelines were developed, the predominant approach was empirical. The guidelines were developed from a statistical analysis of some 11,000 cases sentenced in 1985. That analysis found that "loss" was a significant factor in the sentence for fraud, theft, and other property guidelines.[1] As initially formulated in 1987, the guidelines did not define "loss" at all, apparently on the view that the concept of "loss" was sufficiently understood by the functioning system. In hindsight, that assumption appears to have been too heroic, and so the "loss" definitions have evolved in the commentary over time.

The only early attempt by the Commission to develop a systematic and self-conscious definition of "loss" was one that I drafted in 1988 in connection with a proposal for organizational sentencing. As modified and refined by others, that proposal was published as the "Discussion Draft of Sentencing Guidelines and Policy Statements for Organizations," and was reprinted at 10 Whittier L. Rev. 7 (1988). I commend that document, and in particular those portions devoted to "loss" and "loss rules," 10 Whittier L. Rev. at 10-12, 17-41, to the Commission's attention, not necessarily as a model or paradigm of what loss definitions "should be," but rather as an illustration of the subtlety of the problem of defining loss across the wide range of offenses prosecuted in the federal courts. In particular, I would call the Commission's attention to the fact that, after extensive consideration of the problem, this proposal embodied seven different "definitions" of loss, including two separate definitions for "private" as opposed to "public" fraud offenses.

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[1] I note in passing that "gain" was not found to be a significant sentencing factor in past practice, nor is there any reason in theory why it should be. My recommendation on this topic would be simply to eliminate "gain" from any consideration in the guidelines, except as an estimate of loss.

While the 1988 "Discussion Draft" ultimately was superseded by other proposals for organizational sentencing, some of its concepts ultimately migrated into the commentary to the loss-based sections of the existing guidelines, sometimes without the detailed explanation that accompanied the original formulation. Other changes and refinements, based on other sources, also have found their way into guidelines commentary over the years. Perhaps for this reason, the existing guidelines commentary may appear to the uninitiated as a "hodgepodge." However, most of the distinctions drawn by the existing commentary are based upon very sound considerations of policy and, however inelegantly expressed, have been mostly well-understood by the courts.

If the current critique is analyzed, we can see that its core rests on three supposed instances of "inconsistent" treatment of loss: (1) as among the various guidelines that use loss as a primary sentencing factor; (2) as between the inclusion or exclusion of "indirect" harms; and (3) in the treatment of "actual" versus "intended" loss. In my opinion, none of these are examples of inconsistency; all are products of the basic policy decision to use a "charge offense" sentencing system, which has many virtues, among them to give prosecutors an incentive to charge the crime that they wish to be punished, and to make the sentencing system tolerably administrable. Every proposal to "consolidate" guidelines undercuts the logic of a charge-based sentencing system, and therefore should be viewed with trepidation, even if otherwise apparently justified. But in this case, the proposal is unjustified. It is simply not true that a case charged as simple theft should be treated the same as fraud: the proof requirements on liability are not identical,[2] and the interests served by the prohibition are not the same. Fraud involves an element of scienter that may or may not be present in simple theft cases. Furthermore, as charged in federal courts, fraud cases invoke a much range of interests than typically are involved in state law fraud cases.

Furthermore, it is not true that the treatment of "direct" versus "indirect" harms is inconsistent, nor is it confusing to the courts. According to last year's report by the Commission's Economic Crimes Policy Team, most courts had reached the correct interpretation of the current guideline rule (albeit an implicit one) that "indirect" harms generally were excluded from "loss" computations, with two specific exceptions, both of which involved frauds committed in the context of government contracting. The reason for those exceptions should be obvious: criminal prosecution plays a different role in such cases than in the ordinary fraud practiced upon a private victim; this was the main reason why the 1988 Discussion Draft had two

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[2] Unlike the Model Penal Code's approach of "consolidating" larceny, fraud, and embezzlement into a single offense of theft, federal law, like the common law, treats those crimes differently. The common-law approach had a sound policy basis in distinguishing, for example, "larceny by trick" (possession obtained with the victim's consent, followed by asportation) form "false pretenses" (title obtained with the victim's consent, voluntarily induced), on the ground that transfer of title should induce more attention on the part of the victim. In the earliest days, "false pretenses" was a tort, but not a crime, where larceny by trick was a crime.

separate "loss" guidelines distinguishing public from private fraud. Even if the propriety of those exceptions were questionable, the general rule clearly is the correct one from a policy perspective: in the interest of simplicity in administration, the guidelines simply should cut off arguments about remote or indirect effects, except as departure arguments in extreme and unusual cases. After all, the rationale of a fraud prohibition is to punish the misleading aspect of the wrongdoer's behavior, and not to make the wrongdoer an insurer for all consequences that might to factually caused by the fraud, whether or not "foreseeable." The current proposal seems to be the worst of all possible worlds, as it substitutes a vague "foreseeability" concept for the straightforward "out of pocket" loss test that exists in current law. Millenia of experience in all fields of remedial law have taught us the necessity of focusing on the direct and immediate, and largely excluding consideration of the indirect, the remote, or the speculative. This common reticence should apply a fortiori to the problem of criminal sentencing, not only because of administrative difficulties but also because of our strong interest in sharpening the message of deterrence. If a person convicted of fraud is punished incrementally because of downstream effects that could have occurred with or without the fraud, what message is being sent by the incremental punishment? Very quickly, fraud penalties could escalate beyond those imposed for more serious crimes. In that instance, an over-expanded system of fraud or theft penalties could fail to distinguish those offenses from extortion. What message is then being sent?

As an illustration, consider the two examples used by Professor Bowman in last Fall's conference to demonstrate the "problems" of the current loss definitions in terms of the "problem of causation."[3] I gave these cases to the students in my Federal Sentencing Law this term, and gave them 10 minutes to solve both cases. Within that time, 20 of my 21 students had reached the correct solutions under current law. Only 2 students even posed arguments that the answer "should" be different. All 21 students clearly recognized the point that going off into remote effects that may or may not be "foreseeable" would increase the cost and complexity of the sentencing system, which after all is not designed to replace the tort compensation system, but only to draw meaningful punishment distinctions among charged offenses of the same type.

Similar considerations apply to the proposed changes to the treatment of "intended" or "inchoate" harms. These proposals are slightly less objectionable, because at least they focus attention on the criminal state of mind of intent as opposed to a tort-like standard of "foreseeability." Nevertheless, to the extent that the proposals seek to expand the inclusion of potential harms, they operate in the wrong direction. For the most part, the guidelines seek to focus on actual as opposed to imagined possible harms, and that is the appropriate focus from a policy point of view, because sound policy would seek to given everyone in the system–offenders, police, and prosecutors– the incentive to avoid actual harm. For this reason, potential harms should always be discounted in sentencing as opposed to actual harms. For the same reason, any loss considered, actual or potential, should be "net" loss to the victim rather than "gross" loss.

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[3] Entitled "Adventures in Fraud Loss and the Problem of Causation."

Overall, I believe that these proposed amendments are an overreaction to what appears to be no more than a cosmetic defect in the elegance of expression used by previous drafters of guidelines commentary. But the remedies proposed are far worse than the cosmetic disease, if any there be, because each of the amendments proposed would undermine the structural integrity of the existing "charge offense" system, and deprive the courts of the best rationale for resolving disputed questions of loss determination, which is the policy vindicated by the underlying substantive prohibition that was charged and proved at trial. Without that principled guidance of statutory policy, no amount of detailed commentary will bring the desired level of consistency to the process. The Commission should be modest in demanding precise refinements from a system that is capable of making only rough determinations of relative punishments. Moreover, the Commission should always resist the false economy promised by "consolidation" proposals, for every "consolidation" sacrifices the distinctions that have been found meaningful in past practice.

For the foregoing reasons, I recommend that the current proposals be rejected in their entirety. In lieu of these sweeping changes of largely uncertain consequence, I would suggest that the Commission direct its staff to reformulate commentary on an evolutionary basis, as required to address Circuit conflicts or similar instances of actual problems in practice. Otherwise, the Commission should leave well enough alone.

Very truly yours,

Jeffrey S. Parker
Professor of Law

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March 13, 2001

Office of Public Affairs,
U.S. Sentencing Commission,
One Columbus Circle,
Suite 2-500, N.E.,
Washington, DC., 20002-8002
Attn: Michael Courlander

Re: **Proposed increase in MDMA penalty**

Dear Mr. Courlander,

I generally do not get involved in matters such as this or respond to Internet prompts and calls to action. This time I felt compelled to voice my opinion. I do so because for once I feel I have enough information to do so intelligently.

A few years back I reviewed, prior to publication, a journal article on Federal Mandatory Minimums in drug offenses. The clear evidence was that they did not act as a deterrent and unfairly imposed sentences of a length that often ruined the lives of first time offenders.

I believe that our penal system should be used for rehabilitation purposes whenever possible and drug offenders are certainly a prime example of when this is most important. Putting kids in jail and prison where they still have easy access to drugs will not rehabilitate them. It will only indoctrinate them into a life of crime.

Please understand that I by no means advocate drug usage among young people or anyone else. However, it is an age old fact that some people choose to use "illegal drugs" (I will not comment here on the rampant usage among adults of so-called therapeutic prescription drugs for recreational purposes).

Congress must face the fact that the War on Drugs has failed horribly. Drug use is up; drugs are cheaper and easier to find. Going after the user has quite simply failed as a deterrent.

Treatment programs work. Jail does not. Increasing the penalties for drug use, especially amongst youth, will only crowd our already overcrowded jails and prisons, and build life-long criminals, not good citizens.

Thank you for your time and thought on this matter.

Very truly yours.

[305]

Dean Sheldon Serwin

TO: U.S Sentencing Commission

FROM: Dustianne North
MSW/Ph.D Candidate, UCLA
3909 Cumberland Ave.
Los Angeles, CA 90027

Francis Dellavecchia
Los Angeles Mayoral Candidate
5850 W. 3rd St. #336
Los Angeles, CA 90036

RE: Proposed Increase of MDMA Penalties

DATE: March 8, 2001

Sent via facsimile
(202) 502-4699
ATTN: Michael Courlander

To whom it may concern:

We are writing to comment on the proposed increases of penalties for MDMA. We are extremely concerned about these proposed increases, and we believe strongly that cracking down on MDMA usage by increasing penalties is not reasonable, sensible, or appropriate; we also believe it does little to address the problem of drug abuse.

We are both members of the dance community, and so we are very familiar with some of the populations who use MDMA. As people concerned about the dance movement, it is important to us that both adults and children enjoy the dance experience safely. And as two people who have chosen politics and social work as our chosen fields of work, we are both concerned about the problem of drug abuse in our society. But we are more concerned about the devastating effects that the War on Drugs has already had on this country; we believe strongly that tough sentencing guidelines will not address the problem of MDMA abuse and in fact will do further harm to our community and its members who use MDMA.

We realize that one of the big fears about MDMA is that teens are doing it. And we agree that steps need to be taken to educate and prepare youth to make good decisions regarding its use. However, we ask that it be known that many adults—well-adjusted, professional, productive citizens—use ecstasy. Some use it for therapeutic purposes; others use it *recreationally*. In our experience, MDMA does not appear to be addictive, nor does it lead to drug-related crime. Under these proposed increases, these people would be vulnerable to heavy and destructive prosecution—even persecution-- though they have hurt no one. Further, there is a large contingent of the treatment community that believes MDMA should be tested more thoroughly for its therapeutic uses. It just does not seem to make sense that a drug such as this should have oppressive consequences from a government that has not sufficiently studied its properties.

We also ask that thought be given to the fact that incarceration rarely rehabilitates. If it is teens we are worried about, how will it benefit them to lock them up for all of their early adult years because they took a pill? How will this benefit society? We would like it known that those truly concerned about the dance movement are as concerned about youth as is the rest of the nation, and we agree that the problem of unsafe MDMA use among teens needs to be addressed. We recommend that effort be made by government and non-profit agencies concerned about ecstasy use to become more educated about the drug itself, the lifestyles that go along with its use, and the reasons people choose to do it. Then it will be possible to construct a sensible and fair policy regarding its use.

Finally, we oppose crackdowns like this because we feel they are likely to be used as ammunition against our community and way of life. Those in favor of the Drug War and the media have demonized dance and rave culture since its inception. What they do not realize is that the dance movement is an important and meaningful force among youth. It allows people of all ages and

backgrounds to come together peaceably and enjoy good music. Some dance events are commercial; others are community-based or have a more spiritual focus. In many cases, communities have developed in which people assist each other in their professional and personal lives. People who like to dance to electronic music are as diverse as can be, and some use drugs while many do not. But what is shared by many is a belief in the kind of community that promotes art and expression, supports the individual and allows freedom of thought, and builds strong collectivity that benefits all members and the larger world. Events are done that raise awareness and funds for critical social and environmental issues, and large numbers of people worldwide enjoy the music, dancing, and experience of dance gatherings without any negative consequences whatsoever.

While we do not argue that there are events that are unsafe, problems with drug abuse, and unscrupulous forces that prey on us, the core dance movement is a positive thing for many, many youth and adults. Youth dance because they want to connect with other people and enjoy good music. So do adults. It is not about drugs, and the dance community has expressed and shown willingness to work with authorities and other community members to reduce the harm sometimes associated with dance culture; however, we feel instead that we are villainized and treated as the enemy. Parents are led to believe that their children are only interested in raves because of drugs; law enforcement becomes emboldened to crack down on any place where people dance. And, because MDMA is perceived as a "club drug," these sentencing increases are likely to be used to justify violation of our first amendment right to our kind of music and expression.

Indeed—public fear about ecstasy has already been used against members of our community in extremely inappropriate ways. Right now, a rave promoter and two club managers are standing trial under the 1986 Crackhouse Law. These promoters were not found to have any ties with the drug trade whatsoever, and were even found to have taken security measures at their events like any rock concert But because of the style of music played at their events, they are labelled crackhouse operators. These men face 25 years in prison and $500,000 in fines. We are deeply grateful to them for their decision to fight these charges in spite of the rather lenient plea bargains they were offered. We think it likely that if MDMA penalties are increased, that examples of law enforcement harassment like this one will become all too common.

We realize that Congress has instructed this Commission to increase the penalties, but we ask that you consider our voice as well. Congress is meant to represent us, and we disagree with its mandate to you. We are told that the Commission has already recognized that the increased sentences for crack cocaine—a much more damaging, addictive and crime-related drug than MDMA—have not helped that situation, and have instead been used differentially along race and class lines. In that case, a well-intended measure to reduce drug abuse problems in inner-city neighborhoods is likely to have actually exacerbated the situation for those communities. We feel that the same thing could only happen with MDMA if this penalty increase is too harsh. We ask that the Commission move to lessen the harm being done by the War on Drugs to our nation's people, not make things worse.

We thank you for your time and your careful consideration of this matter.

Sincerely,

Francis DellaVecchia
Los Angeles Mayoral Candidate

Dustianne North
M.S.W./Ph.D Candidate

[3087]

U.S. Department of Justice
Immigration and Naturalization Service
Central Region, Helena District
Boise, ID *Sub-Office*

Officer in Charge

(208) 334-1822

4620 Overland Rd., Suite 8
Boise, ID 83705

Office of Public Affairs
US Sentencing Commission
One Columbus Circle, NE
Washington, D.C. 20002-8002

Dear Sir;

I am writing this out of concern for the proposed changes in sentencing guidelines by the US Sentencing Commission which will lower the term of imprisonment for Aggravated Felons who re-enter the United States after deportation. This will not deter them from re-entering and committing more crimes, it will just promulgate their desire to return to the United States to do so.

Please reconsider Amendment 18 and keep the sentencing guidelines as they are.

Thank You,
Karen Smith
Karen Smith
Deportation Clerk

[309]

Office of Public Affairs
Elected Representatives
US Sentencing Commission
One Colombus Circle, NE
Washington DC 20002-8002

RE: Sentencing Guidelines USC 1326, Amendment #18

To Whom It May Concern:

I am currently serving as an Immigration Enforcement Agent with the Newark District Office of Investigations. I am assigned to the Institutional Removal Program (IRP), which is the program that encounters incarcerated felons and processes them for immigration hearings. I can tell you from first hand experiences that the current sentencing guidelines are the only deterrent to these convicted felons. If these guidelines are relaxed the US Attorney will not accept prosecution in this district and once again the American people will be victimized. Many of these are career criminals with violent felonies that include sexual assault, child abuse, multiple drug convictions and even aggravated manslaughter. The current prison system recognizes this effective deterrent and paroles these felons early, into INS custody, to remove them from the US with a lasting effect. If these guidelines are relaxed this will force the current state system to keep these felons longer, imposing a greater strain on this already over-burdened system. In conclusion I wish to reiterate the harm and possible damage that will be done by those who return, unrehabilitated, to further victimize the American people. These guidelines were created for a specific purpose and have served us well. Please don't silence the American people and remove this safeguard. Thank you for your consideration.

James Fuller, US INS

[311]

MICHAEL T. GANNON

700 East Carson Street
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562-988-6866 (fax)
mtgannon@earthlink.net

March 3, 2001

United States Sentencing Commission
One Columbus Circle N.E. Suite 2-500
Washington, D.C. 20002-8002
Attention: Public Information

Dear Sir or Madam:

I am writing in regard to a proposed change in the U.S. Sentencing Guidelines being proposed by the U.S. Sentencing Commission. This change will effect the term of imprisonment for conviction under 8 USC 1326 (reentry after deportation).

As an Inspector employed by the U.S. Immigration and Naturalization Service I am very familiar with these types of cases and am extremely concerned how these proposed lowered sentences will affect the American public. I would like this letter to be included as part of the written public comment in regards to this proposed amendment.

Under current Federal Sentencing Guidelines an alien deported from the U.S. after conviction of any crime designated as an aggravated felony is a base level 24 on the current sentencing table and faces a minimum sentence of 51 to 63 months.

Under the proposed amendment to the guidelines the defendant would actually have had to serve a period of a least 10 years imprisonment as a result of their aggravated felony conviction, or the conviction would have to had involve a death, serious bodily injury, the use of a weapon or been a serious drug trafficking offense in order to reach a base level of 24 on the sentencing table. (The definition of a serious drug trafficking offense is not included. However it appears that selling a vial of "crack cocaine" to a 15 year old would not be considered a "serious drug trafficking offense" under the proposed amendments.)

Many aliens convicted of crimes in the U.S. get reduced sentences or are released from prison early on the condition that they are to be deported from the U.S. What good is this if they only return to the U.S. a short time later to victimize the U.S. public once again. Many of the person convicted under this statute are found in a U.S. prison after having illegally entered the U.S. after their deportation and are then convicted of committing a new crime.

In the Eastern District of New York the United States Attorney's office will not accept a case for prosecution if the base level on the sentencing table is under a 24. This proposed change will result in almost no one being prosecuted for attempting to reenter the U.S. after deportation. 8 USC 1326 might as well be repealed, as enactment of this proposed sentencing amendment will result in no effective deterrent to stop a criminal alien from attempting to illegally enter the U.S. again and again until successful.

The current sentences are a very strong deterrent to keep criminal aliens from attempting to or reentering the U.S. after their deportations, and as a result, in my experience the recidivism rate for persons convicted of this offense is miniscule.

There are many examples I could provide where aliens were deported based upon very serious convictions for violations of U.S. law and under the proposed amendments would more then likely not be prosecuted for this offense or if prosecuted face only a relatively minor sentence in comparison to their past criminal behavior.

In closing, I urge that the proposed amendments under section 2L1.2. not be enacted and the current guidelines in respect to this section remain intact as a successful deterrent and appropriate punishment for conviction of this crime.

If you have any questions or feel there is anyway I can be of assistance to you in this matter, please feel free to contact me.

Sincerely,

Michael Gannon
Journeyman, Immigration Inspector
Los Angeles District

William R. Jones
4405 Hornbeam Drive
Rockville, Maryland 20853

February25, 2001

Office of Public Affairs
US Sentencing Commission
One Columbus Circle, NE
Washington, DC 20002-8002

Dear Sir:

I read the proposed Amendment #18, concerning reduced sentences for Aggravated Felons who illegally reenter the United States, and found myself horrified! As a career Immigration & Naturalization Officer (Service), having served as a Deportation Officer, Criminal Investigator, and Supervisory Detention and Deportation Officer, I feel well qualified and obligated to respond on this matter. This proposal is absurd!

I have witnessed the enforcement mission of the Service continuously degraded by benefits granted to illegal aliens and a lack of commitment of high-ranking Service managers. Now I read proposal #18. Currently, States frequently reduce sentences and/or parole aggravated felons to Service custody because they believe the illegal aliens are a Federal problem, in fact- they are correct. The Service removes the aliens, many of whom are aggravated felons as expeditiously as possible to their countries of citizenship. These aliens are all provided warning letters explaining their rights regarding future entry into the US. Aggravated felons are informed they may not return and if they do, they will face stiff penalties. This is a deterrent. I have witnessed the current sentencing guideline effects in numerous cases, when debriefing aggravated felons who have returned and been convicted of violation of 8 USC 1326(a) and other crimes.

Currently, the Service cannot control the borders and has a more limited ability to enforce the Immigration and Nationality Act in the interior. Although most reentry after deportation cases are never apprehended or charged, the current sentencing guidelines deter some recidivism. A reduction in the sentencing guidelines will eliminate any deterrent presently keeping the most dangerous illegal alien group, the aggravated felons, from returning to the US.

This is the most ill advised change and I hope it is rejected!

Sincerely,

WR Jones

William Jones

[315]

February 26, 2001

Office of Public Affairs
Attorney General John Ashcroft
Your Elected Reps
US Sentencing Commission
10th & Constitution
One Columbus Circle, NE
Washington D.C. 20036

Dear Mr. Ashcroft:

I am writing this letter to express my opinion regarding the U.S. Sentencing Commission's proposal to reduce the sentencing guidelines for foreign-born Aggravated Felons that illegally reenter into the United States. As a citizen, and a Special Agent with the Immigration Service, I am outraged. As with other crimes, this one needs a deterrent. In order for us to effectively keep these individuals from returning the United States, the punishment must fit the crime. If these guidelines are dropped from 41-51 months incarceration, to 12-18months, this WILL NOT deter Aggravated Felons from returning, in fact, it will actually promulgate their desire to return to the United States.

The crimes that are being committed by these individuals are not the same crimes that they were ten years ago. The Aggravated Felons of today are committing serious crimes, ie: drug trafficking, murder, rape, sexual assault, and various other crimes of violence. It's bad enough that we have our own citizens committing crimes, so why should we encourage individuals from other countries to come here and commit these crimes? If the majority of these people committed these same crimes in their native countries, they would be put to death, or incarcerated for the rest of their lives.

Furthermore, there is an increase in the cooperation between the State's Attorney's offices and the U.S. Attorney's offices throughout the United States regarding foreign-born defendants. Often times, these defendants are being given suspended sentences or, as part of their sentencing agreements, are stipulating to being deported. Some of these people are even paroled out early into INS custody for the purposes of deportation. If we just simply send these people back to their countries, without any sanctions (or minimal sanctions as is being proposed), what deterrent will the INS have to keep these people from returning, and committing these crimes again?

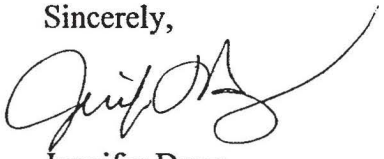
Anyone having any knowledge about the crime statistics in the United States can tell you the recidivism rates among criminals has continued to increase over the years, and probably will continue to do so if we don't impose tougher sanctions against those committing the crimes. As an Agent with INS, I see on a daily basis, the number of criminal aliens that are reentering into the United States, some as many as seven or eight times. If these individuals are apprehended by INS, and essentially given time served (after the time for prosecution), is it really feasible to think that they won't do it again?

Please take what I have said under careful consideration. Law enforcement agencies across the United States (local, state, and federal) are working together to combat the criminal alien problem. We need tougher sentencing guidelines to spread the word that we will not tolerate Aggravated Felons who have previously been deported reentering the United States.

Please feel free to contact me I can be of further assistance.

Jennifer L Duey
334 Bunker Hill Cir
Aurora, Illinois 60504
(630) 851-8799

Sincerely,



Jennifer Duey

William T Malone
124 Udall Road
West Islip, NY 11795
(631) 321-6239

March 2, 2001

United States Sentencing Commission
One Columbus Circle N.E. Suite 2-500
Washington, D.C. 20002-8002
Attention: Public Information

Dear Sir or Madam:

I am writing in regard to a proposed change in the U.S. Sentencing Guidelines being proposed by the U.S. Sentencing Commission. This change will effect the term of imprisonment for conviction under 8 USC 1326 (reentry after deportation).

As a Senior Inspector employed by the U.S. Immigration and Naturalization Service I am very familiar with these types of cases and am extremely concerned how these proposed lowered sentences will affect the American public. I would like this letter to be included as part of the written public comment in regards to this proposed amendment.

Under current Federal Sentencing Guidelines an alien deported from the U.S. after conviction of any crime designated as an aggravated felony is a base level 24 on the current sentencing table and faces a minimum sentence of 51 to 63 months.

Under the proposed amendment to the guidelines the defendant would actually have had to serve a period of a least 10 years imprisonment as a result of their aggravated felony conviction, or the conviction would have to had involve a death, serious bodily injury, the use of a weapon or been a serious drug trafficking offense in order to reach a base level of 24 on the sentencing table. (The definition of a serious drug trafficking offense is not included. However it appears that selling a vial of "crack cocaine" to a 15 year old would not be considered a "serious drug trafficking offense" under the proposed amendments.)

Many aliens convicted of crimes in the U.S. get reduced sentences or are released from prison early on the condition that they are to be deported from the U.S. What good is this if they only return to the U.S. a short time later to victimize the U.S. public once again. Many of the person convicted under this statute are found in a U.S. prison after having illegally entered the U.S. after their deportation and are then convicted of committing a new crime.

In the Eastern District of New York the United States Attorney's office will not accept a case for prosecution if the base level on the sentencing table is under a 24. This proposed change will result in almost no one being prosecuted for attempting to reenter the U.S. after deportation. 8 USC 1326 might as well be repealed, as enactment of this proposed sentencing amendment will result in no effective deterrent to stop a criminal alien from attempting to illegally enter the U.S. again and again until successful.

The current sentences are a very strong deterrent to keep criminal aliens from attempting to or reentering the U.S. after their deportations, and as a result, in my experience the recidivism rate for persons convicted of this offense is miniscule.

There are many examples I could provide where aliens were deported based upon very serious convictions for violations of U.S. law and under the proposed amendments would more then likely not

be prosecuted for this offense or if prosecuted face only a relatively minor sentence in comparison to their past criminal behavior.

In closing, I urge that the proposed amendments under section 2L1.2. not be enacted and the current guidelines in respect to this section remain intact as a successful deterrent and appropriate punishment for conviction of this crime.

If you have any questions or feel there is anyway I can be of assistance to you in this matter, please feel free to contact me.

Sincerely,

William T Malone
Senior Immigration Inspector

February 26, 2001

Office of Public Affairs
United States Sentencing Commission
One Columbus Circle, NE
Washington, D.C. 20002-8002

Edward A. Tomlinson
2908 Coldspring Way #321
Crofton, Maryland 21114

Gentlemen:

It was with great dismay that I learned that the United States Sentencing Commission (USSC) has proposed lowering the sentencing guideline ranges on "aggravated felons" whom re-enter the United States after Deportation in violation of Title 8 United States Code 1326 (b)(2).

I strongly oppose any lowering of the sentencing guidelines relating to aggravated felon re-entrants. These guidelines are a very strong deterrent to the most violent of alien criminals whom re-enter the United States with disregard for Immigration and Nationality Law. Many of those violators have suffered no criminal action for illegally entering the United States initially in violation of Title 8 United States Code 1325. Defendants prosecuted in the United States for Re-entry After Deportation (8USC1326) by the United States Attorney's Office have been convicted of crimes such as, Rape, Murder, Sexual Abuse of a Child, Trafficking of Controlled Substance, Trafficking of Firearms, Money Laundering, Crimes of Violence, Ransom, Child Pornography, Racketeering, Sabotage, etc. Many of these offenders find that after conviction, or a guilty plea, they will only be deported from the United States and unfortunately, frequently avoid a typical sentence for their crime in lieu of deportation.

It is imperative that after criminal conviction, for such serious offenses, which were the basis for their removal from the United States, we should not send the message that we will tolerate the convict's illegal return to this society without a severe penalty for this offense. The Immigration and Naturalization Laws of the United States allow many avenues for foreign nationals to visit, immigrate and remain in the United States and impose slight or insignificant penalties for those who violate the law. Those persons whom are not citizens of the United States, who commit heinous and violent crimes should be afforded immediate removal from the United States with a warning not to return. We should not allow serious and violent criminals to re-enter the United States without severe penalty after having been afforded due process and found guilty. The United States struggles with an ever increasing crime problem from within, permitting, or giving the appearance of condoning an alien threat to the public is not permissible.

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As a long time member of the United States Department of Justice assigned to the Organized Crime Drug Enforcement Task Force (OCDETF) it is apparent that a significant percentage of organized crime investigations involve alien organized crime groups. Investigations of those organizations are unusually difficult due to the unique problems they pose such as, language, ethnic values and overseas bases of operation. One of the more recent and effective tools in combating these groups has been the sure enforcement of the aggravated felon provisions included in Title 8 United States Code 1326.

Sincerely,

Edward O. Tomlinson

Chambers of
William J. Rea
United States District Judge

United States District Court
Central District of California
United States Courthouse
Los Angeles, California 90012

March 16, 2001

Mr. Timothy B. McGrath
Staff Director
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Mr. McGrath:

This letter is in response to your letter, dated March 13, 2001, inviting comments relative to the proposed amendment reviewing guidelines for unlawfully entering or remaining in the United States, USSG §2L1.2.

This is to advise you that I am in favor of the proposed amendment, inasmuch as I believe that the level of commitment is too high. I endorse the language to increase the offense level by 4 if the conviction was for any felony other than an aggravated felony, or for three or more misdemeanors that are crimes of violence or controlled substance offenses.

I believe that if a defendant has already served his/her time for other offenses, such defendant should not be faced with a greater period of imprisonment.

Very truly yours,

WILLIAM J. REA
United States District Judge

/hj

[323]

United States District Court
United States Courthouse
Salt Lake City, Utah 84101

Bruce S. Jenkins
U.S. Senior District Judge

Telephone
801-524-5167

March 20, 2001

Mr. Timothy B. McGrath
Office of Public Affairs
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

RE: Proposed Amendment to U.S.S.G. § 2L1.2

Dear Mr. McGrath:

You asked for comment on the proposed tiered amendment relating to the offense of illegal entry, U.S.S.G. § 2L1.2.

The proposed amendment seems to indicate that if a defendant served a long time on other occasions for other transgressions he must serve a long time now for illegal entry, but for some, less than presently mandated. It is a modest improvement.

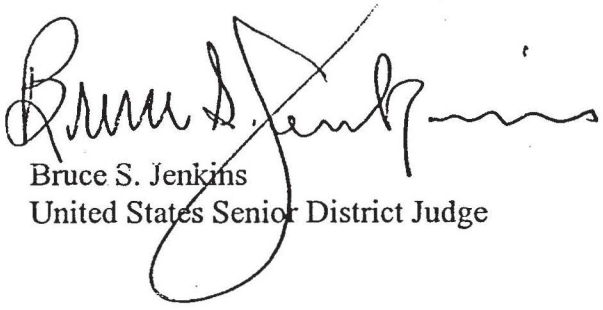
While the suggestion is largely consistent with the draconian punishment model adopted by the Congress and the Commission, one must remember that for some defendants, a long time in federal prison is less onerous , more attractive, and sometimes more profitable than returning home.

If the ultimate result is to send the miscreant home, then perhaps the sooner he be sent home, the better. There is a modicum of irony in that we prevent him from coming back by keeping him here.

It has been estimated that the cost of housing a prisoner in the federal system is about $30,000 per year. Thus, a person convicted of illegal entry and housed for an extended period , say ten years, could cost in the neighborhood of $300,000.

As an alternative, I believe that the power to sentence such a defendant should be restored to the Court. Indeed, in all instances except minimum mandatory sentences, this could be accomplished simply by having guidelines be *guidelines,* and not mandates. Such would enable the court to sentence a *person* rather than a category. In matters of illegal entry, a defendant on occasion would best be sent home promptly, and the court should be empowered--as it was for some two hundred years--to make that determination on a case by case basis.

Very truly yours,



Bruce S. Jenkins
United States Senior District Judge

cc: Hon. Diana E. Murphy
Hon. Orrin G. Hatch
Hon. Robert Bennett

UNITED STATES SENTENCING COMMISSION
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(202) 502-4500
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March 29, 2001

MEMORANDUM

TO: Chair Murphy
Commissioners
Tim McGrath
Susan Hayes
Ken Cohen
J. Deon Haynes
Pam Montgomery
Lou Reedt
Judy Sheon
Charlie Tetzlaff
Susan Winarsky

FROM: Mike Courlander

SUBJECT: Public Comment

Attached for your reference are a few letters of public comment supplementing the public comment notebook. Of special note may be letters from the Department of the Interior, the Federal Public Defender's Office in New Mexico, and a December letter from the U.S. Attorney in Utah to DOJ that is referred to in some of our recent public comment.

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Washington, D.C. 20240

IN REPLY REFER TO:
Environmental and Cultural
Resources Management

MAR 19 2001

The Honorable Diana E. Murphy
Judge, United States Sentencing
Commission
Suite 2-500, South Lobby
One Columbus Circle, NE
Washington, DC 20002

Dear Judge Murphy:

The Bureau of Indian Affairs (BIA) has received a copy of the December 7, 2000, letter (enclosed) from Paul M. Warner, United States Attorney for the District of Utah, to Laird Kirkpatrick, Commissioner Ex-Officio of the United States Sentencing Commission. Mr. Warner's letter requests that sentencing guidelines be established for violations of the Archaeological Resources Protection Act of 1979 (16 U.S.C. 470aa-mm) (ARPA) and of the criminal provisions (18 U.S.C. 1170) of the Native American Graves Protection and Repatriation Act of 1990 (25 U.S.C. 3001-3013) (NAGPRA).

As the United States' primary agency for carrying out the federal trust responsibility for Native American Indians and with over 54 million acres of Indian trust land under our administration that are subject to the provisions of these two statutes, the BIA agrees and strongly supports the proposed solutions raised in Mr. Warner's letter.

The BIA is aware of the serious problems of looting and vandalism of archeological resources that take place on both Indian and public lands. We also are aware of the serious effect these types of crimes have on Native American Indian communities. We often hear such communities voice their distress over the destruction, for selfish and commercial gain, of archeological resources. Not only do Native American Indians consider such acts to be serious insults to themselves, but to their ancestors as well.

At present, ARPA and NAGPRA are our best weapons in combating the looting and vandalism of irreplaceable archeological resources. Without effective sentencing of violators, however, the protection afforded by the law is seriously impaired. From our perspective, appropriate sentencing guidelines would be a major asset in our efforts to protect archeological resources. Current sentencing guidelines do not reflect the actual harm caused by the thoughtless minority who engage in grave robbing activity.

The BIA would appreciate your consideration of our position on this important matter. If we can be of any assistance in your efforts to develop more effective sentencing guidelines, please contact Donald Sutherland at (202) 208-4791.

Sincerely,

W. Sharon Blackwell

Deputy Commissioner of Indian Affairs

Enclosure

cc: Michael Horowitz
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U.S. Department of Justice
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Washington, D.C. 20530

Vicki Portney
Office of Policy and Legislation, Criminal Division
U.S. Department of Justice
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Honorable Paul M. Warner
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District of Utah
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Francis P. McManamon
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U.S. Department of Justice

Paul M. Warner

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District of Utah

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December 7, 2000

Laird Kirkpatrick
Counsel to the Assistant Attorney General
Criminal Division
U. S. Department of Justice
10th and Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Re: Heritage Resources Crimes and the Sentencing Guidelines

Dear Mr. Kirkpatrick:

As Commissioner Ex-Officio of the United States Sentencing Commission, you are well aware that the Commission is considering a group of important revisions to the Sentencing Guidelines known as the Economic Crime Package. The purpose of this letter is twofold: first, to inform the Commission and the Department of serious deficiencies in the Guidelines concerning heritage resource crimes; and second, to respectfully urge the Commission, with the full support of the Department of Justice, to incorporate into the Economic Crime Package essential Guidelines provisions to correct the problems.

As a preliminary matter, this office is uniquely qualified to address this issue. During the past decade, the District of Utah has led the nation in the enforcement of the Archaeological Resources Protection Act (ARPA), whose noble purpose "is to secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands." 16 U.S.C. § 470aa(b). During this period 38 defendants in Utah were convicted of ARPA offenses (the 32 ARPA felonies may exceed the combined total from all other districts). We have successfully prosecuted the largest ARPA case (10 defendants convicted of 18 felonies, including 9 ARPA felonies). In another case, we obtained the longest ARPA prison sentence (63 months) for a notorious looter of archaeological resources. Assistant U. S. Attorney Wayne Dance of this office recently received the EOUSA Director's Award for Superior Performance for his exemplary ARPA prosecution record and his nation-wide training efforts.

AUSA Dance has had numerous discussions with AUSAs, Department of the Interior officials, and federal land managers from around the country concerning the subject of this letter. There is unanimous agreement that the Sentencing Guidelines are wholly inadequate for ARPA and other heritage resources crimes. These crimes cause devastating and irreparable harm to the nation's cultural heritage, yet there is an utter dearth of recognition and specific treatment of them in the Guidelines.

The Solicitor General of the United States became familiar with this issue two years ago while considering whether to authorize appeal of the ARPA sentence in United States v. Hunter, 48 F.Supp.2d 1283 (D. Utah 1998) (discussed below). Although he ultimately decided against appeal for reasons applicable only to that specific case, Solicitor General Waxman personally informed AUSA Dance that he believes the Sentencing Guidelines to be inadequate for ARPA and other heritage resources crimes, and fully supports a Guidelines amendment.

The professional archaeological community also strongly supports amending the Sentencing Guidelines to give appropriate guidance to the federal courts in sentencing those who violate ARPA and other heritage resources statutes. The President of the Society for American Archaeology, the nation's largest body of professionals in this field, personally urged Solicitor General Waxman to appeal the Hunter case because of the importance and necessity of utilizing the ARPA statutory and regulatory concept of "archaeological value" in determining "loss" for ARPA offenses.

The Problems

Problem 1. There is no Sentencing Guidelines provision specifically addressing ARPA offenses and other heritage resources crimes. Appendix A, the Statutory Index for the Guidelines, does not even cite the ARPA criminal provision (16 U.S.C. § 470ee). Appendix A does list the Antiquities Act (16 U.S.C. § 433), and references USSG § 2B1.1 and § 2B1.3. However, since a violation of § 433 is a class B misdemeanor, the Guidelines are inapplicable (§ 2X5.1). In the absence of a specific Guidelines reference for ARPA offenses, the federal courts have been using §§ 2B1.1 and 2B1.3, "the most analogous offense guideline(s)" (§ 2X5.1). The problem with these two provisions is that they are grossly inadequate for ARPA and other heritage resources crimes because they contain no specific offense characteristic which references the unique and irreparable harm caused by these offenses.

Furthermore, the Base Offense Level (BOL) under § 2B1.1 and § 2B1.3 is four levels, the lowest BOL in the entire Guidelines. Even contraband cigarette offenses (§ 2E4.1), odometer offenses (§ 2N3.1), and possessing an alcoholic beverage in

prison (§2P1.2(a)(3)) are accorded substantially higher BOLs by the Sentencing Guidelines than ARPA and other heritage resources crimes. In the theft guideline (§ 2B1.1), various items and property receive specific enhancement treatment, yet the only reference to the nation's cultural heritage is a rarely applicable enhancement for theft from a national cemetery (§ 2B1.1(b)(8); discussed below). The same limited enhancement is set out in the property damage/destruction guideline (§ 2B1.3(b)(4)).

Another important heritage resources crime receiving no Sentencing Guidelines recognition or treatment is the criminal provision of the Native American Graves Protection and Repatriation Act (NAGPRA) (18 U.S.C. § 1170). This statute prohibits illegal trafficking in Native American human remains and cultural items. Appendix A does not reference 18 U.S.C. § 1170. There is no "analogous offense guideline" (§ 2X5.1) to use for NAGPRA offenses. United States v. Corrow, 941 F.Supp. 1553, 1566-67 (D. N.M. 1996). Thus, the courts are guided only by the general sentencing provisions of 18 U.S.C. § 3553(b).

In addition to ARPA and NAGPRA offenses, there are other federal crimes involving precious and irreplaceable heritage resources (e.g. theft of major artwork; illegal trafficking in stolen cultural heritage). All of these federal offenses are Sentencing Guidelines "orphans." The significance of the Guidelines' inadequate treatment of heritage resources crimes is profound. It not only affects the administration of justice in this important area of federal law, but also is a major impediment to the heritage resources protection mandate of our federal land management agencies (National Park Service, Bureau of Land Management, Bureau of Indian Affairs, U. S. Forest Service, Tennessee Valley Authority, Corps of Engineers, Department of Defense, Department of Energy, etc.).

Problem 2. The lack of specific guidance in the Guidelines concerning "loss" determination for ARPA offenses has been problematic for federal courts. Application Note 2 under § 2B1.1 provides alternative definitions of "loss," depending on whether the property is "taken or destroyed" (fair market value), or "damaged" (cost of repairs, with a limitation). However, because of the unique and irreplaceable nature of archaeological resources, using either fair market value or costs of repairs, or both, to gauge "loss" for ARPA offenses would inadequately measure the irreparable harm caused by crimes of this nature.

Virtually every ARPA offense involves destruction of the archaeological resource, not simply "damage" to the resource. This concept requires brief explanation. Almost all ARPA offenses involve violation of 16 U.S.C. § 470ee(a), which provides: "No person may excavate, remove, damage, or otherwise alter or deface (or attempt to so

act) any archaeological resource located on public lands or Indian lands. . . ." ARPA also prohibits illegal trafficking in archaeological resources, as provided in 16 U.S.C. § 470ee(b) and 470ee(c). Illegal excavation of an archaeological resource cannot occur without destruction of the archaeological context of that resource (context being the foundational principle of all archaeology). The removal of an archaeological resource from its original location also irrevocably changes the context of that resource (i.e. archaeological destruction), even if the object (artifact) itself is not physically damaged. Likewise, any damage, alteration or defacement of an archaeological resource cannot be fully restored or repaired due to the unique and irreplaceable nature of the resource.

Consequently, all ARPA offenses under § 470ee(a) involve some form of destruction of the archeological resource. Violations of the ARPA trafficking provisions, § 470ee(b) and § 470ee(c), are also very likely to involve a destruction component of "loss" at sentencing due to the Guidelines' relevant conduct mandate. USSG § 1B1.3. Since ARPA offenses involve destruction as well as damage of archaeological resources, the fair market value component of the "loss" definition in § 2B1.1, Application Note 2, is implicated. However, as previously stated, fair market value is wholly inadequate to measure the irreparable harm of ARPA offenses.

Application Note 2 unsuccessfully attempts to alleviate this problem by providing: "Where the market value is difficult to ascertain or inadequate to measure harm to the victim, the court may measure loss in some other way. . . ." (emphasis added.) This vague suggestion is subject to varying, even conflicting interpretations. For example, compare the disparate "loss" determinations in two ARPA cases prosecuted by this office: United States v. Shumway, 112 F.3d 1413, 1424-26 (10th Cir. 1997), and United States v. Hunter, 48 F.Supp.2d 1283 (D. Utah 1998).

Based on the permissive rather than mandatory language in Application Note 2 quoted above, the district court in Hunter disparaged and disregarded the concept of "archaeological value" in determining "loss," even though the ARPA statute (16 U.S.C. § 470ee(d)) and the implementing uniform ARPA regulations (see 43 C.F.R. § 7.14(a)) explicitly establish and define "archaeological value" as a required measure of harm caused by an ARPA offense. Instead, the Hunter court created its own subjective measure of harm to the archaeological resources ("aesthetic diminishment") and assigned an arbitrary monetary value to it. Hunter, 48 F.Supp.2d at 1287-88.

In contrast to the Hunter decision, the U. S. Court of Appeals for the Tenth Circuit a year earlier upheld a district court's use of "archaeological value" (combined with costs of restoration and repair) as an appropriate method of determining "loss" for

an ARPA offense, i.e. "to gauge the severity of a particular (ARPA) offense." Shumway, 112 F.3d at 1425. The Tenth Circuit also soundly rejected defendant's argument that the ARPA "loss" determination should be based solely on the costs of restoration and repair. Id. Unfortunately, the district court in Hunter did not deem itself bound by the Tenth Circuit's astute analysis and holding in Shumway due to the permissive language of Application Note 2 ("may measure loss in some other way").

Problem 3. There are no Guidelines provisions applicable to other serious aggravating factors in ARPA offenses and other heritage resources crimes, where the offense (a) "was committed for pecuniary gain or otherwise involved a commercial purpose" (compare USSG § 2Q2.1(b), or (b) "involved a pattern of similar violations" (compare same provision).

Problem 4. The Guidelines are silent on federal offenses involving human remains, except for the limited and rarely applicable enhancement for theft of "property" from a national cemetery (§ 2B1.1(b)(8), or damaging or destroying "property" of a national cemetery (§ 2B1.2(b)(4)).

Proposed Solutions

ARPA offenses and other heritage resources crimes should be appropriately recognized and specifically addressed in the Sentencing Guidelines. This can be accomplished with either a new guideline specific to these offenses, or amendments to existing guidelines and attendant Specific Offense Characteristics and Application Notes. The following proposals could be incorporated into the Guidelines by either means. For ease of reference, the latter method is used to discuss these proposals.

Proposal 1. Archaeological resources and other irreplaceable cultural heritage resources should be given due recognition and appropriate treatment in the Guidelines by adding a Specific Offense Characteristic (SOC) to § 2B1.1 (theft of government property), § 2B1.3 (damage or destruction of government property), and any other applicable guidelines (e.g. § 2F1.1), by requiring an increase in the offense level for ARPA and any other federal offense involving such resources.

The extent of this offense level increase, applicable to all ARPA and other heritage resources crimes, should be a sufficient number of levels to convey appropriate sentencing recognition to the uniquely harmful nature of these offenses to the nation's cultural heritage. This SOC should apply to every ARPA and heritage resources crime, regardless of the severity of the offense in a particular case.

There are important reasons for this general SOC provision to be applicable to all relevant offenses. The "loss" determination for each individual offense (see Proposal 2 below) separately serves the important purpose of assessing that offense's severity. Shumway, 112 F.3d at 1425 ("Loss also serves to gauge the severity of a particular offense."). The unique and irreplaceable nature of heritage resources crimes cannot be fully gauged by only a monetary loss determination, as would be true for fungible goods and repairable property. In addition to the general enhancement, the separate "loss" enhancement appropriately measures the extent of harm caused by the particular ARPA offense or other heritage resources crime.

Proposal 2. The loss" determination for ARPA and other heritage resources crimes should be specifically addressed in the Guidelines. A standardized "loss" determination could be easily accomplished by inserting a new Specific Offense Characteristic in the applicable guidelines (§§ 2B1.1, 2B1.3, 2F1.1, etc.). For ARPA offenses, the SOC would require the "loss" to be the total of the archaeological value of the resource (or commercial value as defined by the ARPA regulations, whichever is greater), plus the cost of restoration and repair relative to the offense. This SOC would simply incorporate into the Guidelines the Tenth Circuit's excellent analysis and resolution of this issue in the Shumway case. For other heritage resources crimes, a comparable method of "loss" determination will be necessary where the relevant heritage resource is other than an "archaeological resource" as defined by ARPA.

Proposal 3. A Special Offense Characteristic should be added to the Guidelines for ARPA offenses and other heritage resources crimes to appropriately account for two other serious aggravating factors present in some of these cases. The Guidelines already address these two aggravating factors by providing enhancements for offenses involving fish, wildlife, and plants, and set forth in USSG § 2Q2.1(b)(1):

> If the offense (A) was committed for pecuniary gain or otherwise involved a commercial purpose; or (B) involved a pattern of similar violations, increase by **2** levels.

This new SOC for ARPA offenses and other heritage resources crimes should conform to the language of § 2Q2.1(b)(1).

Proposal 4. USSG § 2B1.1(b)(8) and § 2B1.3(b)(4) should be amended to make the national cemetery property enhancement also applicable to (a) all offenses involving human remains and funerary objects located on public or Indian lands, and (b) any NAGPRA offense involving trafficking in Native American human remains or funerary objects.

CONCLUSION

I apologize for the length of this letter, but the subject matter is immensely important and requires more than a cursory review. Amending the Sentencing Guidelines to fully address the irreparable harm caused by ARPA offenses and other heritage resources crimes will truly manifest to "the present and future benefit of the American people," as Congress intended. 16 U.S.C. § 470aa(b). Few undertakings by the Sentencing Commission could be of greater significance to the nation.

Very truly yours,

PAUL M. WARNER
United States Attorney

PMW/sb Vicki ~~Bowling~~ Portney

cc: ~~Jonathan Wroblewski~~
~~Acting Director~~, Office of Policy and Legislation
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March 28, 2001

The Honorable Diana E. Murphy
Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500
Washington, D.C. 20002-8002

Re: Amendment 5

Dear Judge Murphy:

As a former visiting federal public defender at the Sentencing Commission, I am aware of the hard work and dedication of the Commissioners and the staff to implement fair and just sentencing guidelines. However, I believe the Sentencing Commission must use greater caution in amending the sentencing guidelines to avoid unintended and unjust impacts on the Native American community. As a federal public defender from New Mexico, I have represented a diverse Native American population on a variety of criminal charges. In my experience, there is a wide-spread belief among Native Americans that they are treated unjustly by the federal government and the Sentencing Guidelines.

Unfortunately, my practice has given me significant experience with child sex abuse cases. Native Americans charged with violations of 18 U.S.C. § 2241 represent about one-third of my caseload. I, and my colleagues, are the ones that have to sit with the individuals and their families and inform them of what they are facing under the Sentencing Guidelines. Often, I also confer with the victims, and their families.

Before I offer advice concerning the technical amendments, I wish to describe the world that the vast majority of federal sex offenders come from. I first must note that in a few sentences or even pages I cannot do justice to the life of a Native American on the reservation. There is a great diversity between the tribes. While some of the tribes have received some economic boom due to natural resources or gaming, the greatest poverty in America is on the reservations. On some reservations, unemployment exceeds 50%. A fact often ignored is that a significant number of those individuals who are employed are still below the poverty level.

According to 1999 statistics from the Census Bureau and the Bureau of Indian Affairs, 1.4 million Indians live on or near the reservations. *See*, http://washingtonpost.com/wp-srv/national/daily/july99/indian7.htm. Thirty-eight percent of Native American children aged 6 to 11 live in poverty, in comparison with eighteen percent for U.S. children nationwide. *Id.* Only sixty-three percent of Native Americans are high school graduates. Nineteen percent are homeless, and

fifty-nine percent live in substandard housing. *Id.* Twenty percent of Native American households on the reservations do not have full access to plumbing. *Id.*

Misery unfortunately begets misery. Abject poverty, little hope of gainful employment, limited educational opportunities and isolation have led to other ills. Crime rates, while on the decline nationally, remain constant and high on the reservations. Also, the symptoms of depression are reflected in the high teenage pregnancy rate and the epidemic of alcoholism and substance abuse. Personally, I have represented clients so depressed, they have used diesel fuel, a phenomenon unique, in my experience, to Native American clients.

The federal government has been niggardly in the use of resources on the reservation. I, along with the judges and other court personnel, are often frustrated by the lack of alcohol, substance abuse and other counseling programs on the reservation. Moreover, several local AA programs on the reservations have been closed due to the lack of funds.

While prosecutors may bring individual cases to the Sentencing Commission's attention, I do not believe that the district judges in South Dakota, New Mexico and Arizona, who handle these cases daily, believe that the current guidelines are insufficient to deal with major crimes, including sex abuse cases. If the United States Attorney or the District Court believes that an individual defendant is a danger to the community, there is sufficient provision in U.S.S.G. § 2A3.1 to incapacitate an offender. In my experience, the majority of my Native American clients are usually sentenced at the low end of § 2A3.1. If anything, I believe the sentencing courts desire a greater discretion in Native American cases.

I urge the Sentencing Commission to meet with members of the Native American community in both the plains and the Southwest before acting upon Amendment 5. The causes of Native American crime are complex and cannot be resolved in most cases by sentencing increases.

Most of my clients who are charged with sex offenses are victims of abuse themselves. Currently, I represent a young man who was subject to ongoing abuse from approximately ten to fourteen years of age. He was continuously sodomized by multiple male members of his family, as well as their friends. For sport, they tied him to a chair and used him as a target for their BB guns. He was also subject to other physical and verbal abuse. The abuse led to severe depression and alcohol abuse, and he inappropriately fondled two of his family members.

My client is not a sexual predator. His acting out is consistent with his being a victim of sexual abuse. However, under the proposed guidelines, he could be subject to both a pattern of activity and incest enhancements. The psychological evaluation reflects, and the government does not dispute, that my client is very amenable to treatment and has made significant attempts to reform his life, including becoming sober and seeking counseling. But, the proposed guidelines would effectively incapacitate him before ever giving him opportunity for treatment and counseling. Thus, he would be victimized twice.

If the Commission proceeds with adopting a pattern of activity enhancement, I would propose option four, an encouraged upward departure. This would give the court the flexibility to incapacitate those individuals who are a true risk to society. The current guidelines for an offender

with no criminal history under U.S.S.G. § 2A3.1 currently provide for a sentencing range of between 108-135 months for the sexual abuse of a child under 12 years of age without force of injury and not in the custody of defendant. If force was used, the minimum sentencing range for a criminal history category I defendant would be 168-210 months. Thus, increases due to multiple counts and an encouraged upward departure would be sufficient to incapacitate an offender who was a true pedophile.

The Sentencing Commission should not adopt an incest enhancement. This would be tantamount to an enhancement for being a Native American since the vast majority of the offenders who would receive the enhancement would be Native American. Moreover, incest offenders are the most amenable to treatment and present the least risk of recidivism. The difference between incest and pedophilia can be found in the laws of South Dakota. Incest is a Class 5 felony with a sentencing range from probation to a maximum sentence of 5 years. S.D. Codified Laws Ann. § 22-22-19.1. Criminal pedophilia, which excludes acts of incest, is a Class 1 felony with a maximum sentence of life imprisonment. S.D. Codified Laws Ann. § 22-22-30.1.

The Sentencing Commission should not raise the base offense level for U.S.S.G. § 2A3.2 for Native American statutory rape cases. A base guideline sentence of an offense level 15 is appropriate where there is consensual sex between two individuals without undue influence that would be legal except for the age of one of the participants. Moreover, a base offense level of 15 would be consistent with the state laws of New Mexico and South Dakota, *see*, N.M. Stat.Ann. § 30-9-11(F) *and* S.D. Codified Laws Ann. § 22-22-7, which allow the sentencing court to impose a sentence of probation.

If the Sentencing Commission does enact amendments for pattern of activity and incest, they should be mutually exclusive enhancements. The greatest danger to society are true pedophiles, who prefer and prey on children. Native American incest offenders are the most amenable to treatment and represent the least risk for recidivism. However, the imposition of both enhancements would subject Native Americans to the harshest sentences and pedophiles to lesser punishment. Moreover, a cumulative enhancement for incest, in addition to enhancements for pattern of activity and custody, care and control, would result in a disproportional sentence by overvaluing similar concerns.

I hope the above comments are useful for the Commission to determine the appropriate guidelines in this very difficult area. If you have any questions, please do not hesitate to contact me.

Sincerely,

John V. Butcher
Assistant Federal Public Defender
Albuquerque Office

JVB:srf

cc: Vice Chair John Steer
Susan Hayes
Pam Montgomery

UNITED STATES SENTENCING COMMISSION
ONE COLUMBUS CIRCLE, N.E.
SUITE 2-500, SOUTH LOBBY
WASHINGTON, D.C. 20002-8002
(202) 502-4500
FAX (202) 502-4699

March 13, 2001

Mr. McGrath,
I CONCUR
with option one.

Honorable Samuel F. Biery, Jr.
United States District Court
John H. Wood, Jr. United States
Courthouse
655 East Durango Boulevard
San Antonio, TX 78206-1198

Re: Proposed Amendment

Dear Judge Biery:

The United States Sentencing Commission currently is reviewing the guideline for unlawfully entering or remaining in the United States, USSG §2L1.2, and has published for comment the attached proposed amendment in the *Federal Register*. Our staff analysis of the proposal identified your court as one of the ten districts with the greatest number of cases sentenced under §2L1.2.

You may wish to comment on the proposed amendment, but the period for receiving comment is short. By statute the Commission is required to submit guideline amendments to Congress by May 1 of any given year, and the Commission is scheduled to vote on this particular amendment at its meeting on April 5, 2001.

Please forward any comments to: Office of Public Affairs, United States Sentencing Commission, One Columbus Circle, N.E., Washington, DC 20002-8002.

Sincerely,

Timothy B. McGrath
Staff Director

TO:

Enclosure

cc: Commissioners

HARRY LEE HUDSPETH
Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
511 EAST SAN ANTONIO STREET
EL PASO, TEXAS 79901

March 23, 2001

Mr. Timothy B. McGrath
Staff Director
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002

Re: Proposed Amendment to Section 2L1.2

Dear Mr. McGrath:

Thank you for the copy of the Sentencing Commission's proposed amendment to Section 2L1.2 of the Guidelines. The amendment is long overdue. The guidelines applicable to violations of Title 8 U.S.C. § 1326(b)(2) have long been unrealistically and unreasonably high. As you know, we sentence several defendants every day. It is quite common for a defendant convicted of plain old illegal reentry to have guidelines two or three times higher than the drug smuggler sentenced just before him or just after him. This defies all reason and common sense. Therefore, I enthusiastically endorse the effort to change the guidelines applicable to section 1326.

With respect to your specific request for comments, I would prefer Option One to Option Two, and suggest that the enhancement for an aggravated felony not apply to convictions more than fifteen years old.

Yours very truly,

Harry Lee Hudspeth

HLH:sd

United States District Court
NORTHERN DISTRICT OF TEXAS
U. S. COURTHOUSE
FORT WORTH, TEXAS 76102

CHAMBERS OF
DON B. MAHON
U. S. DISTRICT JUDGE

March 20, 2001

Mr. Timothy B. McGrath, Staff Director
Office of Public Affairs
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-5000, South Lobby
Washington, D.C. 20002-8002

Re: Proposed Amendment of USSG § 2L1.2

Dear Mr. McGrath:

Thank you for soliciting my comments regarding the proposed amendment of USSG § 2L1.2. Based on the number of these cases I see on a regular basis, I am not surprised to learn that the Northern District of Texas has more defendants sentenced under § 2L1.2 than most other federal courts. Having reviewed the proposed amendment, I offer the following comments.

I applaud the proposal of an amendment of § 2L1.2; it is long overdue. As you correctly point out, the current § 2L1.2 does not distinguish among the types of aggravated felonies, resulting in a 16-level sentencing enhancement regardless of the circumstances of the offense. As a result, the offense levels under this section are often grossly disproportionate to the seriousness of a defendant's prior felony conviction.

Although the proposed amendment of § 2L1.2 does much to alleviate the problem of overstating a defendant's prior aggravated felonies, it does not go far enough because it does not give trial judges any discretion. For more than a half-century I have had an opportunity to serve as a state prosecutor, state district judge, United States Attorney, and for the past 29 years a federal district judge. My experience has taught me that each case is unique, and we should trust our judges to exercise some discretion in sentencing matters because they are in a position to best understand and consider the facts and circumstances of each case.

The problem I have with the proposed amendment to § 2L1.2 is that it does not allow trial judges to consider the unique extreme or mitigating circumstances that are present in each criminal case. The proposed amendment neatly divides sentencing enhancement levels based on a defendant's prior period of imprisonment; however, considering the imprisonment time alone fails to take into account whether a defendant was sentenced in state or federal court. For example, a "felon in possession of a firearm" charge in federal court frequently carries a sentence

of more than five years, whereas a defendant prosecuted for the same crime in Texas state court might receive a probated sentence. In addition, by relying solely on number of years of imprisonment, the proposed amendment does not allow the trial judge to consider the type of crime committed by the defendant. Furthermore, the proposed amendment is also flawed because it sets a mandated enhancement level based on the number of years of imprisonment and does not provide trial judges with a range of enhancement levels.

To properly give the trial judge discretion to consider all the facts involved in each individual case, I would propose further amending § 2L1.2 to provide the trial judge with a range of at least 4 enhancement levels that can be applied. For example, rather than impose a mandated 10 level enhancement for defendants who have served a certain number of years, allow the trial judge the discretion to apply an 8-12 level enhancement range. This would allow the trial judge to consider the distinctive circumstances underlying each defendant's previous imprisonment.

Again, I thank you for the opportunity to comment on the proposed amendment to § 2L1.2, and I hope my observations will be helpful. Please feel free to contact me if you have any additional questions, comments, or concerns in which you feel I may have a personal insight.

Sincerely,

Eldon B. Mahon

Eldon B. Mahon
Senior United States District Judge
for the Northern District of Texas,
Fort Worth Division

(817) 978-2011

EBM:jw

UNITED STATES DISTRICT COURT
CHAMBERS OF
JUDGE JOHN F. KEENAN
UNITED STATES COURTHOUSE
500 PEARL STREET
NEW YORK, NY 10007-1312

March 20, 2001

Timothy B. McGrath
Staff Director
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Mr. McGrath:

I am writing to express my full agreement with and support for your proposed amendment to USSG § 2L1.2. Thank you very much for bringing it to my attention.

Very truly yours,

John F. Keenan

John F. Keenan
United States District Judge

UNITED STATES SENTENCING COMMISSION
ONE COLUMBUS CIRCLE, N.E.
SUITE 2-500, SOUTH LOBBY
WASHINGTON, D.C. 20002-8002
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March 29, 2001

MEMORANDUM

TO: Chair Murphy
Commissioners
Tim McGrath
Susan Hayes
Ken Cohen
J. Deon Haynes
Pam Montgomery
Lou Reedt
Judy Sheon
Charlie Tetzlaff
Susan Winarsky

FROM: Mike Courlander

SUBJECT: Public Comment – Last Minute Submission

Attached for your reference is a letter of comment that just came in the door from the ABA Tax Section Committee on Civil and Criminal Tax Penalties.

David F. Axelrod
Direct Dial (614) 464-8246
Facsimile (614) 719-4612
E-Mail - dfaxelrod@vssp.com

March 29, 2001

VIA E-MAIL Donald A. Purdy, Jr., Esq.

Chief Deputy, General Counsel
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500 South Lobby
Washington, D.C. 20002-8002

Re: Comments on Economic Crimes Package

Dear Mr. Purdy:

As we discussed, I enclose a draft of what we believe will be the final comments of the ABA Tax Section Committee on Civil and Criminal Tax Penalties on the proposed amendments to the Sentencing Guidelines that affect tax crimes. As I mentioned, these comments have not yet been reviewed or approved by the Chair of the Tax Section.

Thank you for your courtesy and assistance.

Very truly yours,

/s/

David F. Axelrod
Chairman of the ABA Tax Section
Committee on Civil and Criminal Tax
Penalties

DFA/bas
Attachment
cc: Bryan C. Skarlatos, Esq. (via e-mail, w/ attachment)
03/29/01 - 8835678

Daniel T. Hartnett, Esq. (via e-mail w/ attachment)
Kathryn M. Keneally, Esq. (via e-mail w/ attachment)

COMMENTS CONCERNING PROPOSED AMENDMENTS TO THE UNITED STATES SENTENCING GUIDELINES

The following comments relating to the United States Sentencing Guidelines are the individual views of the members of the Section of Taxation who prepared them and do not represent the position of the American Bar Association or the Section of Taxation.

These Comments were prepared by individual members of the Committee on Civil and Criminal Tax Penalties. Principal responsibility was exercised by Bryan C. Skarlatos and Daniel T. Hartnett. The Comments were reviewed by John Barrie of the Section's Committee on Government Submissions and by Karen Hawkins, Council Director for the Committee on Civil and Criminal Tax Penalties.

Although members of the Tax Section who participated in preparing and reviewing these comments represent clients who may be affected by the proposed amendments to the United States Sentencing Guidelines, no such member (or firm or organization to which such member belongs) has been engaged by a client to make a government submission with respect to, or otherwise to influence the development of, the specific subject matter of this proposal.

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Date: March 27, 2001

INTRODUCTION

In the current amendment cycle, the Sentencing Commission is considering changes to United States Sentencing Guidelines, Part S (Money Laundering And Monetary Transaction Reporting) and Part T (Offenses Involving Taxation) (the "Proposed Amendments"). The Commission has invited comments on the Proposed Amendments. We appreciate the opportunity to offer the Commission the perspective of the defense practice with regard to criminal sentencing.

PROPOSED AMENDMENT 20
MONEY LAUNDERING

1. The Proposal To Combine §2S1.1 and §2S1.2

Proposed Amendment 20 would consolidate the two money laundering guidelines, §2S1.1 and §2S1.2 into one new guidelines applicable to all offenses under 18 U.S.C. §1956 and §1957. The primary purpose of the amendment is to tie the offense levels for money laundering more closely to the underlying criminal conduct that was the source of the dirty money.

The Sentencing Reform Act of 1984 created the United States Sentencing Guidelines in order to achieve three main objectives: honesty, uniformity and proportionality.[1] The proposed amendments to United States Sentencing Guidelines §§2S1.1 and 2S1.2 (the "Proposed Amendments") substantially further the objectives of uniformity and proportionality and should be adopted.

A report prepared by the United States Sentencing Commission on the Proposed Amendments presents a compelling argument for revision of the money laundering guidelines.[2] The primary money laundering sections, 18 U.S.C. §§1956 and 1957, were enacted just six months before the sentencing guidelines were submitted to Congress in April 1986. As a result, the Sentencing Commission had no empirical evidence of how the money laundering laws would be applied and was forced to rely instead on the legislative history in determining the appropriate level of punishment. The legislative history, as well as information from the Department of Justice (the "DOJ") about how it intended to apply the new laws, indicated that the statutes were intended to combat large scale drug trafficking, organized crime and complex financial crimes. Based on the severity of these crimes, the Sentencing Commission developed a correspondingly severe penalty structure for the money laundering guidelines.

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[1] United States Sentencing Commission, Guidelines Manuel, §1A.3 (Nov. 2000).

[2] United States Sentencing Commission, Report to the Congress: Sentencing Policy for Money Laundering Offenses, including Comments on Department of Justice Report at 3 and 4.

Over time, however, it became apparent that prosecutors and courts were applying the money laundering laws to more garden variety frauds that were less serious than the drug and complex financial crimes which were the primary targets of the money laundering laws. In some cases, the more expansive interpretation of the money laundering laws lead to an asymmetry between the magnitude of the sentence and the severity of the conduct being punished. This asymmetry impaired the objective of proportionality which is one of the goals underlying the sentencing guidelines.

Courts addressed the asymmetry and consequent unfairness inherent in the money laundering guidelines by developing ways to avoid application of those guidelines in certain cases. With increasing frequency, courts have determined that less complex fraud cases either do not constitute money laundering at all or fall outside the heartland of the money laundering guidelines. The tendency by the courts to address the asymmetry in the money laundering guidelines on a case by case basis has impaired the objective of uniformity which is another goal underlying the sentencing guidelines.

In 1995, the Sentencing Commission responded to public critique of the money laundering guidelines by adopting amendments that are substantially the same as the Proposed Amendments. However, the Department of Justice (the "DOJ") opposed the amendments and, ultimately, they were rejected by Congress because of Congress' perception that the sentencing anomalies the amendments were intended to cure arose in relatively few cases and that such rare anomalies did not justify a sweeping modification of the guidelines.[3]

A subsequent report by the Department of Justice ("DOJ") states that it has taken steps internally to insure that the money laundering laws and sever sentencing guidelines are not used in cases were money laundering is minimal or incident to the underlying crime.[4]

In the years since Congress rejected the amendments and the DOJ drafted its report, prosecutors have continued to charge money laundering in routine fraud cases and courts have continued to seek ways to avoid application of the money laundering guidelines. In a

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[3] H.R. Rep. No. 104-272, at 14-15, reprinted in 1995 U.S.C.C.A.N. 335, 348-49.

[4] Department of Justice, Report for the Senate and House Judiciary Committees on the Charging and Plea Practices of Federal Prosecutors with Respect to the Offense of Money Laundering, at 14 (June 17, 1996).

memorandum dated February 28, 1995, the Sentencing Commission stated that appellate courts have routinely rejected defendants' arguments to depart from the money laundering guidelines because the conduct being sentenced falls outside the heartland of money laundering.[5] The state of the law has since changed and several Courts of Appeals now approve of downward departures to avoid application of the money laundering guidelines for conduct that outside the heartland of money laundering. *See e.g.*, *United States. v. Caba*, 104 F. 3d 354 (2nd Cir. 1996); *United States v. Smith*, 186 F.3d 290 (3rd Cir. 1999); *United States v. Hemmingson*, 157 F. 3d 347 (5th Cir. 1998); *United States v. Woods*, 159 F. 3d 1132 (8th Cir. 1998).

We believe that courts will continue to seek ways to avoid the asymmetry inherent in the application of the money laundering guidelines to routine fraud cases and different courts will continue to reach different conclusions on similar facts thereby contributing to the unfairness and uncertainty in the sentencing process. The DOJ's position that the guidelines should not be changed and that it can address the above-described problems through internal policies gives local prosecutors too much discretion and, at the very least, allows prosecutors to use the threat of a disproportionately harsh sentence as a club in plea negotiations.

Adoption of the Proposed Amendments will further the objective of proportionality underlying the sentencing guidelines by tying the severity of the sentence more closely to the conduct being punished. In addition, the Proposed Amendments will further the objective of uniformity by virtually eliminating downward departures for conduct that is outside the heartland of money laundering and by limiting the ability of local prosecutors to choose among varying levels of punishment. Accordingly, we strongly support the adoption of the Proposed Amendments.

2. Other Proposals

The Commission has noted that there may be cases in which "third-party" money launderers will receive a higher base offense level than the offender who committed the underlying offense. This can happen when the base offense level for the offender who committed the underlining offense is determined with reference to the amount of the loss but the based offence level for the "third party" launderer is determined with reference to the gross amount of laundered funds. The Commission has suggested three alternatives to deal with this type of case: allow a downward departure; create a specific rule that the offense level be determined by the lesser of the amount of the laundered funds or the amount of the loss; or do nothing. In our view, the preferable alternative is to create a specific rule that the offense level is determined with reference to the amount of the laundered funds or the amount of the loss, whichever is less. The codification of such a rule will promote certainty and uniformity.

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5 "[A]ppellate courts (apart from the early decision in Skinner) appear to have uniformly rejected such departures." Memorandum of the Money Laundering Working Group, at 4 (February 28, 1995).

The Commission has invited comments on the following enhancements: (1) whether the proposed enhancement for sophisticated concealment should apply to all forms of concealment; (2) whether there should be an enhancement if a defendant launders funds with the intent to engage in conduct constituting a violation of §7201 or §7206 of the Internal Revenue Code; and (3) whether there should be an enhancement if a defendant is a "direct" money launderer, no other enhancement applies and the value of the laundered funds is greater than $10,000.

These enhancements insure that there will be an upward adjustment every time a defendant's conduct happens to fall within the definition of money laundering regardless of whether the crime is the aggravated type of conduct that Congress originally intended to combat with the money laundering statutes. This is contrary to the overall thrust of the current amendments which were designed to avoid disproportionate sentences in ordinary fraud cases that also happen to violate the money laundering statutes. Accordingly, we believe it is appropriate to limit enhancements to only those cases which involve additional aggravating money laundering conduct.

We have chosen not to comment on the following issues: (1) whether application of §2S1.1(a)(1) should be expanded to include offenders who otherwise would be accountable for the underlying offense solely on the basis of §1B1.3(a)(1)(B); (2) whether eligibility for an enhancement under §2S1.1(b)(2)(A) should be expanded to include "direct" money launderers who launder the criminally derived proceeds of others in addition to their own criminally derived proceeds; (3) whether there should be a downward adjustment for defendants who are convicted under 18 U.S.C. §1957 who did not commit the underlying offense and to whom no other enhancement applies; (4) whether a conviction for money laundering should be grouped with a conviction for the underlying offense; and (5) whether a conviction under 18 U.S.C. §1960 is more appropriately referenced under §2T2.2 or §2S1.3.

PROPOSED AMENDMENT 12
OFFENSES INVOLVING TAXATION

Proposed Amendment 12 change two guidelines provisions affecting sentencing in criminal income tax cases: options for the tax loss table of §2T4.1, which translates a particular amount of tax loss to a particular offense level (Proposed Amendment 12, Part B); and a methodology for computing tax loss in situations where a defendant's misconduct causes tax loss at both the corporate and individual levels (Proposed Amendment 12, Part F). The Commission has also invited comments on three topics related to criminal tax case sentencing (Proposed Amendment 12, Part G).

3. Proposed Amendment 12, Part B: Options for Changes to the Tax Loss Table of §2T4.1

The two Options for changing the tax loss tables in §2T4.1 reduce to 14 from 21 the number of tax loss break-points which correspond to particular offense levels. Both proposals embrace two-level changes between the break-points, rather than the one-level changes under the tax loss table currently in place. Compared to the current table, Option One prescribes generally higher offense levels for tax losses less than $200,000; both Options assign roughly similar offense levels to tax losses exceeding $200,000.

While the goal of simplifying any aspect of tax case sentencing is laudable, reductions in the number of offense levels may not reduce as much controversy as may be hoped. IRS agents and prosecutors are acutely aware of the tax loss offense levels. Working a case to find enough tax loss to arrive at a given offense level so that a prison sentence results after allowing for the acceptance of responsibility adjustment may be a natural tendency. On the other hand, defense counsel is duty-bound and client-stimulated to strive to reduce the tax loss computation and qualify for a lesser offense level. Reducing the number of offense level triggers will not eliminate that advocacy, and with a two-level benefit/detriment at issue, may even intensify it.

Both proposed options for modifying the tax loss table to achieve the reduced number of offense levels necessarily will result in punishment increases in a number of cases. Option One produces greater increases in punishment over the current tax loss table. We are concerned that collateral damage resulting from increased sentences in criminal income tax cases will outweigh the system's likely small efficiency gain from the reduction in the number of offense levels.

A proposal to increase the offense levels from those prescribed by the current tax loss table seems unnecessary in view of indications that the present regimen functions satisfactorily in identifying an appropriate punishment. A review of the various Sourcebooks of Federal Sentencing Statistics for the years 1996-1999, discloses fairly consistent patterns of sentencing in tax cases. Table 27[6] indicates that roughly 75% of all tax offense defendants are sentenced within the guideline range, and roughly 24% receive downward departures, including some 15% receiving substantial assistance departures. Upward departures have occurred in no more than .6% of the cases; in fiscal 1999, there were no upward departures. Table 29[7] indicates that of the cases sentenced within the guideline range, between 70% and 78% of defendants are sentenced at the guidelines minimum, another 10% to 15% at the mid-point or less, and less than 10% at the guidelines maximum.

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[6] Table 27, U.S. Sentencing Commission, Sourcebook(s) of Federal Sentencing Statistics, 1995, 1996, 1997, 1998 and 1999.

[7] Table 29, U.S. Sentencing Commission, Sourcebook(s) of Federal Sentencing Statistics, 1995, 1996, 1997, 1998 and 1999.

We interpret the statistics as telling us that sentencing judges find the current punishment levels for tax offenders to be appropriate in the overwhelming majority of cases. Were the ranges perceived to be too light for tax crimes sentencing, we would expect to see significant numbers of defendants sentenced in the upper reaches of the ranges, and meaningful numbers of upward departures. If the tax offense levels are to be altered at all, the compression of some 75% of the cases at the guidelines minimum speaks of the need to reduce, not increase, the offense levels for tax offenses.

We assume some of the rationale for increasing the punishment at most levels of tax loss is to achieve greater general deterrence. We acknowledge the **position** that because so few income tax cases are prosecuted each year, sentences in these cases must be sufficiently punitive as to deter the public from tax criminality. Yet there is another aspect of general deterrence which is being overlooked in the emphasis on punitiveness.

The number of prosecutions of federal tax offenders is remarkably small. Our anecdotal experience is that the number of IRS enforcement activities of all kinds, including examinations, collection activity, and criminal investigations has declined precipitously since 1999. Yet the numbers of tax returns filed continues to grow:

	1996	1997	1998	1999
Returns filed[8]	208,975,000	216,510,000	222,481,000 (est.)	228,118,000 (est.)
Guideline Offenders in Tax Category[9]	851	996	859	728

The risk of criminal prosecution is exceedingly small and declining. Our experience with criminal tax defendants suggests that at least for legal-source income tax offenders, the likelihood of criminal prosecution is the lever of deterrence, not the degree of punishment imposed upon those successfully prosecuted. For this group, the current pains of federal conviction - exposure to a term of imprisonment, the loss of professional standing, shame, embarrassment for family members, and the economic punishments - are acute. Without increases in the number of prosecutions brought, we believe the prospect of criminal prosecution is not a meaningful part of a taxpayer's decision-making when deciding whether to cheat in connection with taxes. It does not appear that increasing the punishment component will increase deterrence.

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[8] 1997 Internal Revenue Service Annual Data Book, Publication 55B for 1996 and 1997 data; IRS Statistics of Income Bulletin, Winter 1999/2000, Publication 1136, Rev. 2/00.

[9] Table 3, U.S. Sentencing Commission, Sourcebook(s) of Federal Sentencing Statistics1996, 1997, 1998 and 1999.

2. Proposed Amendment 12, Part F: Prescribing a Methodology for Computing Tax Loss Where the Defendant's Misconduct Causes Tax Loss at the Corporate and Individual Levels & Clarifying That Tax Loss Does Not Include State or Local Tax Loss

Two approaches have emerged from the circuit courts of appeals for computing tax loss when a defendant's conduct causes both corporate income tax loss and individual income tax loss. To take an example, under both approaches, the defendant who skims $100,000 of corporate income causes a tax loss of $34,000 at the corporate level. The issue is whether the individual income tax loss should be figured on the entire $100,000 the defendant received, or on the net amount of $66,000 to take into account the amount of tax deemed to arise at the corporate level. One approach, articulated in *United States v. Cseplo,* 42 F.3d 360 (6th Cir. 1994), calculates the tax loss at the corporate level, then adds the tax loss at the individual level without reduction for the amount of tax deemed to arise at the corporate level. The other approach, expressed in *United States v. Harvey*, 996 F.2d 919 (7th Cir. 1993), reduces the amount of tax loss at the individual level by the amount of tax deemed to arise at the corporate level, before adding the two amounts to calculate the entire tax loss. We believe the commission's proposal to adopt the *Harvey* methodology is well considered.

Reducing the amount of tax loss at the individual level by the amount of tax deemed to arise at the corporate level is faithful to the structure of the Internal Revenue Code, which recognizes the corporation as a separate taxpayer. It also avoids a **significant** double counting problem. In addition, the computational mechanism is easily understood and implemented.

The addition to Application Note 1 which clarifies that a tax loss does not include state or local tax loss is also a well considered change by the Commission. Often, the same misconduct involved in the federal offense results in deficiencies in state or local income taxes. Internal Revenue Agents, the first and often only, informed resource for tax loss computations, are generally not acquainted with the technicalities of state and local tax matters. Probation officers certainly are not. This clarification provides welcome guidance and eliminates one area of potential complication in tax case sentencings.

3. Proposed Amendment 12, Part G: 3 Issues for Comment

We request that the Commission consider these views on the first three of the five topics presented for comment in the Economic Crime Package. We have refrained from commenting on the remaining topics as they are not related to criminal tax cases.

A. Issue 1: The Alternative Methodology for Computing Tax Loss Where the Defendant's Misconduct Affects Both Corporate and Individual Tax Liabilities.

In expressing our support for the *Harvey* methodology, it goes without saying that we view the *Cseplo* methodology to be the less attractive alternative. The *Cseplo* approach in situations where a defendant's misconduct causes losses of both corporate income tax and individual income tax totals the two kinds of tax loss with no reduction for the tax attributable at the corporate level. While this alternative methodology may appear simpler, it is no more "simple" than the *Harvey* approach, and the drawback of overstating the tax loss, is a considerable one. The proposed amendment based on the *Harvey* rationale is preferable for its greater accuracy, fairness, and comparable ease of application.

B. Issue 2: Whether to Include Interest and Penalties in Attempted Evasion of Payment Cases

Evasion of payment prosecutions are rare. The paradigm is the case in which the Internal Revenue Service ("IRS") has assessed the tax liability upon completion of what is usually a lengthy process involving notice to the taxpayer and the opportunity to communicate relevant information to the IRS. While generalizations are necessarily limited, our anecdotal experience is that these defendants are often highly committed to resisting their obligations to pay their taxes. As such, they are unintended beneficiaries of the current policy of not including interest or penalties in the tax loss computation.

Not uncommonly, interest and penalties dwarf the tax portion of an assessed liability. In seeking to evade the payment of an already assessed liability, the defendant plainly intends to evade the liability in its entirety. Thus, interest and penalties are fairly encompassed within "the loss that would have resulted had the offense been successfully completed," §2T1.1(c)(1), in evasion of payment cases. We therefore support the inclusion of interest and penalties in the computation of tax loss to be warranted in the limited class of evasion of payment cases.

C. Issue 3: Whether the "Sophisticated Concealment" Enhancement in §2T1.1(b)(2) and §2T1.4(b)(2) Should Be Conformed to the "Sophisticated Means" Enhancement in §2F1.1(b)(6)(c)

As it is currently applied, the "sophisticated concealment" enhancement for tax cases suffers a serious problem of over inclusion, thus frustrating the Commission's intent for the enhancement in tax cases. Given the over-inclusion problem, which we attribute to an inappropriate extrapolation from the sophisticated means standard from theft and fraud cases, we see a need not to conform, but to distinguish, the two.

First, the goal of increasing the offense level for sophisticated conduct in tax cases, under whatever rubric, is appropriate. Sophisticated conduct is harder for the IRS to detect, and harder to investigate and prove at trial. Additionally, sophisticated conduct corrodes