commentary addresses whether the prior sex offense conviction is one that has to be counted under the provisions of §4A1.1(a), (b), or (c), or is restricted by the time periods under §4A1.2. POAG would strongly encourage the Commission to consider that the prior sex offense conviction receive criminal history points under the provisions of §4A1.1 in order for the defendant to qualify for the application of §4B1.5.

The second concern lies within the format presentation of §4B1.5(d), "a repeat and dangerous sex offender's criminal history category in every case shall be...". We suggest that this language precede the table at §4B1.5(b). This minor format change becomes consistent with the presentation of a career offender's criminal history category found at §4B1.1. POAG takes no position in recommending the criminal history category for this type of defendant.

With respect to the commentary options for §4B1.5, POAG prefers the commentary as set forth at Option 1B. However, we would strongly encourage that for Option 1B, comment.(n.3), language be included to designate whether the prior sex offense conviction under §(a)(2) is one that has to be counted under the provisions of §4A1.1.

POAG prefers Option Three wherein a specific offense characteristic is included at §2A3.1, that addresses "pattern of activity". This two-level enhancement allows for the consideration of additional sexual abuse or exploitation of a minor behavior that does not necessarily result in a conviction, hence sanctioning the often ongoing activities of many sex offenders.

Amendment Nine – Safety Valve

POAG strongly supports the proposed amendment which allows a two-level reduction for all defendants despite their offense level who meet the criteria of the sub-sections as set forth at §5C1.2. Such change allows for the first-time offender to benefit even if their offense level is below 26.

Amendment 12 – Economic Crime Package

Based on time constraints with respect to our meeting, POAG focused on the proposed loss tables for the consolidated guideline. Of the three options proposed, POAG prefers Option One. POAG's collective opinion is that the penalties in all the proposed tables are too low as we routinely receive comment from our courts that the sentencing ranges for offenses calculated under §§2B1.1 and 2F1.1 do not provide significant punishment at the lower levels where the majority of the defendants prosecuted under these two guidelines fall. However, of the options presented, POAG prefers Option One since the majority of offenses we encounter would receive greater sentences, thus keeping in line with the concerns of our courts. While we recognize the penalties are more substantial at higher loss levels in the recommended tables, it has been our experience that only a minority of cases prosecuted fall within this category.

Amendment 18 – Immigration

POAG appreciates the concerns that have been voiced in reference to the application of §2L1.2(b)(1)(A) wherein a 16-level enhancement is applied if the defendant was previously deported after a criminal

conviction for an aggravated felony, thus often resulting in offense levels that are disproportionate to the seriousness of the prior aggravated felony conviction. POAG concurs that the term "aggravated felony" is broadly defined and that some aggravated felonies are "less serious" than others. Although conceding that a problem exists, POAG nonetheless, has reservations with the proposed remedy. While disproportionality is the stated incentive for revising §2L1.2(b)(1)(A), POAG acknowledges the plight of the border states and the overwhelming number of unlawful entry cases they perennially process. It is believed that distinguishing one aggravated felony from another may benefit certain defendants and expedite the plea/sentencing process in those cases. Like other defendants, aliens are more agreeable when they are facing the possibility of serving less time.

The proposed amendment is intended to achieve proportionate punishment by providing tiered sentencing enhancements based on the period of imprisonment the defendant actually served for the prior aggravated felony conviction. The concerns POAG had with the "time served" approach are three-fold. First, ascertaining reliable information pertaining to the time a defendant actually served is believed to be impractical and in some instances, impossible. Court records are often difficult to acquire. Even if it were possible to obtain reliable jail/institutional/correctional records to determine the actual time served, the already protracted sentencing process may take even longer, thus providing another obstacle for the border states. The solution to the problem is beyond officers merely improving their investigation/research techniques and/or work ethics. POAG is of the opinion that officers already perform an admirable job ferreting available information within a reasonable time period.

A second concern is that the use of the time served methodology is contrary to the philosophical underpinnings of Chapter Four. There has been an ongoing debate as to the propriety and purpose of using criminal history to determine the defendant's sentence. There has also been objection to the *Federal Sentencing Guidelines* because of their relatively unique approach to determining criminal history by measuring the severity of the prior offense by the length of time imposed for the prior conviction. Employing a tiered system at §2L1.2 could possibly fuel the fires of discontent regarding the current approach in determining severity in Chapter Four. We do not suggest, however, that the rationale in Chapter Four is beyond reproach.

As a third issue, even if it were practical or possible to determine time served, the same may not be a fair measure of severity. One would have to wrestle with the issue of the disparity that results in varying charging and plea practices, time served in parole- and non-parole systems, alternative sentences whose custodial component is not the traditional form of incarceration, early releases prompted by prison overcrowding, time served for revocation of supervision, and premature releases to detainers, particularly those in the cases of deportable aliens.

Looking to an alternative to basing the enhancement on time actually served, one option would be predicated on the type of aggravated felony involved. It is noted that this focus is eluded to in Option One. Such alternative may be a feasible approach if the enhancement hinged on real versus charged offense behavior. Given prosecutorial discretion and charge/plea bargaining, reliance on the latter would invite disparity in the application of §2L1.2. The traditional measure of severity, i.e., length of sentence imposed, may still be the preferred approach.

The option of relying on departures was also discussed as an approach to the situation but summarily dismissed by POAG as we are of the opinion that sufficient language presently exists in the guidelines inviting such a departure. It was perceived that given a range of 16 levels, departures without structure would invite an unacceptable degree of disparity.

Lastly, the Commission invited comment as to whether the enhancement for previous convictions for aggravated felony should follow the same counting rules as provided at §4A1.2. POAG generally favors consistency and would recommend that there be a "shelf life" even for aggravated felonies in Chapter Two.

Although not precisely on point, POAG engaged in a brief discussion with regard to "uniformity" in the punishment of aliens. When incarcerated and upon completion of their imprisonment sentence, alien offenders are typically released to a detainer and deported. Although a term of supervised release is applicable, it is seldom imposed. Aliens seldom have to comply with the rigors of supervision. Given this reality, the severity of their sentence is obviously depreciated. An order to remain outside the United States may be consequence enough but it would seem this depreciated sentence undermines the goals of uniformity that Congress sought to achieve by enacting the Sentencing Reform Act. In expediting the disposition of immigration cases, POAG is of the opinion that we must remain cautious so as not to compromise the ability of the criminal justice system to "...combat crime through an effective, fair sentencing system".

Amendment 20 – Money Laundering

The Commission invited comment on four issues with respect to the money laundering proposed amendment.

(1) Whether application of subsection (a)(1) of proposed §2S1.1 should be expanded to include defendants who are otherwise accountable for the underlying offense under §1B1.3(a)(1)(B)(Relevant Conduct), in addition to defendants who commit or are otherwise accountable for the underlying offense under §1B1.3(a)(1)(A).

The consensus of POAG is that relevant conduct should be limited to the defendant's accountability under §1B1.3(a)(1)(A). Incorporating under §1B1.3(a)(1)(B) would more than likely include the "third-party cases", thus, the distinction between the two groups would be lost. It was brought to our attention that the Commission did not want to lose the distinction between the two groups.

(2) Should §2S1.1 include enhancements for conduct that constitutes elements of the money laundering offense, even if the conduct did not constitute an aggravated form of money laundering offense conduct. Specifically, whether, and if so, to what extent, proposed §2S1.1 should include an enhancement if:

(A) The offense involved concealment even if the conduct did not constitute sophisticated concealment.

POAG is of the opinion that concealment is inherent in the offense. Therefore, an enhancement should only be applicable if the offense involved "sophisticated" concealment.

(B) If the defendant is convicted under various codes indicated referencing Internal Revenue violations:

The presumption is that tax issues are not necessarily part of every money laundering offense; therefore, POAG is of the opinion that an enhancement treated as a specific offense characteristic would be appropriate. Furthermore, addressing this conduct as a specific offense characteristic would satisfy the grouping issue that exists when there is also a tax count charged.

(C) If subsection (a)(1) applies and: (1) the defendant did not engage in an aggravated form of money laundering as accounted for by subsection (b)(2), and (2) the value of funds laundered exceeded $10,000.

POAG is of the opinion that the underlying offense appropriately addresses the seriousness of the amount of laundered funds. Should an aggravating or mitigating factor be identified that has not been captured within the computation, the Court would have the option of departing.

(3) Whether application of §(b)(2)(A) should be expanded to include defendants: (1) whose base offense level is determined under subsection (a)(1), and (2) who launder criminally derived funds generated by offenses which they did not commit and are not otherwise accountable under §1B1.3(a)(1)(A).

POAG is of the opinion that application of this subsection should be expanded so a defendant is held accountable for being a direct and a third-party money launderer.

(4) Whether violations of 18 U.S.C. §1960 should be referenced to §2S1.3.

POAG has no position with respect to this issue.

In Conclusion

Due to the time constraints of our meeting and the volume of information presented to us, the staff of the Office of Education and Sentencing Practices assisted POAG in prioritizing issues for response. Our lack of response to additional proposed amendments in no way should be interpreted that we do not consider the proposed amendment noteworthy, i.e., *Sentencing Table Amendment* and *Alternative to Sentencing Table Amendment*. We trust that our comments have been beneficial and should you have any questions or need clarification, please do not hesitate to contact me or a circuit representative.

Very truly yours,

Ellen S. Moore

Ellen S. Moore
Chairman

ESM/amc

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
200 EAST WALL, SUITE 301
MIDLAND, TEXAS 79701

CHAMBERS OF
ROYAL FURGESON
JUDGE

TELEPHONE:
(915) 686-4040

March 15, 2001

Office of Public Affairs
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, DC 20002-8002

Re: Proposed Amendment to USSG § 2L1.2

Dear Friends:

As a trial judge with a border docket, I strongly support the proposed amendment to USSG § 2L1.2. I believe that the amendment will achieve a more proportionate punishment than the present guideline provision in connection with unlawful re-entry cases involving a prior aggravated felony conviction. I also believe that aggravated felonies committed beyond a certain number of years prior to the instant offense should not count.

Thank you for considering these comments.

Very truly yours,

Royal Furgeson

RF:blg
cc: Hon. Joe Kendall, U. S. District Judge, Northern District of Texas (via facsimile)

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UNITED STATES DISTRICT COURT
UNITED STATES COURTHOUSE
500 PEARL STREET
NEW YORK, NY 10007

CHAMBERS OF
HAROLD BAER, JR.
DISTRICT JUDGE

TEL (212) 805-0184
FAX (212) 805-7901

March 19, 2001

Timothy B. McGrath, Esq.
Staff Director
US Sentencing Commission
One Columbus Circle NE
Washington, DC 20002-8002

Dear Mr. McGrath:

Thank you for your letter of March 13. In keeping with your timetable, I am forwarding to you a copy of my decision signed today. It provides most of my thoughts on the proposed amendments to §2L1.2. I hope it is helpful and if there is any further information or testimony you want from me please, just call.

Very truly yours,

Hon. Harold Baer, Jr.
U.S.D.J.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES,	:	OPINION & ORDER
-v.-	:	
DARLING PAULINO-DUARTE,	:	00 CR 686 (HB)
Defendant.	:	

Hon. Harold Baer, Jr., District Judge:

Defendant Darling Paulino-Duarte ("Paulino-Duarte") pled guilty on September 6, 2000 to illegal reentry in violation of 8 U.S.C. § 1326. For the reasons set forth below, Paulino-Duarte will be sentenced pursuant to offense level twenty-one and criminal history category IV.

I. BACKGROUND

Paulino-Duarte was born in the Dominican Republic on November 1, 1974. The youngest of three children, Paulino-Duarte grew up in a financially distressed family and had what he described as a "tough" childhood. According to INS records, Paulino-Duarte left the Dominican Republic in 1988, entered the United States through New York on a three month visa, and remained in New York after the visa expired. In 1994, Paulino-Duarte started using and became addicted to marijuana and cocaine. Since then, he has used marijuana on a daily basis, getting high approximately three times a day, and has used cocaine regularly, though not on a daily basis.

The first of Paulino-Duarte's five prior convictions, all drug related, dates from his arrest in April, 1996 when Paulino-Duarte was found in possession of a small quantity of cocaine. Six months later in October of the same year, Paulino-Duarte was arrested for attempting to sell a

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single tin foil of cocaine to an undercover police officer. Five months later, on March 24, 1997, Paulino-Duarte was once again arrested for attempting to sell one bag of crack. Not long thereafter, Paulino-Duarte's run of bad luck continued with an arrest on May 10, 1997 for possession of marijuana. For these four offenses, in total Paulino-Duarte served approximately one year in jail, from June 23, 1997 until May 19, 1998, when he was deported back to the Dominican Republic. The longest of the four sentences was one to three years imprisonment. He was a mere street seller, the lowest level on the narcotics distribution chain, and none of Paulino-Duarte's convictions concerned significant quantities of drugs. In each case, Paulino-Duarte was convicted for possessing or attempting to sell drugs from the same location, West 163rd Street in Manhattan. As mentioned above, during this time Paulino-Duarte was a regular and dependent addict, abusing marijuana and cocaine in an effort to escape depression and loneliness. Paulino-Duarte apparently has no family in the United States.

Paulino-Duarte returned to the United States on January 11, 2000 near Tijuana, Mexico and made his way back to New York soon thereafter. Paulino-Duarte entered the United States without having obtained the express consent of the U.S. Attorney General, as is required of foreign nationals previously deported. The indictment for illegal reentry followed from a February 23, 2000 arrest for possession of marijuana in public view, whatever that indicates, this time on 191st street in Manhattan.

In total, between April, 1996 and February, 2000 Paulino-Duarte committed three misdemeanors and two felonies for which he served one year in prison. Although Paulino-Duarte was sentenced to one to three years imprisonment for each of the two felony convictions, the sentences were run concurrently. The longest sentence for any of Paulino-Duarte's three

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misdemeanors was twenty days. None of Paulino-Duarte's convictions involved violence.

Pursuant to the United States Sentencing Guidelines (the "Guidelines"), the court's role is to calculate the total offense level and criminal history category and sentence within that framework. Here, Paulino-Duarte's conduct – illegally reentering the United States subsequent to his deportation without the prior consent of the Attorney General – carries a base offense level of eight, pursuant to §2L1.2(a). Because he had been deported subsequent to the conviction for what qualifies, believe it or not, as an aggravated felony, Paulino-Duarte is subject to a sixteen level enhancement pursuant to §2L1.2(b)(1)(A). The Probation Office recommends a three point reduction for acceptance of responsibility pursuant to Guidelines §§ 3E1.1(a) and (b), resulting in a total offense level of twenty-one.

The Probation Office calculated Paulino-Duarte's criminal history category at level V by adding the point values for each of his five prior convictions -- three points for the misdemeanors, three points each for the two felonies, and two points added because Paulino-Duarte committed the instant offense while on parole – which yielded a point total of eleven, and consequently a criminal history category of V (10-13 points).

Pursuant to the Guidelines sentencing table, the prescribed prison sentence for a defendant with a total offense level of twenty-one and a criminal history category of V is between seventy and eighty-seven months. The Probation Department, therefore, recommends a sentence of seventy months with three years supervised release and a $100 special assessment.

II. DISCUSSION

Section 4A1.3 of the Guidelines grants sentencing courts the discretion to depart where the criminal history calculation overstates the seriousness of a defendant's criminal record. See

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United States v. Rivers, 50 F.3d 1126, 1130 (2d Cir. 1995) ("We agree with the other circuits that section 4A1.3 manifests the [Sentencing] Commission's view that a sentencing judge should exercise discretion whenever the judge concludes that the consequences of the mathematical prior-history calculation . . . either underrepresent or overrepresent the seriousness of a defendant's prior record."). In such situations, the sentencing court may make a so-called "horizontal departure," whereby the judge "mov[es] horizontally across the Guidelines Sentencing Table from" one criminal history category to another. United States v. Mishoe, 2001 U.S. App. LEXIS 3352, *7 (2nd Cir. 2001).[1]

Courts must enumerate specific reasons justifying departures. See United States v. Butler, 954 F.2d 114, 121 (2d Cir. 1992). "[D]epartures are to be made on the basis of individualized consideration of the circumstances of a defendant's case, rather than a general 'rule.'" See Mishoe, U.S. App. LEXIS 3352, at *11-12; Koon v. United States 518 U.S. 81, 100 (1996) ("[w]hat the district court must determine is whether the misconduct that occurred in the particular instance suffices to make the case atypical.").

In Mishoe, to guide courts in their "individualized considerations" of defendants' criminal histories, former Chief Judge Newman identified some, but not all, of the factors that a sentencing court may consider in assessing whether a horizontal departure is warranted: (1) the

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[1] Guidelines § 4A1.3 states in part: There may be cases where the court concludes that a defendant's criminal history category significantly over-represents the seriousness of a defendant's criminal history or the likelihood that the defendant will commit further crimes. An example might include the case of a defendant with two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period. The court may conclude that the defendant's criminal history was significantly less serious than that of most defendants in the same criminal history category (Category II), and therefore consider a downward departure from the guidelines.

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amount of drugs involved in defendant's prior offenses; (2) defendant's role in those offenses; (3) the sentences previously imposed; (4) the amount of time previously served compared to the sentencing range called for by placement in the recommended criminal history category. See U.S. App. LEXIS 3352, at *16-17 ("Such factors might include . . .").

In my "individualized consideration" of Paulino-Duarte's particular circumstances, I will apply, in turn, each of the four factors identified in Mishoe to the facts of this case. First, although Paulino-Duarte has five prior narcotics convictions, each were for minute quantities of drugs. Paulino-Duarte's two felony convictions arose from the attempted sale of one tin foil of cocaine (while we have no specific information about the quantity of cocaine here, the DEA indicates that a tin foil of cocaine generally contains one gram of the controlled substance) and one bag of crack; the misdemeanors were as well for minute quantities of cocaine (slightly less than 2 grams on one occasion, and approximately half a gram on another) and one conviction for possession of marijuana in public view, presumably for his personal use. See United States v. Leviner, 31 F. Supp. 2d 23, 29-30 (D. Mass 1998) (placing defendant with several minor convictions in criminal history category V would "do violence to the purposes of the Sentencing Guidelines . . . . by creat[ing] a new form of disparity, treating offenders that are completely different in a like way").

Second, while Paulino-Duarte was the only person implicated in his five offenses, his role was that of a street level drug pusher. In Mishoe, the Second Circuit recently held that there is not a "special rule for [criminal history category] determinations whereby prior offenses involving street-level sales of narcotics generally (perhaps always) permit a horizontal departure," and that "departures are to be made on the basis of individualized consideration."

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U.S. App. LEXIS 3352, at *11-12. In holding that there is no "generalized exception" for street-level drug sales, however, Mishoe did not foreclose this court's contemplation of Paulino-Duarte's minor role in narcotics distribution as part of an "individualized determination."[2] Paulino-Duarte, who has not been convicted of a violent crime and who was never more than a bit player selling small amounts of narcotics from a piece of pavement on 163rd Street, does not resemble the typical category V defendant as envisaged by the Sentencing Commission. C.f. United States v. Chambers, 2001 U.S. Dist. LEXIS 894, at *7 (S.D.N.Y. 2001) (Judge Sweet horizontally departed because, inter alia, the prior narcotics conviction was for selling drugs from the same location as the instant offense such that "enhancement of recent prior offenses would unjustly penalize [defendant] twice for participation in the same scheme or course of conduct"). There are only six criminal history categories, and criminal history category V is just short of the one reserved for career criminals. Paulino-Duarte's relatively short and far from illustrious career as a minor street level pusher hardly puts him in the company of violent offenders, drug kingpins and perpetrators of far more serious offenses. Only rarely does law enforcement reach and convict the distributor and the like who are insulated from prosecution by droves of Duartes. Perhaps equally relevant here, as Judge Scheindlin noted in United States v. Dejesus, 1999 U.S. Dist. LEXIS 11365 (S.D.N.Y. 1999):

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[2] "[T]he fact that prior small sentences cannot be disregarded and cannot justify routine horizontal departures for all street-sellers does not mean that the relationship between a particular defendant's [criminal history category] sentencing range and the time he served on his prior sentences, in combination with other factors (all assessed on an individualized basis), might not warrant a departure." Id. at *17-18. While I am mindful of Mishoe's limitations on a court's consideration of defendant's status as a street-level drug seller, this is a case where Paulino-Duarte's role in narcotics distribution is one of several concerns appropriate in an individualized determination of whether a horizontal departure is warranted.

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> A high criminal history category demonstrates that there is little reason to believe that previous punishment has had any impact on the defendant and that he is unlikely to be rehabilitated. . . . A lengthy sentence required by a higher criminal history category will lessen, not increase, the likelihood of rehabilitation. Thus, I conclude that because most of his earlier crimes were non-violent and because he has not served any significant terms of incarceration, his Criminal History Category is better represented by Criminal History Category IV.

Id. at *10-11; see Leviner, 31 F. Supp. 2d at 32 (criminal history category should take account of whether a prior conviction was for a violent or non-violent crime); United States v. Footman, 66 F. Supp. 2d 83, 99 (D. Mass. 1999) (same).

Third, although Paulino-Duarte has five prior convictions, they resulted in a total jail time of one year. Only the two felonies, the sentences for which (1-3 years) ran concurrently, exceeded twenty days. Paulino-Duarte's three misdemeanor convictions resulted in sentences of conditional discharge, twenty days imprisonment, and time served. See United States v. Francis, 2001 U.S. Dist. LEXIS 631 (S.D.N.Y. 2001) ("this court agrees that the addition of one point for a minor offense for which Defendant received a sentence of time served may overstate the seriousness of Defendant's criminal history . . . "). Each of Paulino-Duarte's misdemeanor convictions counts for one criminal history point, and collectively represent three of Paulino-Duarte's eleven criminal history points. Since criminal history category V requires a minimum of ten points, but for his misdemeanor sentences of conditional discharge and time served Paulino-Duarte would fall within criminal history category IV.

Fourth, there is a significant disparity between the "amount of time previously served compared to the sentencing range called for by placement" in criminal history category V. See Mishoe, U.S. App. LEXIS 3352, at *17. Paulino-Duarte actually served eleven months in prison.

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If sentenced under criminal history category V Duarte would serve seventy to eighty-seven months in prison, roughly seven to eight times the combined length served for his prior convictions.[3]

In sum, the factors identified in Mishoe as applied to the facts of the present case clearly indicate the propriety of horizontally departing from criminal history category V to category IV. This conclusion is further supported by my determination that a longer incarceration of Paulino-Duarte is unlikely to reduce the risk of recidivism. In Mishoe, the Second Circuit emphasized the Guidelines' core concern with deterrence. Mishoe at *18 ("[o]bviously, a major reason for imposing an especially long sentence upon those who have committed prior offenses is to

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[3] I noted with interest the publication of a proposed amendment to the Guidelines that takes into account the seriousness of a defendant's prior aggravated felony conviction in calculating the sentence enhancements for previously deported defendants. See 66 FR 18, at 7961 (January 26, 2001). Currently, Guidelines § 2L1.2(b)(1)(A) provides a 16 level enhancement to the base offense level for a defendant previously deported subsequent to a conviction for an aggravated felony. The consequence of the current rule, which "neither distinguishes among the many types of aggravated felonies for purposes of triggering the 16-level enhancement, nor provides for smaller increases for less serious aggravated felonies," is that "[s]ec. 2L1.2 often results in offense levels that are disproportionate to the seriousness of the prior aggravated felony conviction." See 66 FR 18, at 7961 ("Synopsis of Proposed Amendment"). In recognition of the inequities wrought by the current rule, the Sentencing Commission proposes an amendment whereby the number of levels by which the sentence is enhanced turns upon the amount of time the previously deported defendant actually served in prison for the aggravated offense. Under the current rule, Paulino-Duarte's total offense level (including the 16 level enhancement) is 21, resulting in a sentencing range of 57-71 months under criminal history category IV and 70-87 months under criminal history category V. By contrast, under the proposed rule, Paulino-Duarte's total offense level would be 11 (including an enhancement of 6 levels because Paulino-Duarte "actually served a period of imprisonment of less than two years"), resulting in a sentencing range of 18-24 months under criminal history category IV and 24-37 months under criminal history category V. In other words, under the proposed rule, a sentence of even 57 months (the sentence in this case) is significantly "disproportionate to the seriousness" of Paulino-Duarte's criminal history. Here it resulted in more than twice what the sentence would be under the proposed changes, and that with my downward departure taken into consideration.

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achieve a deterrent effect that the prior punishments failed to achieve"); see United States v. Leviner, 31 F. Supp. 2d 23, 29-30 (D. Mass 1998) (the Guidelines take account of criminal history because it "was found to be a strong predictor of recidivism and a good measure of culpability"). With respect to narcotics cases, Mishoe instructs that the Guidelines include street sellers as well as kingpins, and that horizontal departures may not be warranted even for street sellers if a longer sentence is necessary to deter future offenses.

Here, however, Paulino-Duarte was not charged with narcotics offenses, but with illegal reentry. Because, as in most such offenses, the wrong is unrelated to the defendant's prior convictions, a sentence pursuant to illegal reentry may not be an appropriate means to deter future drug sales, to say nothing of a defendant's addiction. The only cognizable deterrence value of sentences like this is to deter Paulino-Duarte from again illegally reentering the United States. Sentencing under criminal history category IV is more than sufficient to fulfill this purpose, added to which is the fact that this defendant will likely be deported promptly after serving his jail time.

Moreover, in this particular case, the most effective way to distance Paulino-Duarte from drugs and reduce the likelihood of future drug offenses is rehabilitation through treatment for Paulino-Duarte's addiction. I direct that the defendant be incarcerated at an institution with a drug rehabilitation program and I adopt the Probation Department's recommendation that following his sentence Paulino-Duarte be required to participate in a substance abuse program. I take seriously Paulino-Duarte's statement to the Probation Department that "he made sacrifices to come to the U.S. for a better way of life and 'drugs have destroyed' everything for him." (Pre-Sentence Report, ¶ 57.) See United States v. Garrett, 1996 U.S. App. LEXIS 19054, *3 (4th Cir.

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1996) (the court concluded that an eleven-month sentence afforded Garrett with the most effective correctional [drug] treatment and provided deterrence to future crimes"); United States v. Tonya Davis, 763 F. Supp. 645, 653 (D.D.C. 1991) ("The fact that Davis' offenses are attributable to her drug addiction does not absolve her of responsibility for her actions, nor does it obviate the need for punishment. It does, however, suggest that if she can successfully treat that addiction, there is less need to incarcerate her.").[4]

Finally, in Mishoe, the court stated that "if a defendant served no time or only a few months for the prior offenses, a sentence of even three or five years for the current offense might be expected to have the requisite deterrent effect." Id. at *18. Setting aside the fact that in Mishoe the instant offense was the last in a long line of drug offenses – not the case here – the seventy to eighty-seven month prison sentence required by criminal history category V overrepresents the seriousness of Paulino-Duarte's criminal record and I find that the facts here

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[4] I am not departing from criminal history category V because Paulino-Duarte is willing to participate in a drug treatment program, however I note that the Second Circuit has repeatedly held that a defendant's efforts to escape addiction may constitute a complete and independent basis to depart from the Guidelines. See United States v. Williams, 65 F.3d 301 (2nd Cir. 1995) (noting that defendant's "criminality was largely a product of his addiction" and upholding downward departure because of defendant's "subjective willingness" to participate in a drug rehabilitation program); United States v. Maier, 975 F.2d 944, 948 (2nd Cir. 1992) ("though drug dependence is not a reason for a departure, awareness of one's circumstances and the demonstrated willingness to act to achieve rehabilitation, thereby benefitting the individual and society, can remove a cae from the heartland of typical cases, thus constituting a valid basis for departure")(internal quotation marks omitted); United States v. Herman, 172 F.3d 205, 207 (2nd Cir. 1997) ("[i]n this circuit, a district court has the discretion to depart downwardly from the applicable Guideline range on the basis of a drug rehabilitation"). Here, I consider the linkage between Paulino-Duarte's addiction and criminal past, and his willingness to escape that vicious circle through treatment, only in the context of analyzing the likelihood of recidivism within an individualized determination of whether criminal history category V overstates the seriousness of his record.

are appropriate for a downward departure to criminal history category IV.

III. THE SENTENCE

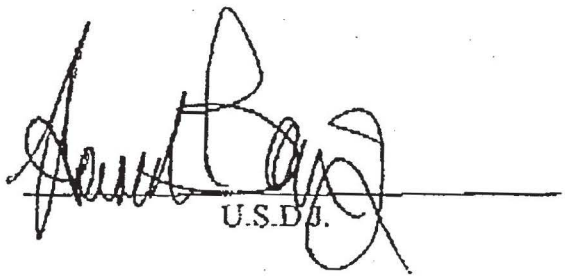
An offense level of twenty-one in criminal history category IV yields an applicable Guidelines range of fifty-seven to seventy-one months in custody. Accordingly, Paulino-Duarte is placed in the custody of the Attorney General for a period of fifty-seven months of imprisonment to be followed by one year of supervised release. Paulino-Duarte is to report to the nearest Probation Office within seventy-two hours of his release from custody, and supervision shall be by the probation office in his district of residence.

Let me remind you that there are mandatory and general conditions as well as special conditions of supervised release, including: (1) not committing another federal, state or local crime; (2) not illegally possessing a controlled substance; and (3) not possessing a firearm or other destructive device. The mandatory drug testing condition is suspended due to the imposition of a special condition requiring drug treatment and testing.

In addition, Paulino-Duarte shall be incarcerated in an institution with a drug rehabilitation program and if possible admitted to that program. Further, following his release, Paulino-Duarte shall participate in a program approved by the United States Probation Office for substance abuse, which program may include testing to determine whether the offender has reverted to the use of drugs or alcohol. You may be required to contribute to the costs of services rendered (copayment) in an amount to be determined by the probation officer, based on ability to pay or availability of third-party payment. Also, Paulino-Duarte shall comply with all INS requests and obey all U.S. immigration laws.

Paulino-Duarte is required to pay a mandatory assessment of $100, which payment is due immediately. No fine is imposed. Paulino-Duarte may appeal this sentence.

SO ORDERED
New York, NY
March 19, 2001



[207]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
201 UNITED STATES COURTHOUSE
501 WEST TENTH STREET
FORT WORTH, TEXAS 76102

CHAMBERS OF
JUDGE TERRY R. MEANS

817-334-4207
FTS-334-4207

Chambers: (817) 978-4207
FAX: (817) 978-4208

March 20, 2001

Office of Public Affairs
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, DC 20002-8002

Re: Comment on Proposed Amendment to USSG § 2L1.2

Greetings:

I believe the enhancement in § 2L1.2(b)(1) for previous conviction for an aggravated felony offense should be graduated based on a factor other than the period of imprisonment the defendant actually served for the aggravated felony. I believe the enhancement should be graduated based on the type of aggravated felony involved. For example, the approach of Option One for Subsection (b)(1)(A)(i) should be extended to Subdivisions (ii) through (iv) of Subsections (b)(1).

I say this because using the period of imprisonment the defendant actually serves for the aggravated felony will result in greater disparity between sentences. The various state and federal jurisdictions have differing sentences for the same or similar felonies and judges within those jurisdictions will have further differences between and among themselves for the same felonies. Thus, the time that a defendant serves for a felony is an inadequate guide to the seriousness of his previous offense behavior. To the extent that the sentence does reflect the seriousness of the offense behavior, the sentencing judge under § 2L1.2(b)(1) can take that into account in deciding where within the range he will sentence such defendant.

I do not believe that the enhancement in § 2L1.2(b)(1) for a

previous conviction for an aggravated felony should take into consideration only aggravated felonies that were committed within a specified time period. A person who is in the United States illegally and who has committed a previous aggravated felony should not receive any grace for having committed the crime much earlier during his unwelcome stay in the United States.

Sincerely,

Terry R. Means

Terry R. Means

TRM/dgt

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012

CHAMBERS OF
MANUEL L. REAL
JUDGE

TELEPHONE:
894-5267

March 22, 2001

Office of Public Affairs
United States Sentencing Commission
One Columbus Circle, N.E., Suiie 2-500S
Washington, D.C. 20002

Mr. Timothy B. McGrath:

Comments requested in your letter of March 13, 2001.

Section 2L1.2(b)(1)(A) I agree with the removal of the guideline.

Section 2L1.2(b)(1)(A) as amended I have some disagreement.

Section 2L1.2(b)(1)(A)(i)(I) causes me some pause because I have experienced many illegal aliens who were "mules" that are caught in the 10 year mandatory minimum. That situation should be distinguished from those who are principals in the drug traffic.

Section 2L1.2(b)(1)(A)(i)(II) causes no problem for me.

Section 2L1.2(b)(1)(A)(ii)(iii)(iv) should also be lowered by (2) levels each and graduated by the degree of culpability in the prior convictions.

Section 2L1.2(b)(1)(B) should be no more than a (2) increase. I believe all other problems would be solved by the criminal history category.

Cordially,

Manuel L. Real
United States District Judge

[211]

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

Honorable Deborah A. Batts
United States District Court
2510 Daniel Patrick Moynihan
United States Courthouse
500 Pearl Street
New York, NY 10007-1312

Re: Proposed Amendment

Dear Judge Batts:

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

Enclosure [213]

cc: Commissioners

PUBLISHED VERSION: IMMIGRATION
(Proposed Amendment 18 of User Friendly, Volume Two)

Synopsis of Proposed Amendment: *This amendment modifies §2L1.2(b)(1) (Unlawful Entering or Remaining in the United States) to provide more graduated sentencing enhancements based on the seriousness of the prior aggravated felony conviction. Subsection (b)(1)(A) currently provides a 16-level enhancement if the defendant was previously deported after a criminal conviction, and the conviction was for an aggravated felony.*

The Commission has received comment that §2L1.2 often results in offense levels that are disproportionate to the seriousness of the prior aggravated felony conviction. This occurs for two primary reasons. First, 8 U.S.C. § 1101(a)(43) and, by reference, §2L1.2, defines aggravated felony very broadly. Second, subsection (b)(1) neither distinguishes among the many types of aggravated felonies for purposes of triggering the 16-level enhancement, nor provides for smaller increases for less serious aggravated felonies.

The proposed amendment is intended to achieve more proportionate punishment by providing tiered sentencing enhancements based on the period of imprisonment the defendant actually served for the prior aggravated felony. In addition, the amendment contains two options for providing increased punishment for the most serious aggravated felonies. Under Option One, the 16-level enhancement would be triggered not only by the period of imprisonment actually served but also by all aggravated felonies involving death, serious bodily injury, the discharge or other use of a firearm or dangerous weapon, or a serious drug trafficking offense, regardless of the period of imprisonment actually served by the defendant. Alternatively, Option Two would encourage an upward departure in such cases, which could result in an increase greater than the 16-level enhancement for these most serious aggravated felonies.

The Commission invites comment as to whether the 16-level enhancement provided by subsection (b)(1) should be graduated on some basis other than period of imprisonment actually served, perhaps by extending the approach taken by Option 1 throughout the other tiers. In addition, the Commission invites comment as to whether aggravated felonies that were committed beyond a certain number of years prior to the instant offense should not count for purposes of triggering subsection (b)(1).

Proposed Amendment:

§2L1.2. **Unlawfully Entering or Remaining in the United States**

(a) Base Offense Level: 8

(b) Specific Offense Characteristic

(1) If the defendant previously was deported after a criminal conviction, or if the defendant unlawfully remained in the United States following a removal order issued after a criminal conviction, increase as follows (if more than one applies, use the greater):

~~(A) If the conviction was for an aggravated felony, increase by 16 levels.~~

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(A) If the conviction was for an aggravated felony; and—

(i) (I) the defendant actually served a period of imprisonment of at least ten years for such conviction; or

[Option One:

(II) the aggravated felony involved death, serious bodily injury, the discharge or other use of a firearm or dangerous weapon, or a serious drug trafficking offense],

increase by 16 levels;

(ii) the defendant actually served a period of imprisonment of at least five years but less than ten years, increase by [10][X] levels;

(iii) the defendant actually served a period of imprisonment of at least two years but less than five years, increase by 6 [X] levels; or

(iv) (I) the defendant actually served a period of imprisonment of less than two years, or (II) the sentence imposed was only a term of probation or other sentence alternative to a term of imprisonment, or a combination of probation and other sentence alternative to a term of imprisonment, increase by 4 [X] levels.

(B) If the conviction was for (i) any ~~other~~ felony other than an aggravated felony, or (ii) three or more misdemeanors that are crimes of violence or ~~misdemeanor~~ controlled substance offenses, increase by 2 [X] levels.

Commentary

Statutory Provisions: *8 U.S.C. § 1325(a) (second or subsequent offense only). 8 U.S.C. § 1326. For additional statutory provision(s), see Appendix A (Statutory Index).*

Application Notes:

1. *Definitions.—For purposes of this guideline—:*

~~*"Deported after a conviction," means that the deportation was subsequent to the conviction, whether or not the deportation was in response to such conviction. An alien has previously been "deported" if he or she has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.*~~

~~*"Remained in the United States following a removal order issued after a conviction," means that the removal order was subsequent to the conviction, whether or not the removal order was in*~~

~~*response to such conviction.*~~

"Aggravated felony," ~~is defined as~~ has the meaning given that term in 8 U.S.C. § 1101(a)(43) without regard to the date of conviction of the aggravated felony.

~~*"Crime of violence" and "controlled substance offense" are defined in §4B1.2. For purposes of subsection (b)(1)(B), "crime of violence" includes offenses punishable by imprisonment for a term of one year or less.*~~

"Controlled substance offense"—

(A) means an offense under federal or state law that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense; and

(B) includes—

(i) unlawfully possessing a listed chemical with intent to manufacture a controlled substance (see 21 U.S.C. § 841(d)(1));

(ii) unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (see 21 U.S.C. § 843(a)(6));

(iii) maintaining any place for the purpose of facilitating an offense described in subdivision (A) (see 21 U.S.C. § 856);

(iv) using a communications facility in committing, causing, or facilitating an offense described in subdivision (A) (see 21 U.S.C. § 843(b)); and

(v) the offenses of aiding and abetting, conspiring, and attempting to commit any offense described in subdivision (A) or (B)(i), (ii), (iii), or (iv).

~~*"Firearms offense" means any offense covered by Chapter Two, Part K, Subpart 2, or any similar offense under state or local law.*~~

"Felony ~~offense~~" means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.

"Misdemeanor" means any federal, state, or local offense punishable by imprisonment for a term of imprisonment of one year or less.

"Serious bodily injury" has the meaning given that term in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

"Serious drug trafficking offense" has the meaning given that term in Application Note 1 of the Commentary to §5K2.20 (Aberrant Behavior).

2. *Application of Subsection (b)(1).—For purposes of subsection (b)(1):*

(A) A defendant shall be considered to be deported if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.

(B) A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, whether or not the deportation was in response to such conviction.

(C) A defendant shall be considered to have remained in the United States following a removal order issued after a conviction if the removal order was subsequent to the conviction, whether or not the removal order was in response to such conviction.

(D) The period of imprisonment that the defendant actually served for the aggravated felony includes, in the case of a defendant who escaped from imprisonment, time the defendant would have served if the defendant had not escaped.

~~*2 This guideline applies only to felonies. A first offense under 8 U.S.C. § 1325(a) is a Class B misdemeanor for which no guideline has been promulgated. A prior sentence for such offense, however, is to be considered under the provisions of Chapter Four, Part A (Criminal History).*~~

~~*3. In the case of a defendant with repeated prior instances of deportation, an upward departure may be warranted. See §4A1.3 (Adequacy of Criminal History Category).*~~

3. Computation of Criminal History Points. ~~An adjustment under subsection (b) for a prior felony conviction applies in addition to any criminal history points added for such conviction in~~Prior felony and misdemeanor convictions taken into account under subsection (b) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

~~*3. Aggravated felonies that trigger the adjustment from subsection (b)(1)(A) vary widely. If subsection (b)(1)(A) applies, and (A) the defendant has previously been convicted of only one felony offense; (B) such offense was not a crime of violence or firearms offense; and (C) the term of imprisonment imposed for such offense did not exceed one year, a downward departure may be warranted based on the seriousness of the aggravated felony.*~~

4. Departure Provisions.—

[Option Two:

(A) Upward Departure Provisions.—There may be cases in which subsection (b)(1) applies but the applicable enhancement understates the seriousness of the aggravated felony taken into account under that subsection. In such cases, an upward departure may be warranted. For example an upward departure may be warranted if the aggravated felony involved any of the following:

(i) Serious bodily injury, as defined in Application Note 1 of the Commentary to §1B1.1 (Application Instructions), or death.

(ii) The discharge or other use of a firearm or a dangerous weapon.

(iii) A serious drug trafficking offense, as defined in §5K2.20 (Aberrant Behavior).]

(B) Downward Departure Provision.—A downward departure may be warranted in a case in which the defendant was not advised, at the time the defendant previously was deported or removed, of the criminal consequences of reentry after deportation or removal.

Issues for Comment: *The Commission invites comment regarding whether the enhancement in §2L1.2(b)(1) for a previous conviction for an aggravated felony should be graduated based on a factor other than, or in addition to, the period of imprisonment the defendant actually served for the aggravated felony. Should the enhancement be graduated based on the type of aggravated felony involved? For example, should the approach of Option One for subsection (b)(1)(A)(i) be extended to subdivisions (ii) through (iv) of subsection (b)(1)?*] yes

The Commission also invites comment on whether the enhancement in §2L1.2(b)(1) for a previous conviction for an aggravated felony should take into consideration only aggravated felonies that were committed within a specified time period, e.g., fifteen years, or the counting rules provided by §4A1.2 (Definitions and Instructions for Computing Criminal History).

five

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

GEORGE P. KAZEN
CHIEF U.S. DISTRICT JUDGE

P.O. BOX 1060
LAREDO, TEXAS 78042
(956) 726-2237
Fax (956) 726-2349

March 7, 2001

United States Sentencing Commission
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Suite 2-500
Washington, D. C. 20544

Re: Proposed Guideline Amendments

I offer the following comments with respect to three of the currently proposed guideline amendments:

Proposed Amendment 18. In my opinion, this proposal is an unnecessarily cumbersome way to address the perceived problem of disproportionate sentences for aggravated felons under Guideline §2L1.2. Preliminarily, it should be remembered that in 1994 Congress doubled the maximum sentence for §1326 offenses to twenty years' confinement and deliberately broadened the definition of an "aggravated felon." Nevertheless, under the current guideline, I cannot recall sentencing any defendant to more than nine years' confinement, and that was one unusual case. Generally, the maximum sentences range from 60-72 months, and those defendants have had rather extensive criminal records. More often, the sentences are in the range of 45-55 months.

In my experience, the ability to find that a defendant's criminal history category is overstated, under Guideline §4A1.3, together with the current Application Note 5 to Guideline §2L1.2, usually have allowed me to appropriately mitigate sentences when necessary.

A relatively modest change to Application Note 5 would allow further flexibility in the occasional harsh case, without completely rewriting the guideline. That Note correctly recognizes that aggravated felonies vary widely across the country. Nevertheless, under sub-part (C), a downward departure is not allowed if "the term of imprisonment imposed" exceeded a year. This language has been interpreted to apply to a suspended sentence. I have seen countless cases involving extremely small quantities of narcotics or very petty assaults or thefts where the

sentence "imposed" was several years, but the defendant was immediately placed on probation and never confined. In my judgment, such sentences should be considered the equivalent of a federal sentence to "probation," so long as the probation has not been revoked. Indeed, prior to the Sentencing Reform Act, one method of placing a federal defendant on probation was to impose a suspended sentence. Note 5 should be modified so that the limitation on departures is controlled by the non-suspended portion of the imposed sentence.

I realize that this approach differs from that proscribed in 8 U.S.C. §1101(a)(48)(B). That provision, however, is one reason why sentences under Guideline §2L1.2 are sometimes disproportionately harsh, and the purpose of Note 5--and of Proposed Amendment 18--is to ameliorate that situation. I respectfully suggest that my proposal would accomplish that goal in a much simpler way.

A further modification to Note 5 would be even more curative. That modification would provide that a departure would be allowed so long as the non-suspended portion of the prior sentence did not exceed two or perhaps three years, instead of only one year as in sub-part (C). To those who might be concerned about allowing judges an unrestrained departure, I first observe that the current Note 5 already allows it. Further, the proposed Option Two would allow unrestrained upward and downward departures. If necessary, however, the departure could be channeled, as in "not more than _____ levels" or "to not lower than level _____." I believe that either or both of these modifications to Note 5 would largely accomplish the goal of proposed Amendment 18.

I stress that a modification of Note 5 to consider only the non-suspended portion of a judgment is not the equivalent of using the criteria of "time served," as contemplated in Option One. The latter interjects a feature which could often be hard to determine and would tend to increase litigation. My proposal would be determined strictly by the sentencing document, as is currently done. If the probation is later revoked and the sentence is implemented, the term again would be determined by the judgment revoking probation.

With respect to Option Two, I oppose a proposed departure for a defendant who supposedly was not advised of the "criminal consequences" of an illegal reentry. The meaning of the term "criminal consequences" is unclear. Does it refer to the fact of being indicted or the potential sentence upon conviction or something more? Whatever it means, it would be almost impossible to verify what a particular defendant was told at his deportation. Moreover, in handling probably over a thousand of these cases, I have never heard anyone claim that he did not know it was illegal to return. The claim, if any, is that he did not realize the sentence would be very high. Incidentally, I have often heard the same claim in narcotics cases. If claimed ignorance as to the possible sentence for violating the law is grounds for departure here, it should be in every case. To my knowledge, ignorance of the law has never been treated that way.

With respect to the text of proposed Amendment 18, I note that there is a proposed definition of the term "controlled substance offense," borrowed in part from Guideline §4B1.2. In the text of Guideline §2L1.2, however, the only place where I see that phrase is at subsection (b)(1)(B), which pertains to convictions of three or more misdemeanor crimes. It would be rare to find a misdemeanor conviction for the type of offenses listed under the tendered definition, which describes such things as manufacturing, distributing, importing and dispensing controlled substances, or possession with those intents. I also note that the current definition of "crime of violence" is deleted, apparently without any new substitute. While again the term "crimes of violence" only appears with respect to misdemeanors, the absence of definition could be problematical. I have recently read the case of United States v. Chapa-Garza, No. 99-51199, decided by the Fifth Circuit Court of Appeals on March 1, 2001. There, the court concluded that a felony DWI conviction was not a crime of violence under 18 U.S.C. §16 (derived from 8 U.S.C. §1101(a)(43), while it would be a crime of violence under Guideline 4B1.2(a)(2). The absence of any definition might lead to similar disputes.

Proposed Amendment 9. This proposal would apparently apply the "safety valve," Guideline §5C1.2, to all drug cases, regardless of the amount. This is presumably based on the perception that current sentences for drug trafficking are too high, a conclusion which is certainly within the prerogative of the Sentencing Commission and the Congress. My primary concern is with subsection (5) of §5C1.2. In the large volume of cases that we handle, there is often a problem of scheduling these "debriefing" hearings between the defense counsel and the prosecutor, and in turn with the particular law enforcement officer assigned to the case. Requested continuances to schedule the conference are not uncommon. After the conference, it is also not uncommon for the parties to disagree on whether the defendant has truthfully provided all information known to him. The judge must make that decision despite not having attended the debriefing session. This then either requires hearing from both sides as to why they disagree or perhaps asking the probation officer to interview the parties and make his own recommendation. This effort is probably worth the result at the higher offense levels. As one descends into the lower levels, the sentencing ranges overlap every two levels and the sentence deferential might be as little as a few months. One questions how diligently subsection (5) would be administered under that circumstance.

Proposed Amendment 7. The stated purpose of this proposal is to provide that a single defendant is not precluded from receiving a mitigating role adjustment. I am not sure that the proposal achieves that result. The new language still provides that there must be more than one "participant" in the offense, and that the adjustment does not apply to a defendant unless the "offense involved other participants." A "participant" is one criminally responsible for the offense but who need not have been convicted. At least at the Mexican border, the vast majority of narcotics cases involve persons handling the transportation leg of the overall narcotics trafficking business. Usually, the defendant is a solo driver transporting narcotics from the Mexican border to somewhere further north, generally at least a few hundred miles but often

more. Everyone in the system understands that this person is almost never acting alone. Others have cultivated and packaged the substance, and others often have imported it, although sometimes the driver and the importer are the same person. Others are the financiers of the venture and others may have provided the vehicle. Also, someone else will receive the substance at the wholesale level and others will distribute it at the retail level. As often as not, these persons are not definitely identified or arrested by agents. The defendant stands alone before the court, charged with either importing the substance or possessing (i.e., transporting) it with the intent to distribute. He is to be sentenced for his own personal conduct, which he performed alone. Is this is a case where "other participants" are involved under Proposal 7? If so, I suggest that there are few, if any, narcotics cases in which the defendant would not be eligible for consideration as a minor participant. If this is not a case with "other participants," then I think the result in the Seventh Circuit's Isienyi case remains intact, which I believe is the correct result.

Sincerely yours,

George P. Kazen

George P. Kazen

GPK/gs

United States District Court
Southern District of Texas

Filemon B. Vela
Judge

600 E. Harrison Street, #305
Brownsville, Texas 78520-7114
(956) 548-2595
Fax (956) 548-2684

March 14, 2001

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

Re: Proposed Amendment to Guideline for Unlawfully Entering or Remaining in the United States, USSG §2L1.2

Dear Members of the Sentencing Commission:

As a Judge who during his tenure has sentenced perhaps as many as 15,000 persons, many who were convicted for the offense in question, I applaud your proposal as it will promise a more fair and just approach in the sentencing scheme.

As you might well acknowledge under the present guidelines, we are caused to sentence persons for longer periods of time just for having come back to this country illegally (given that they have been convicted of virtually any felony offense) than very serious drug situations of enormous magnitude.

I would encourage you to view the proposal favorably.

Very truly yours,

Filemon B. Vela

FBV:mfg

[223]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
511 E. SAN ANTONIO, COURTROOM TWO
EL PASO, TEXAS 79901

DAVID BRIONES
JUDGE

TELEPHONE:
(915) 534-6744
FAX:
(915) 534-6881

March 16, 2001

Office of Public Affairs
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, DC 20002-8002

Members of the Commission:

I submit these comments on the proposed changes to USSG §2L1.2, having sentenced probably more defendants for violations of 8 USC §1326 than any other judge in the United States. I am in favor of the proposed changes. I have one concern which the guidelines and the commentary failed to address.

I have the Presentence Investigation Report on an individual who was sentenced to 5 concurrent jail terms as follows: 10 years for burglary, 9 years for burglary of a vehicle, 5 years for possession of a controlled substance (user amount while in custody), 8 years for aggravated assault and 8 years on a second aggravated assault (both on jail personnel) with no serious injuries. The total time served was 8 years. As I understand the proposed guidelines, this man would be facing a 10- or 12- level increase because he served less than 10 years.

If the proposed guidelines were in effect when I sentenced this individual, I would be compelled to depart upward. The proposed commentary fails to make any reference to concurrent sentences. I invite the Commission to address concurrent sentences. I would propose that you address it in the Departure Provisions.

I also favor 15 years as the cut-off date to trigger the enhancement if the individual does not have any other felony convictions subsequent to the aggravated felony.

Sincerely,

David Briones
UNITED STATES DISTRICT JUDGE

DB:aa

[225]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
515 RUSK AVENUE, ROOM 9136
HOUSTON, TEXAS 77002-2605

CHAMBERS OF
JUDGE EWING WERLEIN, JR.

TELEPHONE NO.
(713) 250-5920

March 14, 2001

Office of Public Affairs
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, DC 20002-8002

Attn: Mr. Timothy B. McGrath
Staff Director

In Re: Proposed Amendment to § 2L1.2

Dear Mr. McGrath:

Thank you for your letter and the opportunity to review the proposed amendment to § 2L1.2.

First, I favor the concept of Option One in preference to the alternative Option Two. It is better to have a prescribed tiered sentencing enhancement than to make upward departures frequently a necessary consideration in these cases. Even with the tiered enhancements, the court can always consider an upward departure in the most egregious of circumstances.

Second, in Option One (b)(1)(A)(i)(I), I strongly urge that the 16-level enhancement apply if the defendant actually served a period of imprisonment of at least five years for such conviction, rather than ten years as proposed.

Actually serving a five-year term in state prison reflects the commission of a very serious crime. It is these felons that I believe Congress *really* wants out of this country. If one who has served as many as five years in prison is deported and then illegally reenters, I feel that the full 16-level enhancement is entirely appropriate and, in fact, necessary to help deter further such reentries and to protect the public.

Third, if the preceding recommendation is accepted, § (b)(1)(A)(ii) in Option Two should be deleted.

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Fourth, I would suggest modifying § (b)(1)(A)(iii) to provide a 10-level enhancement, rather than 8 levels, if the defendant actually served a period of imprisonment of at least two years but less than five years. Defendants who reenter illegally after commission of a felony often remark that they did not believe the crime would entail much punishment because they had not had any appreciable incarceration before their first deportation. Those who have served two to five years of actual imprisonment, and still return, will not be deterred in my opinion from further illegal reentry unless there is an effective, incremental amount of punishment.

Fifth, in Option Two (B), I suggest deletion of the proposed provision encouraging downward departure if a defendant was not advised, at his previous deportation, of the criminal consequences of reentry after deportation or removal. This would predictably lead to an endless stream of claims by defendants on a subject that I do not believe warrants the considerable judicial time required to make those fact determinations.

Sixth, regarding Option Two, I would not place a limitation upon the time that had passed since commission of the aggravated felony.

Finally, I concur that an automatic 16-level enhancement is too much for some defendants who have been convicted of aggravated felonies, been deported, and then illegally reentered the country. I hope, however, that the Commission will not overreact, especially for serious criminals who have actually been imprisoned for as many as five years for an aggravated felony conviction before their prior deportation. I should prefer to see no change in § 2L1.2 rather than to see this guideline made so lenient as to render it out of proportion to 8 U.S.C. § 1326(b)(2), which prescribes a maximum prison term of 20 years. Congress's principal objective seems to be to deter illegal reentry by alien felons who previously have been convicted of aggravated felonies in our country. I suggest that respect for Congress's treatment of this crime requires a sentencing guideline that is proportionately severe.

I very much appreciate the Sentencing Commission's consideration of my views.

Respectfully submitted,

Ewing Werlein, Jr.

Ewing Werlein, Jr.

EW/jeh

[228]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

HAYDEN W. HEAD, JR.
U.S. DISTRICT JUDGE
1133 N. SHORELINE BLVD.
CORPUS CHRISTI, TEXAS 78401
361-888-3148

March 19, 2001

Office of Public Affairs
U.S. Sentencing Commission
One Columbus Circle, N.E.
Washington, DC 20002-8002

RE: Proposed Amendment to USSG § 2L1.2

Members of the Commission:

The proposal is preferable to the present guideline.

Yours very truly,

Hayden W. Head, Jr.

HWHjr/avs

[229]

United States District Court

NORTHERN DISTRICT OF TEXAS
1100 COMMERCE STREET
DALLAS, TEXAS 75242

CHAMBERS OF
SENIOR JUDGE BAREFOOT SANDERS

March 20, 2001

FAX: 202-502-4699
Mr. Timothy B. McGrath
Staff Director
United States Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

RE: Proposed Amendment/Your March 13, 2001 letter

Dear Mr. McGrath:

Thank you for your March 13 letter enclosing copy of Proposed Amendment to USSG §2L1.2. I appreciate the opportunity to comment.

I support the graduated offense level enhancements contained in proposed Option One, viz., new subparagraphs (A) (including proposed subsections (i) through (iv)) and (B). Given the breadth of the statutory definition of aggravated felony, this four-tiered system appropriately links the amount of enhancement to the amount of time served by a defendant for the prior aggravated felony. I also support the amendment's consideration of the type of prior aggravated felony as an additional (or alternative) basis for determining the defendant's offense level, reserving the current 16-level enhancement for only the most serious offenses.

I believe it preferable that the enhancement in Option One be graduated based on the type of aggravated felony involved rather than the amount of time served. However, that may not be practical.

I recommend that the Commission include in its amendment a specified time period beyond which a prior aggravated felony conviction would not be considered for offense level enhancement. The language of 8 U.S.C. §1101(a)(43) presents substantial consequences under the immigration statutes for an alien convicted of an aggravated felony, even for an offense committed many years ago. In my view, a period of ~~ten years~~ [prior to commencement of the instant offense] is sufficient for purposes of criminal sentencing for unlawful reentry or remaining in the United States.

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My recommendations are based on frequent sentencing under §2L1.2. The inflexibility of the current provision often leads to sentences which are unjustly harsh.

I hope these comments will be helpful.

Sincerely yours,

BAREFOOT SANDERS

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Phone (360) 466-3163
Fax (360) 466-5309

Swinomish Tribal Community

A Federally Recognized Indian Tribe Organized Pursuant to 25 U.S.C. § 476
P.O. Box 817 • 11404 Moorage Way
LaConner, Washington 98257

Via Facsimile and First-Class Mail
March 12, 2001

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-5000
Washington, D.C. 20002-8002

RE: Proposed Amendments to Sentencing Guidelines

Dear Commissioners:

The Swinomish Indian Tribal Community (the "Tribe") is a federally recognized Indian tribe organized pursuant to Section 16 of the Indian Reorganization Act of 1934, as amended, 25 U.S.C. § 476 *et seq.*, and derives its organization and authority from its Constitution and Bylaws, as amended, originally approved by the Secretary of the Interior on January 27, 1936, which is the successor in interest to the groups known as Lower Skagit, Kikiallus, Swinamish, and Samish signatories to the Point Elliot Treaty of 1855. The Swinomish Indian Reservation (the "Reservation") is the permanent homeland of the Swinomish Indian Tribal Community. Members of the Swinomish Indian Tribal Community are descendants of the indigenous peoples who used and occupied territories along the Skagit River and its tributaries, on the mainland north and south of the Skagit River system, and on the adjacent islands, such as Whidbey, Camano, Fidalgo, Guemes, Samish, and Cypress.

The Swinomish Indian Reservation is the permanent homeland of the Swinomish Indian Tribal Community. The Tribe has governing powers over those Reservation lands and resources reserved to themselves. The Swinomish Indian Tribal Community actively protects, conserves and restores the total environment of the lands, air, waters, flora and fauna, and other resources traditional to their culture and by treaty reserved whether on the Swinomish Indian Reservation, in tribal ceded areas or usual and accustomed sites. The Tribe is also a natural resource trustee under applicable federal law.

The Tribe writes to respond to your request for public comments on the 2001 Proposed Amendments to the Federal Sentencing Guidelines. Federal Register Vol. 66, No. 18, from Friday, January 26, 2001 at page 7991-2 noted the following issue for comment:

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> The Commission also requests comment on whether, and if so, to what extent it should provide an enhancement for the destruction of, or damage to, unique or irreplaceable items of cultural heritage, archaeological, or historical significance. As one means of providing an enhancement, should the Commission provide an alternative loss calculation based on the cultural heritage, archaeological, or historical significance of the item or based on the cost of the item's restoration and repair? *See, e.g., United States v. Shumway*, 47 F.3d 1413, 1424 (10th Cir. 1997). Alternatively, should the Commission provide an upward departure provision for such cases, or some combination of an alternative measure of loss and an upward departure provision? Should the Commission also consider amending the current enhancement for damage to, or destruction of, property of a national cemetery in Secs. 2B1.1 and 2B1.3 to include, for example, offenses involving human remains and funerary objects located on federal or Indian land?

Because the Swinomish Tribe believes strongly that the damages caused by the violations of the Archaeological Resources Protection Act, 16 U.S.C. § 470ee(a) ("ARPA"), and other crimes related to the removal or damaging of Native American remains or artifacts are not adequately addressed in the current sentencing guidelines, we support the Commission's interest in revising the sentencing guidelines. We address your questions in turn.

1. Should the Commission provide an alternative loss calculation based on the cultural heritage, archaeological, or historical significance of the item or based on the cost of the item's restoration and repair?

For violations of Archaeological Resources Protection Act, courts look to USSG § 2B1.1 for guidance on determining loss. Application note 2 states that "loss is the fair market value" of the property taken, and when property is damaged, "loss is the cost of repairs, not to exceed the loss had the property been destroyed." Application note 2 also provides: "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."

In some cases related to the excavation and removal of Native American remains or artifacts, defendants are charged for violations of the ARPA. The ARPA regulations recognize the commercial component of these losses but also acknowledge one sub-category of loss, *i.e.* archeological value, contemplated, but not specified, by the sentencing guidelines. 43 C.F.R. § 7.14 states:

Determination of archaeological or commercial value and cost of restoration and repair.

(a) Archaeological value.
For purposes of this part, the archaeological value of any archaeological resource involved in a violation of the prohibitions in Sec. 7.4 of this part or conditions of a permit issued pursuant to this part shall be the value of the information associated with the archaeological resource. This value shall be appraised in terms of the costs of the retrieval of the scientific information which would have been obtainable prior to the violation. These costs may include, but need not be limited to, the cost of preparing a research design, conducting field work, carrying out laboratory analysis, and preparing reports as would be necessary to realize the information potential.

(b) Commercial value.
For purposes of this part, the commercial value of any archaeological resource involved in a violation of the prohibitions in Sec. 7.4 of this part or conditions of a permit issued pursuant to this part shall be its fair market value. Where the violation has resulted in damage to the archaeological resource, the fair market value should be determined using the condition of the archaeological resource prior to the violation, to the extent that its prior condition can be ascertained.

(c) Cost of restoration and repair.
For purposes of this part, the cost of restoration and repair of archaeological resources damaged as a result of a violation of prohibitions or conditions pursuant to this part, shall be the sum of the costs already incurred for emergency restoration or repair work, plus those costs projected to be necessary to complete restoration and repair, which may include, but need not be limited to, the costs of the following:

(1) Reconstruction of the archaeological resource;
(2) Stabilization of the archaeological resource;
(3) Ground contour reconstruction and surface stabilization;
(4) Research necessary to carry out reconstruction or stabilization;
(5) Physical barriers or other protective devices, necessitated by the disturbance of the archaeological resource, to protect it from further disturbance;
(6) Examination and analysis of the archaeological resource including recording remaining archaeological information, where necessitated by disturbance, in order to salvage remaining values

which cannot be otherwise conserved;

(7) Reinterment of human remains in accordance with religious custom and State, local, or tribal law, where appropriate, as determined by the Federal land manager.

(8) Preparation of reports relating to any of the above activities.

In addition to these categories, the Commission should recognize expressly an additional category of loss for damage to cultural heritage. Courts have relied upon §7.14(a) and (c) of this regulation when the fair market value calculations contemplated under USSG § 2B1.1 and § 7.14(b) responded inadequately to the seriousness of the harm. *See, for example*, *United States v. Shumway*, 112 F.3d 1413 (1997). By recognizing that commercial value rarely reflects the significance of the loss suffered by Native communities as a result of grave looting and artifact theft, these subsections improve upon the more limited analysis currently permitted under the sentencing guidelines. They continue, however, to account for only part of the picture of harm that the sentencing guideline amendments should address.

When a Native American gravesite is damaged, excavated and/or sacked a series of harms are worked: aside from the associated trespass upon and theft of federal government property that may be involved, at the most general level the public at large is harmed by the loss of these priceless pieces of the historical record as preserved in their undisturbed condition. More particularly, that part of the public that has familial, cultural or geographic affiliation with the damaged or stolen remains or artifacts suffers a unique and difficult-to-quantify harm. Neither the existing sentencing guidelines nor the archeological value section of 43 C.F.R. § 7.14 adequately address that harm.

Many scholars have written vividly and well on the scope and nature of the harm suffered by Native communities through these atrocities. *See, e.g.*, Sarah Harding, *Value, Obligation & Cultural Heritage*, 31 Ariz. St. L. J. 291 (1999) and Rebecca Tsosie, *Privileging Claims to the Past: Ancient Human Remains & Contemporary Cultural Values*, 31 Ariz. St. L. J. 583 (1999). As the *Shumway* court recognized, the harm to cultural heritage to Native American communities is separate from and in addition to the harm experienced by the non-Native community's interest in *inter alia* archaeological value. The *Shumway* court got part of the analysis right. It recognized that fare market value was an inadequate measure of the full harm worked by the damage to or theft of human remains or cultural artifacts. It also understood the important cultural or spiritual dimension of these harms. The Commission needs to provide express guidance to courts to recognize the significance of the loss and nature of the damage to cultural heritage. That guidance should follow a tiered approach that incorporates consultation

with the Native American community or communities most injured by the crime.

First, the sentencing guidelines should allow for a methodology through which a sentencing court could appropriately analyze the extent of harm done to a Native community through damage to or theft of their ancestral remains or artifacts. Second, the methodology employed in the sentencing guidelines must, at a minimum, require that the pre-sentencing investigation has included: 1) an attempt to identify the most closely associated Native community, 2) consultation with that community regarding the facts underlying the charges, and 3) a conclusion reached through that consultation regarding the significance of the fact-specific harm suffered and, if appropriate, required remedies.

2. **Should the Commission provide an upward departure provision for such cases, or some combination of an alternative measure of loss and an upward departure provision?**

As discussed above, an alternative measure of loss is imperative, if the Commission wants the guidelines to provide a methodology through which an appropriate measure of harm can be determined. In addition, both a base level enhancement to sentencing and an upward departure are appropriate for violations of the ARPA or other crimes related to the damage to or theft of Native American remains or artifacts.

An initial and important point must be mentioned. Although every Native American community is distinct, with unique perspectives on and reactions to the harms resulting from damage to or theft of ancestral remains or artifacts, it is true of all Native communities that they are uniquely targeted for this most intimate and devastating of communal harms. No other ethnic or political group suffers from the violating appropriation of their family remains or historic artifacts. The Commission should begin its analysis of alternative remedies to the failure of the sentencing guidelines to allow courts to redress these wrongs.

Whether through a "vulnerable victim" analysis or an assessment of the likelihood of recidivism or seriousness of offense, courts have struggled to address adequately the unique nature of these crimes through base level enhancements. Courts have worried that to include skeletal remains within the category of "vulnerable victims" would stretch the imagination. *See, Shumway, supra.* There are two goals to the "vulnerable victim" enhancement. The first is to protect victims who cannot defend themselves from criminal attack. The second is to protect victims who are more likely because of certain characteristics to become targets of crime in the first place. USSG

§3A1.1(b). These characteristics include race, religion or membership in an ethno-cultural group. *See,* Alon Harel & Gideon Parchomovsky, *On Hate & Equality* 109 Yale L. J. 507 (1999). By focusing on only the first of these justifications, the *Shumway* court found itself engaging the question of whether a skeleton could defend itself from criminal attacks and allowed it to pursue absurd possibilities that need not be a focus of concern. The Commission should emphasize that USSG §3A1.1 supports the second justification's focus upon the vulnerability of the remains and artifacts to attack and the resulting harms upon the members of the Native American ethno-cultural group. Whether these crimes happen through racial animus, cultural prejudice or enhanced risk because of Native American funerary practices, the guidelines should acknowledge the greater likelihood of injury to Native American communities through the damage to human remains and artifacts which are the target of these attacks.

An upward departure provision, specifically acknowledging that damage to or theft of human remains or Native American artifacts harms brings irreparable harm to Native American communities, is also necessary for exceptional cases. Courts have noted that looters of historic Native American burial or living sites are repeat offenders and that the typical apprehended grave thief has likely engaged in this activity many times prior to being apprehended. Although necessary, the ability to augment penalties due to the repetitious character of most cultural resource offenders is not sufficient because it inadequately responds to the seriousness of the harm suffered by Native communities who are the victims of these attacks on their history and families.

3. Should the Commission also consider amending the current enhancement for damages to, or destruction of, property of a national cemetery in §§2B1.1 and 2B1.3 to include, for example, offenses involving human remains and funerary objects located on federal or Indian land?

In light of the cultural disaster that is worked on Native American communities by these offenses and considering how common are the assaults on Native American grave sites, the enhancement contemplated in §§ 2B1.1 and 2B1.3 seem long over due in application to these offenses. Because most crimes against Native American grave sites occur on federal land or land held in trust for Indian Tribes by the United States, extending these enhancements to any human remains or funerary objects would address many instances of these offenses.

The Swinomish Tribe appreciates your willingness to consider these comments and eagerly anticipates the results of your deliberations. If you have any comments, questions or concerns regarding this submission, please do not hesitate to contact

either myself or the Swinomish Tribal Chairman, Mr. Brian Cladoosby, at the above address.

Very truly yours,

Martin C. Loesch by S. Preston

Martin C. Loesch
Office of Tribal Attorey

SAA

SOCIETY FOR AMERICAN ARCHAEOLOGY

March 8, 2001

The Honorable Diana E. Murphy, Chair
United States Sentencing Commission
One Columbus Circle, NE, Suite 2-500
Washington, DC 20002-7727

Dear Judge Murphy:

Last December, I wrote to you on behalf of the Society for American Archaeology (SAA) regarding the December 7, 2000 letter from Paul M. Warner, United States Attorney for the District of Utah to Laird Kirkpatrick, Commissioner Ex-Officio of the United States Sentencing Commission. (A copy of my earlier letter is attached.) The letter from Mr. Warner to Mr. Laird requests the establishment of specific sentencing guidelines for violations of the Archaeological Resources Protection Act of 1979 (16 USC 470aa-mm) (ARPA), the criminal provisions (18 USC 1170) of the Native American Graves Protection and Repatriation Act of 1990 (25 USC 3001-3013) (NAGPRA), and other statutes protecting our nation's heritage resources.

In response to the United States Sentencing Commission's Request for Public Comment (Federal Register, January 26, 2001, Volume 66, Number 18), the SAA is again urging the Sentencing Commission to establish specific sentencing guidelines for the laws protecting our nation's heritage resources. It is the position of the SAA that the Sentencing Guidelines are currently wholly inadequate to properly assess the nature, severity and resultant harm of offenses affecting the nation's archaeological resources and other cultural heritage property. In addition to specifically addressing these offenses in the Sentencing Guidelines, SAA strongly supports sentence enhancements for archaeological and other heritage offenses which involve the following aggravating factors or circumstances:

1) human remains;

2) pecuniary gain or commercial motivation;

3) more than minimal planning, rather that opportunistic conduct;

4) using sophisticated means, equipment, or techniques to commit the offense; and

5) discharging, brandishing, or possessing a dangerous weapon, including a firearm (varying levels of enhancement, depending on the nature of the conduct).

In addition to these aggravating factors or circumstances, it is of the utmost importance that the severity of the offense be gauged by the extent of the loss attributable to the ARPA or other cultural heritage property offense. For ARPA offenses, the SAA urges the Sentencing Commission to adopt the ARPA statutory and regulatory scheme by assessing loss in terms archaeological value or commercial value, whichever is greater, plus the cost of restoration and repair. This method of determining loss in an ARPA case under the existing Guidelines (utilizing the analogous guidelines 2B1.3 and 2B1.1) was upheld by the Tenth Circuit Court of Appeals in Unites States v. Shumway, 112 F.3d 1413, 1424-26 (10th Cir. 1997), the only court of appeals to address this issue. For cultural heritage property offenses not involving archaeological resources (a small minority of offenses to be covered by this new specific guideline), there should be a cross-reference to the loss provisions under the general property guideline (2B1.1).

The current lack of effective sentencing for these types of cases leaves the heritage resources of the United States poorly protected against the devastating effects of looting and vandalism. A new specific sentencing guideline covering these enhancements and loss determinations for these extremely serious

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rectify this situation and help ensure the preservation of our heritage resources for future generations.

Thank you for your consideration of our position on this important matter. If SAA can be of any assistance to you in the effort to develop sentencing guidelines, please do not hesitate to contact me.

Sincerely,

Keith W. Kintigh
President

cc:

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SAA

SOCIETY FOR AMERICAN ARCHAEOLOGY

December 7, 2000

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

Dear Judge Murphy:

The Society for American Archaeology (SAA) has received a copy of the December 7, 2000 letter from Paul M. Warner, United States Attorney for the District of Utah to Laird Kirkpatrick, Commissioner Ex-Officio of the United States Sentencing Commission. This letter requests the establishment of sentencing guidelines for violations of the Archaeological Resources Protection Act of 1979 (16 USC 470aa-mm; ARPA), the criminal provisions (18 USC 1170) of the Native American Graves Protection and Repatriation Act of 1990 (25 USC 3001-3013; NAGPRA), and other statutes protecting our nation's heritage resources.

With more than 6600 members, the Society for American Archaeology is the leading professional organization of archaeologists working in the United States. Because the preservation of our nation's archaeological heritage has always been one of the Society's central objectives, SAA played an important role in the enactment of both ARPA and NAGPRA. The Society strongly supports the effective use of these and other statutes to protect heritage resources from the devastating and irreparable effects of looting and vandalism. As is noted in Mr. Warner's letter, the lack of appropriate sentencing guidelines has seriously weakened criminal prosecutions of looters and vandals. The unfortunate effect is exemplified by what we consider to be the overly lenient sentence imposed in the recent United States v. Hunter looting case in Utah.

On behalf of the Society for American Archaeology, I urge you to support the establishment of sentencing guidelines for the laws protecting our nation's heritage resources as requested in Mr. Warner's letter. These resources are the irreplaceable cultural heritage of the United States and must be protected from the damage and destruction resulting from the illegal acts of the selfish and thoughtless minority who engage in looting and vandalism. Without effective sentencing of violators, the protection afforded by the law is seriously impaired. Appropriate sentencing guidelines would be a major asset to law enforcement efforts directed to the protection of our irreplaceable cultural heritage for future generations of Americans.

Thank you for your consideration of our position on this important matter. If SAA can be of any assistance to you in the effort to develop sentencing guidelines, please do not hesitate to contact me.

Sincerely,

Keith W. Kintigh
President

cc:
Honorable Paul M. Warner
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[244]

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THE SUQUAMISH TRIBE
P.O. Box 498 Suquamish, Washington 98392

Via Facsimile to (202)502-4699 and Regular Mail

March 7, 2001

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

Attention: Michael Courlander, Public Information Officer

Re: Support of enhancing sentences for damage to cultural resources

Dear Commissioners,

I am the Chairman of the Suquamish Tribe, a federally recognized Indian Tribe. Our ancestor, Chief Seattle, greeted the first white people who arrived into our territory on Puget Sound. Our current reservation is due west of metropolitan Seattle-King County, across Puget Sound. We have lived in this region for more than 10,000 years. As an ocean faring Tribe, we fished, hunted and traded as far north as Canada and as far east as the Cascade Mountains in pre-contact times. Evidence of our cultural heritage exists throughout Washington State.

At least five federal military reservations and other federal facilities occupy lands which our Tribe ceded to the federal government in its 1855 Treaty of Point Elliot. Thus, the Commission's work to increase penalties on cultural resource crimes committed on federal lands is very important to us. Our cultural resources are most often found where the ancient shoreline existed, underwater as well as on uplifted lands, having been buried with the shifting geological conditions. All of these federal lands are located on the shorelines.

The existing penalties are inadequate and fail to deter people from engaging in illegal activities which destroy our cultural resources. Our Tribe is particularly concerned with people who excavate, grade and conduct other ground disturbing activities without regard or consideration of cultural resources which are or may be sub-surface. Information from shell middens, for example, can provide our Tribe with valuable information about how our ancestors lived day to day. We have few other sources for this information. Also, the remains of our ancestors are found at these sites.

We strongly encourage the Commission to provide an enhancement as well as an upward departure for the damage or destruction of unique or irreplaceable items of cultural heritage, archaeological or historical significance. At a minimum, the Commission should adopt a combination of an upward departure provision and alternative loss calculation formula used in United States v. Shumway. In our situations, an alternative loss calculation alone would not be

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effective since the cultural and archaeological information lost or destroyed is priceless to us, but has little or no "fair market" value. Thus, a combination is more useful.

Also, because our situation, we especially support amending the current enhancement for damage to or destruction of property of a national cemetery so that it includes offenses involving human remains and/or funerary objects located on both federal and Indian lands.

Thank you for considering these important amendments to the sentencing guidelines.

Very truly yours,

Bennie J. Armstrong

Bennie J. Armstrong, Chairman

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