changed into crack: one need merely add water and baking soda, stir and place the substance in a microwave for 10 minutes. Everything that can be said about crack can thus also be said about cocaine powder—as long as one supplements it with water, baking soda, and the ability to cook.

The problem, as we see it, is that the brutal 100-to-1 ratio is essentially a harsh penalty imposed on the naive. Even moderately sophisticated dealers know full well how to avoid this penalty—they simply keep their substance in powder form, uncooked, until it gets near the end users. This harsh disparity thus serves no real societal purpose, as it does not discourage crack trade at all—it only discourages early cooking. All of the ingredients remain readily available to those foolish enough to caught at the end of the chain—the ignorant who then receive a disproportionately harsh sentence.

That the ignorant poor at the bottom of the chain may be more involved in other crimes such as prostitution and violence would seem no surprise, and frankly may be as attributable to demographic factors as much as any crack use. But even if DOJ's statistics took these factors into account—which they do not—the bottom line would remain: as long as the powder that can easily be cooked into crack remains, the problems DOJ associates with crack will also remain.

Keeping the ratio solves nothing. Indeed, the ratio has now been in place for over 15 years. Have the societal ills which DOJ cites been eliminated? Have they even been reduced? Or do the very figures they cite come from the system they advocate should not be touched?

As Vice Commissioner Steer noted at the hearing, Congress' 100-to-1 ratio adopted in 1986 expressly incorporated the greater violence supposedly "inherent" in crack cocaine dealing. A more enlightened approach would be for the Commission to now separate out these special offense characteristics and order them punished separately where they actually exist, rather than assuming their existence in all cases. We agree with this more enlightened approach.

The Department of Justice nevertheless states that "That is not enough." It claims that some harms are "systemic" and that it will face unspecified "problems of proof" in others. On this first point, the Commission has never historically mandated enhancements for "systemic" (i.e., *assumed*) problems in drug cases, and should not start now—especially when no such enhancement appears to be incorporated into any other drug type, and no scientific analysis of the systemic problems caused by each drug type has been performed. Do we really believe that heroin cases do not also implicate systemic problems such as prostitution? And even if crack's relationship to prostitution were somehow worse than heroin, is it really 20 times worse?

On the second point, this Commission would deviate from its longstanding practice in every other context if it were to condone *automatic* enhancements even in cases where the Justice Department admits it has "proof problems"—unable to meet even a sentencing court's bare "preponderance" standard, even using bare hearsay. Surely many methamphetamine and other dealers also have had guns that were never found. Yet these defendants do not receive "systemic" or "proof-less" bumps in their sentences; nor should anyone face this unrebuttable presumption of guilt in an adversary system that properly places the burden for enhancements on the Government.

B. DOJ's Promise of a New Strategy Should Not Discourage Commission Action

At the hearing, Deputy Attorney General Thompson noted that the Attorney General would be announcing a "new federal drug enforcement strategy" that targets larger drug and money laundering organizations. While welcomed, such a policy does not resolve this issue.

First, the strategy is not a policy. As General Thompson explained upon questioning, this new strategy will not rise to the level of a declination "directive." Local prosecutors will remain free to prosecute the lowest-level crack dealers, and General Thompson acknowledged that there well may be some jurisdictions that will still want to prosecute even the smaller crack cases.

More importantly, if DOJ's new strategy is that the United States' prosecutorial attention need not be focused on lower level dealers, it is difficult to discern why the Government's efforts will be seriously undermined by a change in the drug guidelines for those at the lowest levels.

C. Increasing the Cocaine Powder Penalties is Not the Answer

The Practitioner's Advisory Group respectfully suggests that the relative seriousness of the penalties for cocaine powder and "crack" may best be analyzed by comparing it to heroin. At present, it takes five times as much cocaine powder as heroin to receive a similar sentence. We submit that this 5-to-1 ratio, long the rule and never really questioned by anyone, is frankly about where this ratio ought to be. During the hearing, General Thompson acknowledged that he was not then advocating a position that the powder cocaine guidelines were themselves too low.

The crack ratio can also be viewed in the context. At present, under both the statute and guidelines, it takes 20 times as much heroin as crack to yield a similar sentence. Thus, it is not merely the 100-to-1 ratio between crack and powder cocaine that is so troubling; it is the 20-to-1 disparity between crack and *heroin.*

We respectfully submit that Congress' 1986 placement of crack into the established tapestry of drug penalties was not a considered one. At the very least—the very least—crack cocaine should be treated no more harshly than heroin. While cocaine powder penalties also theoretically could be increased, we do not believe it can logically be elevated above heroin, and we do not believe a ratio of more than 5-to-1 can be logically supported when the one substance can be so easily and rapidly turned into the other with water, baking soda and a microwave.

Crack cocaine is admittedly a bad drug. However, so is heroin—one of the most physiologically addictive drugs around.[2] Crack penalties should simply never exceed those of

[2] In contrast, there is debate in the scientific community whether cocaine is even physiologically (as opposed to only psychologically) addictive. Deputy Thompson's testimony, for example, describes crack only as one of the "more psychologically addictive" substances.

heroin, particularly if a new base offense level for crack is also bundled with a new set of specific offense characteristics that separately accounts for crack's supposed collateral effects.

D. The Claim that Harsh Penalties are Needed for Cooperation is Overblown

General Thompson also suggested that the current harsh penalties for crack are helpful in obtaining cooperation. Only anecdotal information was provided, so we now provide our own:

Our experience has shown that most defendants inclined to cooperate will do so regardless of whether their exposure is 5 years in prison or 2 years. Indeed, many who cooperate do so before a lawyer has even been assigned who might convey accurate guideline numbers. Others must choose whether to cooperate long before any relevant conduct quantities have been well-defined. Logically, one might think higher penalties encourage cooperation. But as this Commission knows, the statistics show that crack cooperators are among the lowest among all drug types. One could debate the cause of this. Perhaps they are too unsophisticated to provide substantial assistance since they have, after all, been the ones foolish enough to cook the substance rather than leaving it in powder form. Perhaps there is no great desire to have them cooperate up the chain against managers who would face only lower powder sentences. Perhaps there are even racial explanations—especially when one confirms the percentages with mostly-white methamphetamine defendants, many of whom receive § 5K1.1 departures. But the bottom line is that this Commission cannot simply assume that reducing the crack penalties will cause crack-related cooperation to dry up. As we understand it, § 5K1.1 downward departures are already more frequently granted to powder defendants than to those charged with crack.

Finally, even if a link in this context could be established, it would not be appropriate for this Commission to adopt (or retain) overly harsh penalties simply because they might encourage more cooperation. The DOJ has plenty of other resources at its disposal to help get cooperation, and does not need the additional hammer of unconscionable penalties in order to do its work.

E. DOJ's New Game of Semantics Does Not Change the Unjust, Harsh Truth

During the hearing, General Thompson also repeatedly took issue with the notion that the crack ratio was 100-to-1, noting that the ratio between crack and cocaine penalties is in fact less.

If the Department is claiming that the penalties themselves are not 100-to-1—meaning that crack defendants do not get 100 years of non-paroleable imprisonment for every 1 year a cocaine powder defendant gets (or 200 years for every 2), they are undoubtedly correct. No one has claimed otherwise. But attempting to recast the ratio's number does not change the reality.

That reality is that a defendant with five grams of crack gets a minimum of 5 years in jail. A defendant with five grams of powder typically gets probation (a *punishment* ratio that, at least in *this* situation, is *more than* 100-to-1). A defendant with 1½ kilos (a little over 3 pounds) of crack starts in Level 38, where the sentencing ranges vary from 235 months to life, while a cocaine powder defendant has just moved into the Level 26, 5-year mandatory minimum range.

Crack defendants are also far more susceptible to 21 U.S.C. § 851's potential doubling of their mandatory minimum exposures, a card often played if the Government's case is not strong.

Stated in more practical terms, cocaine powder defendants are typically able to move past their mistakes and back into productive lives in society. Crack defendants often emerge as hardened, institutionalized prisoners who have lost their youth, needed work experience and often even their relationships with family and children so helpful in turning one's life back around. As this Commission knows, 15 and 20-year non-paroleable crack sentences are not uncommon even for first-time, non-violent offenders. Any notion that this ratio is somehow "not so bad," because it does not rise to a level at which every crack defendant would face 50 years in prison for every 6 months faced by a powder dealer, is simply baffling. The Commission should not be concerned with semantics; it should instead move forward and address the issue—which we consider *the single worst sentencing law in our federal criminal justice system*.

F. The DOJ's Other Arguments Should Not Deter the Commission from Acting

The DOJ also submits other minor arguments against change that deserve little comment. First, it suggests that the changes could create ex post facto issues; but this is true of any downward change, and has long been handled ably by our system. If this were a valid basis for denying amendments, none would ever occur. Similarly, DOJ rather remarkably claims that this Commission, if it were to decouple the guidelines from the statute's mandatory minimums, would be "ignoring existing law." Thompson Statement at 15. We acknowledge that a legitimate policy debate may exist over the wisdom of decoupling. But DOJ's claim that this Commission's discretion is somehow "appropriately cabined" from reaching independent conclusions when a disparity is glaring—as it did with the LSD guidelines—overstates the law.

As with the LSD guideline, this is one of those times. Throughout history, those in positions of leadership are sometimes called upon to stand up and simply do what is right. In the nine years before the Commission proposed amendment in 1995, and in the seven years since then, many federal judges have continued to impose sentences they know are wrong. Many defendants' lives have been forever ruined, and many lawyers who have devoted their lives to the federal criminal justice system have struggled to find some way to rationally explain its fairness to clients and their families.

CONCLUSION

Sixteen years of harsh, glaring injustice is long enough. We ask the Commission to do what is intellectually, scientifically and morally right: amend the crack guidelines.

As always, we appreciate the opportunity to share our perspectives with the Commission.

Sincerely,

Barry Boss
James Felman

CC: All Commissioners
Charles Tetzlaff, Esq.
Andy Purdy, Esq.
Timothy McGrath, Esq.

Testimony of Julie Stewart
President
Families Against Mandatory Minimums Foundation (FAMM)

United States Sentencing Commission Hearings
January 26, 2002

Good morning, Judge Murphy and Commissioners. It is a pleasure to testify before you once again to address the issue of crack cocaine penalties. Many of FAMM's 25,000 members are either serving crack sentences, or have family members who are, and they are deeply concerned about the decisions you will make regarding crack penalties. I am here today on their behalf, and that of the other FAMM members who include lawyers, judges, politicians, professors, criminal justice professionals and concerned citizens.

As many of you are aware, I have appeared before the Commission every year since 1992 to urge you to amend the sentencing guidelines in ways that increase judicial discretion while providing appropriate penalties that fit the offense and offender. Today my comments will focus on amending the crack cocaine guideline to lower the penalties associated with possession and distribution of the drug.

The penalties for crack are unconscionable. You know that. They are also insupportable as was demonstrated with such care in the 1995 Special Report to Congress; as was set out so succinctly in the Issues for Comment published on January 17, 2002 and the statistical analysis just completed by the Commission staff; and as has been underscored in testimony over these two days. I am delighted that the Commission has decided to tackle this difficult issue with the thoroughness that it is.

FAMM has long been on record in support of equalizing crack and powder cocaine sentences at the current levels of powder cocaine. However, in 1995 when the Sentencing Commission voted to do just that, I left the room feeling glad that they took a moral stand, but deeply concerned that it was not the best decision politically. Today, making crack penalties the same as powder is not an option for the Commission, given the congressional directive to propose an amendment that establishes sentences that generally higher for crack than powder. Pub. L. No. 104-38, § 2(a)(1)(A), 109 Stat. 334 (1995).

So, the question is, what is the correct penalty for crack cocaine defendants? It's a hard question to answer and one that is critical to whether the Commission will have support for its recommendation. As long as we are operating in a weight-based sentencing structure, I encourage you to amend the crack guidelines by applying the same organizing principle to crack cocaine that applies to other drugs: punish a mid-level dealer with a five-year minimum sentence and a high-level dealer with a ten-year minimum sentence.

Mid- and high-level dealers

> This organizing principle has been stated in the Commission's Issue for Comment,
>
> [i]n general, the statutory penalty structure for most, but not all, drug offenses was designed to provide a five year sentence for a serious drug trafficker **(often a manager and supervisor of retail level trafficking)** and a ten year sentence for a major drug trafficker **(often the head of the organization that is responsible for creating and delivering very large quantities)**. . . . The drug quantities that trigger the five year and ten year penalties for crack cocaine offenses, however, are thought by many to be too small to be associated with a serious or major trafficker. As a result, many low level retail crack traffickers are subject to penalties that may be more appropriate for higher level traffickers.

Proposed Amendments to the Sentencing Guidelines, November 28, 2001 and January 17, 2002

(Reader friendly version) at 80 ("Proposed Amendment")(emphasis added).

The Commission reached the same conclusion in its 1995 report to Congress following a close examination of legislative history. Congress, the Commission said then, meant to impose the ten-year mandatory term on major distributors and five- year terms on serious distributors "for all drug categories including crack cocaine." Cocaine Report at 119. At some point however, crack cocaine was cut out for different treatment by Congress, likely due to a widespread belief that crack was much more harmful than most other drugs, including even powder cocaine. As you recognize in the Issue for Comment, the crack penalty appears to incorporate penalties for conduct that was considered inherent in the crack trade – an association that has been discredited

> [C]oncern has been expressed that the penalty structure does not adequately differentiate between crack cocaine offenders who engage in aggravating conduct and those crack cocaine offenders who do not. This lack of differentiation is caused by the fact that, for crack cocaine offenses, the Drug Quantity Table accounts for aggravating conduct that is sometimes associated with crack cocaine (e.g., violence). Building these aggravating factors into the Drug Quantity Table essentially penalizes all crack cocaine offenders to some degree for aggravating conduct, even though a minority of crack offenses may involve such aggravating conduct. As a result, the penalty structure does not provide adequate differentiation in penalties among crack cocaine offenders and often results in penalties too severe for those offenders who do not engage in aggravating conduct.

Proposed amendments at 79.

Today, as your recently published analysis of crack and powder sentencing demonstrates, the vast majority (66.5 percent) of those sentenced for crack offenses, were street-level dealers. U.S. Sentencing Commission, "Drug Briefing, January 2002 ("Drug Briefing"), Fig. 11. The median quantity attributed to them was 52 grams (Drug Briefing, Figure 18), for which they are

sentenced at a median of 120 months. (Drug Briefing, Figure 2). Managers and Supervisors are dealing in median quantities of around 250 grams of crack cocaine, while organizers and leaders are handling roughly 500 grams. Drug Briefing, Figure 18.

While these figures represent the quantity involved in crack convictions from the year 2000, the Commission has nearly 15 years worth of data from which to extract the average quantity of crack cocaine handled by mid- and high-level dealers (weighted for trends) to determine role-based trigger amounts for five and ten year penalties. I urge the Commission to do such analysis. As much as FAMM opposes weight-based sentencing, if weight is to be used to establish base sentences, then the weight must be justifiable to the public. The Commission cannot simply pick a number out of the blue because it creates a nice sounding ratio, and expect to gain the support of the sentencing reform community. There has to be a sound basis for the new quantity trigger. Using the mid-and high-level organizing principle intended by Congress when it enacted mandatory minimum sentences in the mid-80s, provides that justification. It will establish coherence, rationality and proportionality to crack cocaine sentencing.

The Commission should not change the powder cocaine penalty.

Seven years ago when the Commission voted to make crack penalties the same as those for powder cocaine, no one suggested raising powder sentences to achieve equalization. In her dissent, Commissioner Deanell Tacha proposed ratios of 5:1, 10:1, or 20:1, for reasons that were arguably valid, but she did not propose raising powder penalties. In 1997, 27 federal judges who previously served as U.S. Attorneys, felt compelled to send a letter to each member of the House and Senate Judiciary Committees urging Congress to lower crack cocaine penalties but **not** raise powder cocaine penalties. Specifically, they said "The penalties for powder cocaine, both

mandatory minimum and guideline sentences, are severe and should not be increased."

They're right. The problem is not powder cocaine penalties, it is crack cocaine penalties. Crack cocaine is sentenced more severely than any of the other drugs--even methamphetamine, which has the same triggering threshold. The Sentencing Commission 2000 Sourcebook of Federal Sentencing Statistics shows that the mean quantity of crack cocaine involved by defendants sentenced at level 26, was 11.3 grams, while the mean quantity for methamphetamine defendants at the same level was 27 grams. At level 32, the mean amounts were 88.5 grams for crack defendants and 228 grams for methamphetamine defendants.

Raising powder cocaine penalties to make powder traffickers spend more time in prison does nothing to cure the excessiveness of crack cocaine sentencing; it would merely send cocaine traffickers, the majority of whom are Hispanic, to prison for lengthier terms for no discernible reason. Drug Briefing, Figs. 26 and 27.

Therefore, I urge you to leave the powder cocaine penalty untouched.

The Commission can and should act absent a change to the mandatory minimum statute.

The Commission should promulgate guidelines independent of the mandatory minimum sentences. Congress has several times in the past permitted amendments to be adopted that delinked certain drug guidelines from their then-corresponding mandatory minimums. In 1993, the Commission changed the LSD-marijuana equivalency to standardize the penalty for LSD and to limit the impact of carrier weight on that penalty. Amendment 488 at Appendix C. In 1995, the Commission successfully proposed Amendment 516 to change the equivalency for marijuana

plants from the statutory 1 plant, 1 kilogram equivalency to the 1 plant, 100 grams equivalency.

I was involved in both amendments and know that the Congress was fully aware and able to defeat them if it had desired. It did not. Were there any legal bar to such decoupling amendments, they would have been raised at the time. Instead, just days before November 1, 1995, a Congressman from Oregon got wind of the imminent marijuana guideline amendment and raised his concerns about it to Rep. Bill McCollum, the minority chair of the House Judiciary Committee. Rep. McCollum stated that he was aware of the proposed amendment and would keep an eye on its impact but he did nothing to stop it from becoming law.

From my recent conversations with Judiciary staff members on the House and Senate sides, they are eagerly awaiting an amendment from the Commission and have expressed no reservations about the Commission submitting an amendment instead of a recommendation. Why should they? The Commission was established in 1984 to promulgate sentencing policy that would reduce unwarranted disparity and increase certainty and uniformity of sentencing. It is doing so in the current proposals to delink the crack possession guideline from the mandatory minimum contained in the statute. I urge you not to let crack cocaine trafficking penalties become an exception to the goals of the Sentencing Reform Act.

The Commission should act in such a way that reassures the public that it has fulfilled its mandate.

I was recently asked by the chief counsel of a senior senator if the sentencing reform community and the civil rights community would respect a crack proposal put forth by the Sentencing Commission. It was a good question and it gave me pause. FAMM did not respect the Ecstasy decision made by the Commission last year because the process was so flawed. I do

not want to feel that way about the crack proposal.

I am encouraged by the Commission's desire to hear from experts in all areas of crack cocaine and to use that information to shape a sensible and rational policy. But, at the end of the day, the Commission must be able to explain in plain terms how it arrived at the quantity it did and how that quantity is consistent with other drug guideline sentences.

The Drug Briefing charts you have compiled are a wonderful source of information regarding crack and powder cocaine sentencing. But from what I understand, a great deal of attention has been paid to the proposed sentences at varying ratios between crack and powder cocaine. While this is certainly of interest, I hope the Commission will not let the length of sentence guide its proposed changes. Instead, a consistent organizing principle should be used to guide the development of new crack cocaine sentences, and all drug sentencing changes. If it is, I will be able to tell FAMM's membership, with confidence, that this is an amendment that makes sense.

However you choose to go forward, the guideline and the process you use must be of unassailable quality so that all Americans can trust that the penalty you chose was the product of informed judgement, not political expedience.

Conclusion

I am enormously heartened by the attention you are paying to this serious problem. Last weekend, FAMM members gathered for our bi-annual organizing conference. They share my hope and enthusiasm, even as they shared with us again their stories of young men and women imprisoned for horrific terms under the crack cocaine guidelines. You can demonstrate the

courage of your obvious conviction that this penalty must change, by proposing an amendment to Congress that brings sentencing for crack cocaine in line with that for other drug offenses.

Thank you.

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February 14, 2002

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

Re: Comments Relating to Proposed Amendments
Federal Register Notice – November 27, 2001

Dear Judge Murphy:

I write on behalf of the Federal and Community Defenders to comment on the proposals published by the Commission relating to the guidelines for (1) acceptance of responsibility, §3E1.1; (2) cultural heritage, § 2B1.5; and (3) career offender, § 4B1.1.

Thank you for your consideration of our comments. As always, we are available to provide the Commission with any additional information it may require.

We look forward to meeting with you on February 25, 2002.

Very truly yours,

Jon Sands/cdh

Jon Sands
Chair, Sentencing Guidelines Subcommittee

cc: U.S. Sentencing Commissioners
Timothy B. McGrath
Charles R. Tetzlaff
Carmen Hernandez

ACCEPTANCE OF RESPONSIBILITY – § 3E1.1

The Federal Defenders oppose the proposed amendment to the acceptance of responsibility guideline because it limits the flexibility of district court judges and makes the guideline less fair and more subject to challenge. In addition, we believe that the Commission should not make changes to §3E1.1 – a guideline that was applied in 90% of cases last year – in this piecemeal fashion. The guideline should be amended, if at all, only after adequate study of Commission data including consideration of the various defense requests for adjustments that have been submitted over the years. We recommend that the Commission defer modifications and convene an *ad hoc* working group – with participation by the defense bar – to study whether disparity or unfairness affects application of the acceptance of responsibility guideline and to recommend changes where appropriate.

It makes little sense to reduce the court's discretion in the manner proposed. Judges will no longer be able to award an additional one-level reduction to defendants who confess at the time of arrest but who – for sound legal reasons – do not immediately plead guilty.[1] These situations frequently occur because counsel is reviewing or waiting for discovery, conducting an investigation or otherwise studying the client's legal options or because the defendant is waiting for the court to rule on a motion that asserts a violation of a legal or constitutional right.[2] To withhold the adjustment because the defendant is exercising rights critical to the reliability and fairness of the proceeding elevates form over substance. In all cases, it seems odd to deny the additional one-level reduction to defendants who confess at the time of

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[1] A defendant with an offense level of 16 or greater who is eligible for a two-level reduction in his offense level because he has accepted responsibility for his offense, may obtain an additional one-level reduction under the current version of U.S.S.G. § 3E1.1(b), in one of two ways, by:

> (1) timely providing complete information to the government concerning his own involvement in the offense; or
>
> (2) timely notifying authorities of this intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently

The proposed amendment would eliminate subsection (b)(1).

[2] It is not clear how prevalent such cases are but a WestLaw search revealed only 13 cases decided under this provision in the year 2000.

arrest, arguably the quintessential demonstration that a person has accepted responsibility for his wrongful conduct in a very timely manner.

Notably, this proposal does not arise out of any of the priorities identified by the Commission. Rather, it is the result of the Department of Justice's interest in creating a stronger incentive for early guilty pleas which, in DOJ's opinion, will conserve prosecutorial and judicial resources. It does so not by some additional incentive but by eliminating judicial discretion. The proposal does not make the guidelines more certain, fair or uniform and does not promote sufficient flexibility "to permit individualized sentences when warranted." 28 U.S.C. § 991(b)(1). And when viewed against the backdrop of the realities of federal sentencing, the proposal elevates the conservation of resources above the exercise of constitutional rights.

Such a shift in emphasis is indefensible. A defendant cannot control pre-plea procedures. Even after a confession, the need for discovery and investigation is acute because uncharged relevant conduct may substantially increase a sentence and the indictment only sets the maximum penalties faced by the accused. But defendants do not control the diligence or schedule of counsel. Defendants also do not control the timely production of discovery and Brady materials by the government. Nor do defendants control defense counsel's ethical obligations to research the law and the facts before rendering legal advice. Undeniably, defendants should not be penalized and deprived of the additional one-level reduction merely because they assert constitutional or legal issues unrelated to factual guilt. See U.S.S.G. § 3E1.1, comment (n.2).

A system in which fewer than 5% of defendants go to trial is not in urgent need of yet more and earlier guilty pleas.[3] At every point in the process, there already exists pressure on the defendant to plead, to waive rights and to do so quickly. At initial appearance, a motions deadline looms for the accused, often within 15 days although discovery is not readily made available. The rush to be the first to obtain the substantial assistance agreement is another source of pressure. Increasingly, the government also relies on "fast-track" deals (*e.g.*, entering an early guilty plea and declining to file motions) and requires that defendants waive all manner of constitutional and statutory rights (including the right to argue for adjustments and departures under the guidelines and appellate rights) as a prerequisite to pleading guilty. We see no need for further incentives to rush the process particularly where the method selected will tie the hands of the judge who will no longer be able to look at why a defendant did not enter an earlier plea. At the same time that it penalizes defendants, the change will give freer rein to prosecutors even in cases where their inactivity in producing discovery and *Brady* materials or insistence on admissions to crimes not committed may be the primary cause holding up the accused's decision to plead and even where the prosecutor's

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[3] See 2000 Sourcebook of Federal Sentencing Statistics at 20 (guilty plea rate has increased from 91.7% in fiscal year 1996 to 95.5% in fiscal year 2000).

conduct may in the particulars of the case impinge on the due process and 6th Amendment rights of the accused. See, e.g., United States v. Fields, 39 F.3d 439, 446-47 (3d Cir. 1964) (reversing denial of third-level reduction where defendant was acquitted of count to which he refused to plead and convicted only of counts to which he was willing to plead).

Furthermore, substantial judicial and prosecutorial resources are already conserved under a guideline scheme that relies on relevant conduct applied on the basis of hearsay evidence without the benefit of confrontation. A defendant should not also have to face a Hobson's choice of rushing to the point of jeopardizing due process and the effective assistance of counsel so as not to lose an additional one-level reduction in his offense level. Against that backdrop, any proposal that binds the hands of judges in this fashion will create inequities that may be rectified in some, but not all, cases by judges granting departures under the authority of 18 U.S.C. § 3553(b).

The case law does not reveal any difficulties with the application of §3E1.1(b)(1) that would warrant its elimination as proposed. In fact, judicial discretion works to distinguish among defendants seeking the adjustment, winnowing out those defendants whose delay is such that they do not warrant an additional reduction. The guideline only allows the additional one-level reduction where the district court is satisfied that the defendant's disclosure is both timely and complete. Several cases illustrate this point. For example, in United States v. Paster, 173 F.3d 206, 215 (3d Cir. 1999), the defendant murdered his wife after she disclosed numerous extramarital affairs. He called the police, confessed and waited for the authorities to arrive. The raised the insanity defense to his first degree murder prosecution and challenged the voluntariness of his statement based on his mental condition. After receiving an opinion from a government psychiatrist that the defendant had not planned to commit the murder, the government offered a plea to a lesser offense, which the defendant accepted. The Third Circuit found that the additional one-level reduction under §3E1.1(b)(1) was appropriate because the defendant had timely and truthfully admitted his role in the offense when he was arrested. That he raised a constitutional challenge to his statement did not preclude the reduction. In contrast, where a defendant recants an earlier inculpatory statement, courts have denied a reduction under (b)(1) finding the statement incomplete. Compare United States v. Francis, 39 F.3d 803, 809 (7th Cir. 1994) (where defendant, after giving statement to FBI regarding his own role and that of his coconspirators, filed a sworn affidavit completely recanting his earlier statement, court denied the additional one-level reduction finding that the defendant's sworn affidavit denying specific facts of the conspiracy made his initial statement incomplete and therefore did not satisfy the requirements of § 3E1.1(b)(1)).

Were a comprehensive review of this guideline to take place, the Commission should clarify that delays relating to pretrial motions, and the production of discovery and *Brady* material should not be used to deprive a defendant of the additional one-level reduction under §3E1.1(b)(2), the other prong that provides for an additional one-level reduction. Although §3E1.1(b)(2) authorizes the additional one-level reduction if the defendant's plea is

sufficiently timely to save the government from having to prepare for trial and allow the court to allocate its resources efficiently, the government often successfully argues to preclude the additional reduction whenever it has to respond to a pretrial motion, effectively expanding the provision beyond its text – even if no trial preparation takes place. See, e.g., United States v. Lancaster, 112 F.3d 156, 158-59 (4th Cir. 1997) (affirming denial of additional one-level reduction to defendant who filed suppression motions then pled guilty nine days after denial of motions, and almost a month before trial). In some cases, the government argues that the mere filing of a motion by the defendant, without any preparation or response by the government whatsoever, disqualifies the defendant from receiving the additional one-level reduction.

In sum, the proposal makes the guideline less fair and more subject to challenge. By eliminating the court's discretion to consider the defendant's timely confession, the proposal shifts the focus from rewarding acceptance of responsibility and remorse to penalizing the exercise of constitutional rights to due process, assistance of counsel, and the other protections guaranteed by the 4th, 5th and 6th amendments to the U.S. Constitution. See United States v. McConaghy, 23 F.3d 351, 353-54 (11th Cir. 1994) (to avoid unconstitutional application of §3E1.1(b)(2) the district court must determine the timeliness of defendant's notice of intent to plead guilty based on the entirety of the circumstances). We recommend that the Commission not adopt this proposal but rather defer any changes to this guideline until it can conduct a more comprehensive review of Commission data with input from a working group that includes members of the defense bar.

Proposal to Resolve Circuit Conflict -- § 3E1.1

The second part of the proposed amendment is intended to resolve the split among the circuits about whether the sentencing court can deny the acceptance of responsibility reduction when the defendant engages in new criminal conduct beyond the offense of conviction. The proposal purports to adopt the majority position, requiring the sentencing court to consider such conduct when determining acceptance. Defenders oppose this proposal because it goes well beyond the findings of the majority of circuits, raises significant policy concerns and sets the stage for a new conflict on this same issue. As with the first part of this amendment, Defenders recommend that the Commission put off this amendment until it can fully review this guideline in based on data and the input of an ad hoc working group that includes members of the defense bar.

We also agree with the Sixth Circuit that whether a defendant has committed or been accused of committing an offense, distinct from the offense of conviction, after he enters a plea of guilty, should not determine whether the defendant has accepted responsibility for the offense of conviction, particularly where the alleged wrongful conduct is a failed drug test. United States v. Morrison, 983 F.2d 730 (6th Cir. 1993). Only in the extraordinary case for example, where the wrongful conduct amounts to relevant conduct to the offense of conviction should such allegations serve to deprive the defendant of a reduction for acceptance of responsibility.

Such post-plea offenses are better treated as an aspect of criminal history and in fact are addressed in Chapter 4 of the guidelines. A conviction that has become final whether it arises out of conduct committed before or after the defendant pleaded guilty counts as criminal history. U.S.S.G. § 4A1.2, comment. (n. 1). If the defendant has been convicted but not yet sentenced, he will receive one criminal history point for that conviction. U.S.S.G. § §4A1.2(a)(4). At a subsequent sentencing for the new conduct, the court may consider the fact that the defendant committed a new offense while awaiting trial or sentencing as a basis for an upward departure. U.S.S.G. § 4A1.3(d); see also U.S.S.G. § 5G1.3 (rules for determining the sentence for a defendant subject to an undischarged term of imprisonment). If a state rather than a federal prosecution were to ensue, a state court can certainly consider that the defendant committed the offense after having pleaded guilty in another case. But at least in those instances, before being penalized for the new offense the defendant will have been formally charged and had an opportunity to plead or go to trial, with the full panoply of constitutional rights afforded to someone who is accused of a crime.

If, on the other hand, there is merely an allegation of wrongdoing, such allegations ought not to be part of the calculus for acceptance of responsibility when sentencing for an unrelated offense. It complicates the sentencing proceeding when allegations unrelated to the offense of conviction have to be resolved in what amounts to a mini-trial. See e.g., Custis v. United States, 114 S. Ct. 1732 (1994) (ACCA defendant not allowed to challenge prior conviction except where there was a Gideon violation); Taylor v. United States, 495 U.S. 575 (1990) (apply categorical approach when determining whether a prior was a crime of violence). It also implicates the defendant's fifth amendment right to remain silent as that silence cannot be used to infer that he in fact committed the alleged wrongdoing. See Mitchell v. United States, 119 S. Ct. 1307 (1999) (defendant's silence at the sentencing hearing regarding drug amounts cannot be used as an adverse inference against her to find a higher amount). Moreover, Mitchell recognized the 5th Amendment conundrum with respect to this guideline noting that

> [w]hether silence bears upon the determination of a lack of remorse, or upon acceptance of responsibility for purposes of the downward adjustment provided in §3E1.1 ... is a separate question. It is not before us, and we express no view on it.

Mitchell at 1311-16 (1999). Based on the principle of constitutional doubt, therefore, the Commission ought not adopt an option that may run afoul of the Fifth Amendment or that places a burden on the defendant's assertion of that right particularly where the criminal history guideline already accounts for such conduct. See Almendarez-Torres v. United States, 523 U.S. 224, 250, 118 S.Ct. 1219, 1234 (1998) (Scalia, J. dissenting) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.").

We therefore recommend that the Commission adopt commentary that provides that allegations of new wrongful conduct, not related to the offense of conviction, be addressed as part of criminal history rather than as part of the determination of whether the defendant is eligible for a downward adjustment under §3E1.1.

The Commission's proposal goes too far for other reasons, also. There is a split among the circuit courts of appeal as to whether a court may deny a reduction for acceptance of responsibility when the defendant commits a new offense unrelated to the offense of conviction. The First, Second, Third, Fourth, Fifth, Seventh, Tenth and Eleventh Circuits have held that the sentencing court can consider new criminal conduct, such as drug use or the commission of a new offense, when determining whether an adjustment for acceptance of responsibility is warranted. United States v. O'Neil, 936 F.2d 599, 600-01 (1st Cir. 1991); United States v. Fernandez, 127 F.3d 277, 285 (2nd Cir. 1997); United States v. Ceccarani, 98 F.3d 126, 128-31 (3rd Cir. 1996); United States v. Kidd, 12 F.3d 30, 34 (4th Cir. 1993); United States v. Watkins, 911 F.2d 983, 984-85 (5th Cir. 1990); United States v. McDonald, 22 F.3d 139, 142-44 (7th Cir. 1994); United States v. Byrd, 76 F.3d 194, 196-97 (8th Cir. 1996); United States v. Prince, 204 F.3d 1021, 1023 (10th Cir. 2000); United States v. Pace, 17 F.3d 341, 343 (11th Cir. 1994). The Sixth Circuit, the sole minority circuit, has held that the court may not look at post-indictment conduct unrelated to the offense of conviction when assessing the defendant's acceptance of responsibility for the underlying offense. United States v. Morrison, 983 F.2d 730, 735 (6th Cir. 1993). None of the circuits have held that a positive drug test or the commission of another offense automatically requires a denial of acceptance of responsibility for the unrelated offense of conviction without regard to the individual circumstances of the case.

The proposed amendment will add language to § 3E1.1, comment (n.4) functionally equating the commission of a new offense while on pretrial release with obstruction of justice, except in extraordinary circumstances. A defendant in this situation would ordinarily not be entitled to a reduction for acceptance of responsibility. The proposal goes well beyond the majority holdings. None of the majority opinions relied on application note four or equated new criminal conduct (such as a positive drug test while on pretrial release) with obstruction of justice. Most of the majority opinions are based on §3E1.1, comment (n. 1(b)), which states that the defendant's "voluntary termination or withdrawal from criminal conduct or associations" is an appropriate consideration for the district court when determining acceptance of responsibility. O'Neil, 936 F.2d at 600-01; Fernandez, 127 F.3d at 285; Ceccarani, 98 F.3d at 129-30; Watkins, 911 F.2d at 984-85; McDonald, 22 F.3d at 142-44; Byrd, 76 F.3d at 196-97; Prince, 204 F.3d at 1023. The Fourth and the Eleventh Circuits do not rely on any particular provision in §3E1.1 in deciding the issue. Kidd, 12 F.3d at 34; Pace, 17 F.3d at 343.

Nor have any courts held that it should be rare for such a defendant to receive the reduction for acceptance of responsibility. To the contrary, the circuit courts have held that the sentencing court is in the best position to determine whether the new conduct should preclude the reduction. In fact, several of the majority circuits explicitly stated that such

conduct does not necessarily preclude a reduction for acceptance, it is merely a factor for the court's consideration:

> We can find nothing unlawful about a court's looking to a defendant's later conduct in order to help the court decide whether the defendant is truly sorry for the crimes he is charged with. The fact that a defendant engages in later, undesirable, behavior does not *necessarily* prove that he is not sorry for an earlier offense; but it certainly could shed light on the sincerity of a defendant's claims of remorse.

O'Neil, 936 F.2d at 600 (emphasis in the original); accord Ceccarani, 98 F.3d at 129-30); Byrd, 76 F.3d at 197; McDonald, 22 F.3d at 144.

In addition, the proposed amendment has significant policy implications. By directing that acceptance be awarded only in rare cases, the amendment has the substantial potential to reduce the number of cases that will be resolved by plea. Many defendants test positive for drug use while on pretrial release, some are arrested for minor offenses and others are accused of more serious conduct. If the district court is instructed to deny acceptance in essentially every such case, these defendants will have absolutely no reason to plead guilty absent a charge reduction by the government. Indeed, defense attorneys will be bound to inform clients that have a history of drug use that there is nothing to be gained by entering a plea and nothing to lose if they choose to go to trial.

If the Commission adopts the amendment as currently proposed, it will change the law in every circuit, not just the minority Sixth Circuit and will very likely result in a new circuit split as the questions of which cases are extraordinary and which are not and how much discretion the district courts can exercise in making that call – particularly with respect to positive drug tests – are resolved by the circuits. Further, the current proposal strips the sentencing court's discretion in evaluating whether, given all of the facts and circumstances of each individual case, the defendant has accepted responsibility. Instead, it substitutes a bright-line rule which will preclude a large number of defendants from receiving the acceptance of responsibility reduction.

Although this alternative is less preferable than the Sixth Circuit rule, the Commission can better adopt the reasoning of the majority of circuit courts by adding clarifying language to application note 1(b) indicating that the sentencing court may consider new criminal conduct unrelated to the offense of conviction when assessing whether the defendant accepted responsibility but only as one of the several factors to be considered. This language would make clear that such conduct is a factor for consideration but does not in and of itself preclude the court from awarding the reduction nor automatically trigger the obstruction enhancement if the court finds the defendant has accepted responsibility.

With respect to positive drug tests, the Commission should also insert language in the commentary to §3E1.1 similar to that included by Congress in the probation and supervised release statutes which provide that the Court must consider substance abuse treatment programs before it takes action against someone who fails a drug test.[4]

Conclusion

For all the reasons stated, the Federal Defenders oppose the particular proposals to amend §3E1.1(b)(1) and to resolve the circuit split. Both proposals eliminate rather than guide judicial discretion placing the proposals at odds with the notion that the "sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility." U.S.S.G. § 3E1.1, comment. (n.5). Eliminating the additional one-level reduction for those defendants who confess at the early stages but take more time to plead guilty has the added fault that it elevates concern with saving prosecutorial resources above what should be the primary concerns of the acceptance of responsibility guideline – whether the defendant's acceptance of responsibility is sincerely made and whether the defendant's confession "ensures the certainty of his just punishment in a timely manner." U.S.S.G. § 3E1.1, comment. (backg'd). Timeliness in this context should not require that the defendant forego his constitutional right to counsel and other due process protections.

Defenders recommend that the Commission resolve the circuit split by directing that new criminal conduct be ordinarily considered for what it is, an issue of criminal history with uncharged allegations left to be considered in any subsequent criminal proceedings.

As to both proposals, we recommend that the Commission defer modifications this year and instead convene an ad hoc working group, including members of the defense bar, to consider comments and data relating to any disparity or unfairness that may be affecting the application of the acceptance of responsibility guideline.

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[4] 18 U.S.C. § 3563(e) provides in pertinent part:

> The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3565(b), when considering any action against a defendant who fails a drug test.

See also 18 U.S.C. § 3583(d) (conditions of supervised release).

CULTURAL HERITAGE OFFENSES – § 2B1.5

Amendment 1 proposes to create a new guideline, § 2B1.5, to cover a variety of offenses involving the theft of, damage to, destruction of, or illicit trafficking in cultural heritage resources, including national memorials, archaeological resources, national parks, and national historic landmarks. Federal Defenders agree with the Sentencing Commission that crimes involving cultural heritage resources present unique issues different from general property crimes covered by the guidelines. For this reason, we do not oppose the Commission's decision to consider these types of offenses. We believe, however, that this proposal should be deferred until the Ad Hoc Committee on Native American Issues that is being established by the Commission is functioning and able to assist in formulating the proposals.

Indeed no one disputes that these sites should be protected. Native American members of the Ad Hoc Committee and counsel who regularly practice in this unique area of the law will bring necessary perspectives and expertise to bear on the mater of designing offense levels, specific offense characteristics and the other sentencing particulars. The Ad Hoc Committee could address issues that may not be apparent to the Commission or covered in § 2B1.5. For example, the appropriate punishment to assign to the theft of a Zuni mask or other artifacts is complicated by cultural factors and practices that may make an offense more or less damaging than might otherwise be perceived. Likewise, an offender who knowingly and wilfully violates a sacred tribal site prohibited to nontribal members may merit a different penalty than an individual who impulsively picks up artifacts at a national park. At times, there exists an inherent conflict between the interests of the Department of Interior and those of the Native American communities that may impact the workings of this guideline but that may be best resolved only after input from the Ad Hoc Committee.

If the Sentencing Commission goes forward with the enactment of § 2B1.5, without first obtaining input from the Ad Hoc Committee, it should not adopt § 2B1.5(b)(4)(B), which provides for an increase of two offense levels if the offense involved a pattern of similar violations. The Commission should also not adopt Application note 5, which defines "pattern of similar violations" to include "two or more civil or administrative adjudications of misconduct similar to the instant offense, in violation of Federal, states, or local provision, rule, regulation, ordinance, or permit." A civil or administrative adjudication is an unreliable indicator for sentencing purposes. An offender charged with a similar administrative adjudication, is not entitled to an attorney. Moreover, usually such adjudications are made without the benefit of a jury and initially may be made by an administrative law judge. Thus, this enhancement disadvantages the poor, who do not have the resources to contest these adjudications. The proposed § 2B1.5(b)(4)(B) would have the same impact as a two level increase in the offenders' criminal history category. However, civil and administrative adjudications are more analogous to those types of proceedings whose outcomes are not counted for the purposes of criminal history under § 4A1.2. It would be more appropriate to treat civil or administrative adjudications related to § 2B1.5 offenses in the same fashion as elsewhere in the guidelines – a potential basis for an upward departure

under U.S.S.G. § 4A1.3(c). Such discretion will permit courts to avoid disparity in treatment – that would otherwise result from wholesale application of this provision – stemming from adjudications that do not meet due process standards and that adversely impact persons lacking the financial resources to retain lawyers or otherwise defend themselves at adjudicative proceedings. Under the current proposal, a "pattern of prior adjudications" which is defines as two or more adjudications overly affects the guideline range in that the existence of a such a pattern has the same impact on the offender's sentence as five criminal history points.

Application Note 7 encourages an upward departure in cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. Application Note 7 gives the example that an upward departure may be warranted if, in addition to cultural heritage resources, the offense involved the theft of or damage to items that are not cultural heritage resources. As an example of when an upward departure may be warranted, the note describes a situation where in addition to historical grave markers from a national cemetery, lawnmowers and other administrative property are stolen. This example places an unwarranted emphasis on factors related to the Department of Interior. The focus of this guideline should be limited to the theft of, damage to or the destruction of items that have cultural heritage value. Other items, such as lawnmowers or administrative materials should not be singled out as the basis of enhancements or upward departures. If anything, they should be the basis for a downward departure as they would not appear to be as valuable as items having cultural significance. It is unclear why this option is necessary as a offense involving a destruction of non-cultural items would be its own offense and thus would be already covered in the guidelines. To the extent that destruction of such items would not be an independent criminal offense, and counted under another guideline, an upward departure should not exceed the corresponding number of levels from the loss table in § 2B1.1. As noted by the Sentencing Commission, the greater loss would be that of the cultural heritage, not the replaceable items which are run-of-the-mill losses of the type normally considered in burglary or theft offenses.

It is doubtful that Application Note 2 would underestimate the actual value of a lost object. If anything, it will overstate the harm. For example, Application Note 2 (C)(iii) could unduly increase the punishment of an offender who damages a minor or insignificant artifact. Also, it could impermissibly bring into the determination of the sentence religious factors. See U.S.S.G. § 5H1.10 ("These factors [creed and religion] are not relevant in the determination of a sentence."). Some cultures may require elaborate reburial ceremonies to be performed while others may not. Differing religious practices should not drive the sentencing guidelines under the claim that they are necessary for the "appropriate reburial of" artifacts. As an example, the Sandia Pueblo does not have any reburial ceremonies where other tribes do.

Many cases charged in federal court are not commercial in nature. They are crimes of opportunity by curious hikers or hunters. Often the cases involve artifacts of limited significance or commercial value. Application Note 2(c)(iii) will greatly overstate the harm in this type of case.

While Application Note 7 provides for an upward departure if the harm caused is not adequately reflected by the calculation under this guideline, it should include a comparable provision for a downward departure in cases where the calculation under the guidelines overstates the harm caused particularly because it is likely as we noted above that Application Note 2(C)(iii) may result in a calculation of loss that greatly overstates the harm or the historical significance of the artifacts taken. Also, what may be appropriate as an award of restitution might not be appropriate for punishment under the sentencing guidelines.

It is appropriate for the Sentencing Commission to have an increase if a dangerous weapon was brandished during the course of the commission of this offense. However, § 2B1.5(b)(5)(B) should only apply if the defendant possessed the firearm in direct aid of the offense. For example, a significant number of historical sites are in rugged country that are infested with rattlesnakes and other dangerous animals. Additionally, some sites are also places where hunters legitimately ply their sport. A hitchhiker with a "snake gun" or a hunter who comes across a site and impulsively takes an artifact should not be subject to the enhancement under § 2B1.5(b)(5)(B). Thus, the guidelines should differentiate between a hunter who comes across a site and takes an artifact and someone who goes into a museum or national memorial with the purpose of using the firearm in connection with the offense.

Finally, there is no need to add an enhancement in the event the offense involved an explosive device unless the incidence of explosive devices in these cases falls within the heartland of this guideline. This factor is otherwise currently covered by a number of encouraged upward departures, i.e., U.S.S.G. § 5K2.6 (Weapons and Dangerous Instrumentalities).[5] See also U.S.S.G. §§ 5K2.1 (Death); 5K2.2 (Physical Injury); and 5K2.5 (Property Damage or Loss). In addition, if the Commission were to add such language it should do so with language that focuses only on the acts of the defendant rather than by any broader reference that also would net not merely the person responsible for the use or plan to use the explosives but also those less culpable who may have had little or no involvement with the explosive but whose sentence will end up substantially increased without sufficient justification.

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[5] U.S.S.G. § 5K2.6 provides:

> If a weapon or dangerous instrumentality was used or possessed in the commission of the offense the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the dangerousness of the weapon, the manner in which it was used, and the extent to which its use endangered others. The discharge of a firearm might warrant a substantial sentence increase.

Conclusion

Notwithstanding these comments, Defenders recommend that the Commission should defer action on proposed § 2B1.5 until the Ad Hoc Advisory Committee on Native American Issues is in place and has the opportunity to provide its comments. We believe that comments from the Ad Hoc Advisory Committee would be instructive and would help the Commission to write a more responsive guideline. While the Department of Interior may address some of the harms of the crime, we believe that input from the Native American tribes and the other experts who make up the membership of the Committee would be at least as valuable in this highly specialized area. Additionally, Application Note 2(C)(iii) should be omitted as a means of calculating value under § 2B1.5(b)(1). While this calculation may be appropriate for issues of restitution, it can lead to unwarranted disparities and an overstatement of the harm caused or the significance of the artifact taken and consequently, the sentence received by the defendant.

anything between 30 years and life. If the changes proposed in Amendment 3 are ever to be made, they should be carefully considered and supported. To do so now, with the discredited claim that *LaBonte* requires such a change, would introduce a level of arbitrariness and unfairness into the Guidelines that the Commission has continually strived to excise from federal sentencing.

PAG recommends that the Commission reject Amendment 3. In the alternative, consideration of Amendment 3 should be deferred to a future amendment cycle.

Official Victim (proposed amendment # 4)

The PAG takes no position on whether or not the enhancement should be expanded to cover prison employees as well as corrections officers. But, the PAG does oppose broadening the scope of the adjustment beyond prison employees as suggested in the issue for comment. We see no justification for including private attorneys, for example, within the definition of an "official victim."

Cultural Heritage Resources (proposed amendment # 1)[9]

Amendment 1 proposes to add to Chapter 2, Part A, a new guideline, § 2B1.5, to cover a variety of offenses involving the theft of, damage to, destruction of, or elicit trafficking in cultural heritage resources, including national memorials, archaeological resources, national parks, and national historic landmarks. We agree with the Sentencing Commission that cultural heritage resources crime is fundamentally different than the general property crimes covered in the guidelines. Moreover, we do not oppose the creation of a new guideline to address the different concerns created by this type of crime.

In a prophetic speech to the Governor of the then Washington Territory, Chief Seattle acknowledged the strong connection between Native American people and their traditional homeland. Even if "the last red man has vanished from this earth," the places dear to them will be "throng[ed] with the returning spirits that once thronged them, and that still love these places." Thus, no one disputes that these sites should be protected.

The Sentencing Commission has sought input on the formation Ad Hoc

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appropriate. U.S.S.G. § 2K2.4 comment. (n.1).

[9] This section was drafted by John Butcher.

Committee on Native American Issues. The Federal Public Defender and Community Defender Organizations, joined with the Practitioners Advisory Group, has commented in favor in forming such an Ad Hoc Committee. The Sentencing Commission should wait to enact this amendment until it has a chance to have input from the Ad Hoc Committee on Native American issues. The issue of the theft and destruction of cultural heritage sites is of capital concern to many Native American tribes and organizations. They have firsthand experience with the actual problems that these crimes create. Thus, they are in a superior place to provide useful commentary to the commission.

The Ad Hoc Committee could address other harms that may not be apparent to the commission or covered in § 2B1.5. For example, the theft of a Zuni mask may not have a value exceeding $2,000, but would have a greater emotional impact upon the living members of the tribe than the theft of more valuable artifacts that may be more valuable but have no connection to living individuals. Likewise, an offender who intentionally violates a sacred tribal site that may be prohibited to nontribal members, could receive a significantly lesser sentence than some individual who impulsively picked up artifacts at a national park. The proposed § 2B1.5 seems to contain a bias to the interest of the Department of Interior that may not be shared by the Native American community.

If the Sentencing Commission goes forward with the enactment of § 2B1.5, without seeking input from the Native American Ad Hoc Committee, it should not adopt § 2B1.5(b)(4)(B), the enhancement for a pattern of similar violations. A civil or administrative adjudication is an unreliable indicator for sentencing purposes. An offender charged with a similar administrative adjudication is not entitled to an attorney. Moreover, usually such adjudications are made without the benefit of a jury and initially may be made by an administrative law judge. Thus, enhancement disadvantages the poor, who do not have the resources to contest these adjudications. The proposed § 2B1.5(b)(4)(B) would have the same impact as a two level increase of the offenders' criminal history category. However, civil and administrative adjudications are more analogous to those types of findings that are not counted for the purposes of criminal history under § 4A1.2. It would be more appropriate for the sentencing court to be able to look at such factors to determine whether the case is outside the heartland and whether an upward departure is appropriate. However, the guidelines should not assume that prior adjudications should have an equivalent impact on an offender's sentence as five criminal history points.

Application Note 7 encourages an upward departure in cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. Application Note 7 gives the example that an upward departure may be

warranted if, in addition to cultural heritage resources, the offense involved the theft of or damage to items that are not cultural heritage resources. Once again, reflecting on the Department of Interior bias, the example given is the theft of lawnmowers and other administrative property in addition to historical grave markers from a national cemetery. The Sentencing Commission should not provide enhancement if the offense also involved the theft of, damage to or the destruction of items that are not cultural heritage items. Under the example in Application Note 7, it would appear that such destruction would be its own offense and thus would be already covered in the guidelines. To the extent that such a destruction would not be an independent criminal offense, and counted under the guideline the extent of the upward departure should not exceed the corresponding number of levels from the loss table in § 2B1.1. As noted by the Sentencing Commission, the greater loss would be that of the cultural heritage, not the replaceable items which are similar to normal losses in burglary or theft.

It is doubtful that Application Note 2 would underestimate the actual value of a lost object. If anything, they will overstate the harm. For example, Application Note 2 (C)(iii) could unduly increase the punishment of an offender for a minor or insignificant artifacts. Also it could raise concerns of religious implications. Some cultures may require elaborate reburial ceremonies to be performed while others may not. Thus, religious practices should not drive the sentencing guidelines under the claim that they are necessary for the "appropriate reburial of" artifacts. For example, the Sandia Pueblo does not have any reburial ceremonies where other tribes do.

Many cases charged in federal court are not commercial in nature. They are crimes of opportunity by curious, hikers or hunters. Often the cases involve artifacts of limited significance or commercial value. Application Note 2(c)(iii) will greatly overstate the harm in this type of case.

Application Note 7 should provide for an upward departure if the harm caused is not adequately reflected by the calculation under Application Note 2. Similarly, Application Note 7 should also provide for a downward departure if Application Note 2 overestimates the cultural or actual harm caused by the criminal conduct. What may be appropriate as an award of restitution might not be appropriate for punishment under the sentencing guidelines. As noted, Application Note 2(C)(iii) may result in a calculation of loss that greatly overstates the harm or the historical significance of the artifact taken.

Enhancement for the use of destructive devices may be appropriate when such use poses a risk to human life. Certainly, the damage caused by the use of a destructive device should be considered part of the loss contemplated in Application Note 2, and thus, attributable to the defendant under the guidelines. A sentencing

court should certainly be able to depart upwards if the use of a destructive device is not adequately taken into account under the guidelines. For example, the use of a destructive device in a marine sanctuary and its resulting damage may be already appropriately counted under the guidelines, where the use of a destructive device in a museum would not be. Also, the use of a destructive device often would result in additional charges that would make it unnecessary for an enhancement or departure to be applied in the cultural heritage conviction.

It is appropriate for the Sentencing Commission to have an increase if a dangerous weapon was brandished during the course of the commission of this offense. However, § 2B1.5(b)(5)(B) should only apply if the firearm was possessed in direct aid of the offense. For example, a significant number of historical sites are in rugged country that are infested with rattlesnakes and other dangerous animals. Additionally, some sites are also places where hunters legitimately ply their sport. Thus, a hitchhiker with a "snake gun" or a hunter who comes across a site and impulsively takes an artifact should not be subject to the enhancement under § 2B1.5(b)(5)(B). Thus, the guidelines should differentiate between a hunter who comes across a site and takes an artifact and someone who goes into a museum or national memorial with a firearm.

For the above reasons, we would request that the proposed § 2B1.5 be tabled until it has a chance for comment by an Ad Hoc Committee on Native American Issues. We believe that such comment would be instructive and would allow the Commission to write a more responsive guideline. While the concerns of the Department of Interior may address some of the harms of the crime, we feel input of the true victims, the Native American tribes, would be more instructive. Additionally, Application Note 2(C)(iii) should be omitted as a means of calculating value as part of the guideline determination under § 2B1.5(b)(1). While this calculation may be appropriate for issues of restitution, it can lead to unwarranted disparities between the harm caused or the significance of the artifact taken and the sentence received by the defendant.

Foreign Corrupt Practices Act (proposed amendment # 2)[10]

Given the amorphous nature of the underlying criminal offense, the PAG is concerned about enacting any changes that will increase the potential sentences for individuals convicted of violating the Foreign Corrupt Practices Act

The proposed amendment of the Sentencing Guidelines for violations of the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78 dd-1, 78 dd-2, and 78dd-3 would shift

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[10] This section was drafted by Preston Burton.

those offenses from U.S.S.G. § 2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery) to U.S.S.G. § 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right). Apparently this modification is fueled by the perception that the public corruption aspect of FCPA violations, though usually committed for commercial purposes from the perspective of the defendant, is the essence of the violation. Even so, the Commentary to amended Section 2B4.1 includes "public international organizations" as entities that, if involved in an otherwise commercial bribery scheme, trigger the application of the corruption guideline, Section 2C1.1, along with clearly governmental bribery schemes. Neither amended guideline defines "public international organizations," nor is it well-defined in the Foreign Corrupt Practices Act, see 15 U.S.C. §§ 78dd-1(f)(1)(B), 78dd-2(h)(2)(B), and 78dd-3(f)(2)(B), and it would appear to be a highly elastic term.

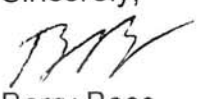
The proposed modification will increase the Base Offense Level for this controversial offense from level 8 to level 10. The Specific Offense Level provisions for both guidelines share the monetary tables from U.S.S.G. § 2B1.1. Compare U.S.S.G. § 2B4.1(b)(1) with U.S.S.G. § 2C1.1(b)(2). Additionally, the organizational fine provisions are identical. The public corruption guideline also includes an enhancement for multiple bribes (two-level enhancement) and an eight-level enhancement if the payment was made to influence an elected official or official holding a high-level position.

As a result, in most cases, the amended guideline will result in a significantly increased sentence for individuals found to have violated the FCPA. This is a troubling result because we are not aware of any statistical analysis or widely-held belief supporting the proposition that defendants convicted of this crime are presently being under-punished. Accordingly, we urge the Commission to move cautiously in making any revision that would increase the sentencing range for this group of offenders.

Conclusion

As always, we appreciate the opportunity to provide the Commission with our perspective on these important issues. Please do not hesitate to contact Jim or me if you have any questions or if the PAG can be of any further assistance.

Sincerely,



Barry Boss

cc: All Commissioners
Jim Felman, Esq.
Charles Tetzlaff, Esq.
Andy Purdy, Esq.
Timothy McGrath, Esq.

CAREER OFFENDER DESIGNATION FOR § 924(c) OFFENSES

The proposed amendment to make the career offender enhancement applicable to persons convicted of §924(c) offenses is too complicated to be workable.[6] This is not because the Commission suddenly has lost the ability to formulate a more workable guideline. The difficulty stems from the fact that §924(c) is itself an enhancement provision that not only requires imposition of a mandatory minimum sentence but more importantly for purposes of this amendment, requires the sentence to be consecutive to any other sentences.[7]

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[6] The proposed amendment to U.S.S.G. § 4B1.1 creates a complex set of rules within the career offender guideline with multiple provisions for determining how to calculate the career offender portion of the §924(c)enhancement. In pertinent part, it states:

> (c) If the defendant (1) was convicted of violating 18 U.S.C. § 924(c) ... and (2) as a result of that conviction (alone or in addition to another offense of conviction), is determined to be a career offender under subsection (a):
>
> (A) The offense level shall be—
>
> (i) in the case of a conviction only of an offense under 18 U.S.C. § 924(c) ...: level 37, decreased by the number of levels corresponding to any adjustment under §3E1.1(Acceptance of Responsibility) that applies; or
>
> (ii) in the case of multiple counts of conviction: the greater of (I) the offense level applicable to the counts of conviction other than the 18 U.S.C. § 924(c) ... count, or (II) level 37, decreased by the number of levels corresponding to any adjustment under §3E1.1 that applies.
>
> (B) The criminal history category shall be Category VI.
>
> (C) The amount of the mandatory term of imprisonment that is imposed to run consecutively shall be determined as follows:
>
> (i) A consecutive sentence of imprisonment shall be imposed on any count of conviction under 18 U.S.C. § 924(c) or .... The length of such consecutive sentence shall be at least the minimum term required by law.
>
> (ii) After taking into account the required statutory minimum consecutive sentence under subdivision (i), the balance of the total punishment shall be allocated and imposed, to the extent possible, on the counts of conviction, other than 18 U.S.C. §§ 924(c) and 929(a), in accordance with the rules in §5G1.2 (Sentencing on Multiple Counts of Conviction), as applicable.
>
> (iii) If the statutory minimum sentence on the count of conviction under 18 U.S.C. § 924(c) or § 929(a) together with the sentence imposed on the remaining counts is less than the total punishment, then the minimum sentence on the count of conviction under 18 U.S.C. § 924(c) or § 929(a) shall be increased to the extent necessary to achieve the total punishment.
>
> * * * *

[7] In United States v. Gonzales, 117 S. Ct. 1032 (1997) , the Supreme Court held that the statutory language mandating a consecutive five-year term of imprisonment that "shall [not] ... run concurrently with any other term of imprisonment" contains no ambiguity and means any other term

In addition, because §924(c) already stacks punishment atop the predicate crime, the Commission ought not to stack even more punishment absent a clear statement from Congress requiring the additional punishment. We do not believe that 28 U.S.C. § 994(h), the statutory directive for career offenders, clearly requires the broad amendment that the Commission has proposed. Consequently, we recommend that the Commission defer action on this amendment, as it did in the spring of 2000, to study the issues further. At that time, the Commission "preserve[d] the status quo as it existed prior to the statutory changes to 18 U.S.C. § 924(c) . . . that established a statutory maximum of life for all violations of the statute." U.S.S.G. App. C, amendment 600. We recommend that the Commission take the same course of action at this time and go back to the drawing board to come up with a more workable and fair guideline taking into account concerns raised by the submitted comments.

Proposed Guideline Is Not Required by 28 U.S.C. § 994(h)

Section 994(h) directs the Commission to "assure" that for adult offenders who commit their third felony drug offense or crime of violence, the Guidelines prescribe a sentence of imprisonment "at or near the maximum term authorized." United States v. LaBonte, 520 U.S. 751,757 (1997), quoting, 28 U.S.C. § 994(h). In response, the Commission created the career offender guideline.

Section 994(h) defines a "career offender" as an adult who has been convicted of a felony that is either "a crime of violence" or one of a number of enumerated trafficking offenses, including 21U.S.C. § 841and four other federal drug trafficking offenses. Section 924(c) is not one of the enumerated drug offenses, however.

If the Commission chooses, as it proposes to do in the current amendment, to define 924(c) as a "drug offense" for purposes of the career offender guideline, it is doing so based on its own discretionary authority to promulgate guidelines and not because it is required to do so by the congressional mandate in 994(h). We recognize that the Commission has in other cases expanded the drug felony definition in the career offender guideline for example, to reach inchoate offenses such as attempts and conspiracies to commit the enumerated drug felonies. See U.S.S.G. § App. C (amendment 528). But in that instance, the Commission had a much stronger basis for doing so. As it explained, the Commission wanted to

> focus more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate and to avoid "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct...." 28 U.S.C. § 991(b)(1)(B)....

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of imprisonment, state or federal including the state term of imprisonment for the underlying crime of violence which triggered the §924(c) conviction).

U.S.S.G. § 4B1.1, comment. (backg'd.).[8] Here, those policy reasons do not apply because 924(c) is itself an enhancement that already stacks additional punishment atop the predicate crime and already quite broadly reaches felons who have not engaged in violent conduct or are held vicariously liable for the acts of others. Rather than avoid unwarranted disparities, the proposed amendment will result in unfairly severe sentences and unwarranted sentencing disparities relative to a defendant's actual culpability.

Indeed, any defendant convicted of a 924(c) offense would likely be subject to prosecution and conviction for the underlying drug or violent felony. The underlying drug or violent felony should more properly trigger designation as a career offender. So that the primary effect of the Commission's proposal is to increase dramatically the career offender sentencing ranges of a class of defendants who may be held vicariously liable for the possession of firearms by co-conspirators where their own culpability is much less serious. For example, a low-level member of a drug conspiracy who never personally handled a firearm but is convicted of conspiracy to possess a firearm in furtherance of a drug offense and has two predicate felonies would be looking at a sentencing range of 360 months to life, before acceptance. Whereas if he were designated a career offender based on his drug offense, his sentencing ranges depending on the severity of his drug conviction could be 210 to 262 months (drug offense maximum of 20 years) or as high as 262 to 327 months (drug offense maximum of 40 years). Under these circumstances, we do not believe that there are sound policy reasons for the Commission to extend the 994(h) definitions of felony drug and violent offenses beyond the statutory mandate.

The congressional mandate also leaves room for the Commission to define a "crime of violence" for career offender purposes. In the career offender guideline, the Commission currently defines "crime of violence" as an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another" or "otherwise involves conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2 (a). We believe this definition has worked well whereas the current proposal to expand it will not.

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[8] The background commentary to the career offender guideline states:

> Section 994(h) of Title 28, mandates that the Commission assure that certain "career" offenders receive a sentence of imprisonment "at or near the maximum term authorized." Section 4B1.1 implements this directive, with the definition of a career offender tracking in large part the criteria set forth in 28 U.S.C. § 994(h). However, in accord with its general guideline promulgation authority under 28 U.S.C. § 994(a)-(f), and its amendment authority under 28 U.S.C. § 994(o) and (p), the Commission has modified this definition in several respects to

Under the current definition, many §924(c) offenses would be crimes of violence because some cases do in fact involve the use or threat of physical force by the defendant or involve conduct that presents a serious risk of injury to another. But not all §924(c) offenses are crimes of violence under the current definition. Indeed, a significant number of §924(c) offenses involve no violence or threat of violence by the defendant, particularly as the elements of §924(c) were amended by Congress in 1998, interpreted by the courts and in light of coconspirator liability. See , e.g., Smith v. United States, 508 U.S. 223 (1993) (holding that defendant "used" a firearm during and in relation to a drug trafficking offense in violation of 18 U.S.C. § 924(c) when he offered to trade a firearm to an undercover agent in exchange for cocaine but did not otherwise use the firearm as a weapon).

A person can be convicted of a § 924(c) offense, if he "uses" or "carries" a firearm during and in relation to a crime of violence or drug trafficking offense or if he "possesses a firearm" in furtherance of any such crime. Yet, as interpreted by the courts, neither physical force of any kind nor even the risk of physical injury to another is an element of a violation under the "use" prong of § 924(c). See Smith v. United States, 508 U.S. 223 (1993). Justice O'Connor, writing for the Supreme Court in Smith, rejected the notion that Congress intended the term "use" in § 924(c) to mean that the firearm be used in an offensive manner as a weapon.

> Even if we assume that Congress had intended the term "use" to have a more limited scope when it passed the original version of §924(c) in 1968, ... we believe it clear from the face of the statute that the Congress that amended §924(c) in 1986 did not. Rather, the 1986 Congress employed the term "use" expansively, covering both use as a weapon....and use as an item of trade or barter, as an examination of §924(d) demonstrates. Because the phrase "uses ... a firearm" is broad enough in ordinary usage to cover use of a firearm as an item of barter or commerce, Congress was free in 1986 so to employ it. The language and structure of §924(c) indicates that Congress did just that. Accordingly, we conclude that using a firearm in a guns-for-drug trade may constitute "us[ing] a firearm" within the meaning of §924(c)(1).

Smith, 508 at 236.

Similarly, a § 924(c) conviction for carrying or possessing a firearm need not involve any of the elements of a "crime of violence" as defined in the career offender guideline when the firearm is carried in relation to a drug offense. See e.g., Muscarello v. United States, 524 U.S. 125 (1998). In Muscarello, Justice Breyer writing for the Court explained that a defendant "carries" a firearm in violation of §924(c) even when the handgun is not immediately accessible but is found in a locked glove compartment or trunk of a car.

> No one doubts that one who bears arms on his person "carries a weapon." But to say that is not to deny that one may also "carry a weapon" tied to the saddle of a horse or placed in a bag in a car.

Id. at 130. Congress did not intend that a defendant be "packing" or bearing the firearm on his person to be convicted for carrying a firearm under 18 U.S.C. § 924(c). Id.

A defendant may also be found guilty of a §924(c) offense merely under a vicarious liability standard of reasonable foreseeability without having acted in a way that involved "the use, attempted use, or threatened use of physical force against the person of another" or that "otherwise involves conduct that presents a serious potential risk of physical injury to another." E.g., United States v. Shea, 150 F.3d 44, 50 (1st Cir. 1998) (defendant may be convicted of §924(c) offense on the basis of Pinkerton liability for the acts of others that are reasonably foreseeable to him rather than under higher mens rea standard as aider or abettor, which requires knowledge to a reasonable certainty). The typical jury instruction on a Pinkerton theory states:

> If you find that any or all of the defendants were members of a conspiracy, you may find each defendant guilty of carrying or using a firearm during and in relation to drug trafficking offense if any of their fellow con-conspirators committed this offense during the existence of the conspiracy and in furtherance of the conspiracy. This is because each member of a conspiracy is considered to be responsible for any offense committed by a co-conspirator that could have been reasonably expected or anticipated as a necessary or a natural consequence of a conspiracy.

United States v. Washington, 106 F.3d 983, 1011 (D.C. Cir. 1997). For example, in United States v. Martinez, the 7th Circuit upheld a defendant's conviction for "carrying" a firearm in connection with a narcotics trafficking offense based on the fact that a fellow coconspirator, riding in a separate car on a trip to pick up drugs carried a firearm.

As a practical matter, what this means is that a courier who transports a shipment of drugs for a small fee or a girlfriend who takes messages for her drug-dealing boyfriend about a shipment of drugs may be held liable under §924(c) if the kingpin or any other co-conspirator has a firearm locked in a closet where he also keeps his stash of drugs. If that hypothetical courier or girlfriend, also happens to have two qualifying felony priors – which could range from felony drunk driving, larceny from a person, pickpocketing charged under a state robbery statute, burglary of a hotel guest room, to a sale of a small quantity of marijuana – she would be subject as a career offender to a sentencing range of 360 months to life, with some part of that being reduced according to formulas proposed by the

Commission to take into account the consecutive mandatory sentence required under §924(c).[9]

Because §924(c) is not – as a categorical matter – a crime that involves actual violence or the serious threat of violence, the statutory directive does not require the Commission to do what it proposes to do which is to expand the definitions in the career offender guideline by inserting an application note that states:

> A violation of 18 U.S.C. § 924(c) ... is a "crime of violence" or a "controlled substance offense" if the offense of conviction established that the underlying offense was a "crime of violence" or a "controlled substance offense."

U.S.S.G. § 4B1.2, comment. (n. 1) (proposed). That expanded definition goes beyond what §994(h) requires and ignores the reality of vicarious liability. Further, the career offender designation generates extremely severe penalties because the statutory maximum for 924(c) cases is life, which generates a career offender sentencing range, before acceptance, of 360 months to life with a consecutive term for the 924(c) offense. Whereas a career offender designation triggered by felony drug offenses would generate sentencing ranges of 210 to 262 months (for drug offenses with statutory maximum of 20 years) and 262 to 327 months (for drug offenses with statutory maximum of 40 years). In light of the very severe penalties that will come into play for persons whose 924(c) convictions trigger the career offender designation, the Commission should not go beyond the congressional directive, should not draw this definition with such a broad-brush, and should provide for a case-by-case analysis to determine whether the defendant's conduct involved "the use, attempted use, or threatened use of physical force against the person of another" or "otherwise involves conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2 (a).

The Commission should also require a case-by-case, individualized analysis by the sentencing court to determine whether the §924(c) offense is a crime of violence. A case-by-case analysis is not unduly burdensome because it would involve consideration of the very conduct for which the defendant is being convicted and sentenced. This approach is consistent with the approach that the Commission has already established in career offender cases:

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[9] See e.g., United States v. Rutherford, 54 F.3d 370, 376 (7th Cir. 1995) (felony drunk driving is crime of violence); United States v. Payne, 163 F.3d 371 (6th Cir. 1998) (larceny from the person); United States v. Wilson, 951 F.2d 586 (4th Cir. 1991) (robbery conviction based on pickpocketing); United States v. McClenton, 53 F.3d 584 (3d Cir. 1995) (burglary of a hotel room). Under the current proposal, the adjusted offense level is 37 for a career offender whenever the instant offense of conviction that triggers the career offender designation is §924(c) because the career offender offense level is based on the statutory maximum penalty for §924(c), which is life.

> in determining whether an offense is a crime of violence or controlled substance for the purposes of §4B1.1 (Career Offender), **the offense of conviction (i.e.,the conduct of which the defendant was convicted) is the focus of inquiry.**

U.S.S.G. § 4B1.2, comment. (n. 3) (emphasis added). It also is the approach the Commission adopted for diminished capacity departures which are precluded whenever the "offense involved actual violence or a serious threat of violence." U.S.S.G. § 5K2.13. Hence, if the Commission designates §924(c) as a trigger offense for the career offender guideline, it should, at a minimum, provide a mechanism for district judges to review the charge and the actual conduct to determine if the offense involved actual violence or a serious threat of violence before the offense would be deemed a crime of violence for career offender purposes.

LaBonte Does Not Mandate the Current Proposal

The Supreme Court's opinion in LaBonte is inapposite to the issue before the Commission. United States v. LaBonte, 520 U.S. 751 (1997). LaBonte involved application of the career offender guideline where the instant offenses were controlled substance offenses. Noting that Congress has delegated "significant discretion" to the Commission to formulate sentencing guidelines, the Supreme Court held that the Commission's discretion had "to bow to specific directives of Congress." LaBonte, 520 U.S. at 757. Because 28 U.S.C. § 994(h) directs the Commission to prescribe a sentence "at or near the maximum term authorized," the Commission could not disregard the recidivist enhancements that increase the statutory maximum in drug trafficking offenses when designating the statutory maximum penalties under the career offender guideline. Id. at 757-58.

But there are no "specific directives" in 994(h) that circumscribe the Commission's discretion to define a crime of violence or that require the Commission to expand the definition of felony drug offense beyond that included in 994(h). There are also no "specific directives" that address whether 924(c) offenses should trigger designation as a career offender. Section 994(h) also does not include any specific directive as to whether offenses that are not categorically "crimes of violence" should trigger treatment as a career offenders when the defendant's conduct was neither violent nor presented a serious risk of violence. Nor does LaBonte or 994(h) offer the Commission guidance on how to write a workable guideline that can incorporate the consecutive, mandatory enhancement penalties required by §924(c), with a guideline scheme that is inconsistent with mandatory minimum penalties, and with the fact that not all §924(c) offenses are crimes of violence. In sum, §994(h) does not provide any "specific directives" with respect to the classification of 924(c) offenses as crimes of violence or drug offenses nor does it require the Commission to ignore the Smith and Muscarello decisions in deciding how to resolve the application of the career offender guideline to 924(c) offenses.

Bailey-fix Legislation Does Not Require the Current Proposal[10]

Congress' decision to include §924(c) offenses in the enumerated list of 'serious violent felonies" in the 3-Strikes enhancement provision also does not resolve the questions before the Commission. See 18 U.S.C. § 3559(c)(2)(F). Congress is obviously free to impose a mandatory life sentence on any offense based on nothing more that its considered political judgment and limited by nothing less than due process, the 8th Amendment prohibition against cruel and unusual punishment and any other applicable constitutional prescriptions. The Commission, on the other hand, has more limited discretion, circumscribed by the organic law and by other guidelines provisions. Congress' statutory change in response to Bailey merely affected the treatment of §924(c) offenses with respect to the 3-Strikes provision.

The Bailey-fix amendment does not purport to define a crime of violence or otherwise extend the terms and definitions contained in 3559(c) beyond that subchapter to other federal statutes or the guidelines as a whole. Indeed, there is no uniform definition applicable throughout the federal criminal code for what constitutes a drug offense or a violent felony, with various definitions scattered through the different congressional acts. Compare, e.g., 18 U.S.C. § 924(e)(2) (for purposes of Armed Career Criminal Act, "serious drug offense" is a drug trafficking offense punishable by a term of 10 years or more; "violent felony" includes certain juvenile adjudications) with 18 U.S.C. § 3559 (c)(2)(H) (defining "serious drug offense" by reference to the enumerated 10-year mandatory minimum federal drug trafficking offenses). As a result, a federal drug trafficking offense involving 5-grams of crack is a "serious drug offense" for purposes of the Armed Career Criminal Act because it carries a maximum penalty in excess of ten years but is not one for purposes of the 3-Strikes enhancement because it is not subject to the 10-year mandatory minimum penalty.

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[10] In 1995, the Supreme Court issued an opinion in a 924(c) cases that started the changes that the Commission is now addressing. Holding that § 924(c) which criminalizes "use" of firearm during and in relation to drug trafficking offense requires evidence that defendant actively employed the firearm, the Supreme Court reversed the §924(c) convictions of two defendants. Bailey v. United States, 116 S. Ct. 501 (1995). One defendant who was stopped for a traffic offense was found to have cocaine in the driver's compartment of his car while the firearm was found inside a bag in the locked trunk of his car; the other defendant had the firearm in a locked foot locker in a bedroom closet; neither had actively employed the firearm in relation to the drug offense. Id. at 151. In 1998, Congress amended §924(c) in what is sometimes referred to as the Bailey-fix to add a provision that makes it unlawful to also "possess" a firearm "in furtherance of" a crime of violence or drug trafficking offense. The penalty structure was also changed. It had been a definite, mandatory, consecutive sentence of 5 years (or in cases involving more dangerous firearms or subsequent convictions, a greater determinate term). Currently, the statute provides for mandatory sentences of "not less than 5 years"; or for brandishing, not less than 7 years; if the firearm is discharged, not less than 10 years, and so on with no stated maximum penalty.

Significantly, the Commission has not proposed an amendment to apply the 3-Strikes' definition of "serious drug offense" – mandatory minimum 10-year drug offenses – throughout the guidelines replacing the definitions currently in use.

Further, Congress may have recognized that the mandatory consecutive provisions of §924(c) are incompatible with the career offender guideline, which provides for a combined total offense. The problem of incorporating the §924(c) consecutive mandatory is not implicated with the 3-Strikes enhancement, which mandates a sentence of life making eliminating the need to combine multiple offenses. More telling also is that while Congress included §924(c) in the 3-Strikes statute, it did not similarly amend the career offender directive. Congress may have decided that the mandatory life enhancement suffices to take care of repeat offenders who meet the requirements of the 3-Strikes statute, which, among other things, is not self-executing but reposes discretion in the prosecutor whether to enhance the punishment by filing an information giving notice of the predicate offenses.

Conclusion

In sum, the current proposal should not be adopted by the Commission. The current definitions in the career offender guideline are appropriate. Because 924(c) is itself an enhancement that already stacks additional punishment atop the predicate crime and already quite broadly reaches felons who have not engaged in violent conduct or are held vicariously liable for the acts of others, the proposed changes are likely to in unfairly severe sentences and unwarranted sentencing disparities relative to a defendant's actual culpability. That notwithstanding, if the Commission adopts all or part of the proposed amendment it should, at a minimum, add commentary to exclude from the career offender designation those §924(c) offenses that do not involve actual violence or a serious threat of violence. The Commission also needs to rework the proposal to come up with a more workable and user-friendly guideline.

Amendment to U.S.S.G. § 2K2.4, note 1(B)

The Commission should also not adopt the proposed amendment to U.S.S.G. § 2K2.4, comment (n.1(B)), which states that an upward departure may be warranted "to reflect the seriousness of the defendant's criminal history, in a case in which the defendant is convicted of a[] ... §924(c)... offense but is not determined to be a Career Offender under §4B1.1." The language that is being deleted, to be replaced by the proposed language, identified the possibility of an upward departure where a defendant would otherwise be a career offender except for the fact that the Commission had excluded §924(c) as an instant offense that could trigger a career offender enhancement. It is not clear what purpose is served by this new encouraged upward departure.

As proposed, an upward departure is indicated in all cases where the defendant is not a career offender, even presumably in a case where a defendant is not a career offender because he has a single prior. We see no need to encourage upward departures for criminal history beyond those identified in U.S.S.G. § 4A1.3. In the context of a §924(c) conviction, which in itself is an enhancement provision, this is an unnecessary invitation to pile even more punishment atop the already enhanced sentence. The departure would be based on past criminal conduct for which the defendant has already been convicted and served his sentence. Indeed, any criminal history departure is of concern because the entirety of the criminal history scheme serves to increase a defendant's sentence for the instant offense based on conduct for which the defendant has already paid his debt to society and for which, the double jeopardy clause of the Constitution would preclude additional punishment. Under those circumstances, upward departures for criminal history should be very rare.

Criminal history is already an imperfect score, as the Commission has acknowledged. See U.S.S.G. § 4A1.1, comment. (backg'd). It also is rife with whatever inequities are present in state and federal sentencing schemes. See United States v. Leviner, 31 F. Supp. 2d 23 (D. Mass. 1998) (granting one-level downward departure where criminal history V was based on seven criminal history points for traffic violations that overrepresented the relatively minor and non-violent nature of record and replicated disparities in state sentencing scheme particularly racial disparities; relied on studies that reflect the incidence of pre-textual traffic stops, the offense of "driving while black," and fact that defendant's offenses received points based on jail sentences for more than 30 days for offenses involving nothing more than erratic driving). To encourage an upward departure in a guideline that already stacks additional punishment on the predicate offense without identifying any guiding principles is an invitation for an unwarranted triple-counting of criminal history, when it already is accorded weight beyond its verified value.

It is particularly unbalanced to propose upward departure language without also proposing that similar language be inserted in U.S.S.G. § §2K2.4, comment. (n.1(C)) noting that a downward departure may be warranted where a career offender designation for a defendant convicted of a §924(c) violation overrepresents the seriousness of the defendant's criminal history. Granted, the mandatory minimum sentence for a §924(c) is not subject to a guideline downward departure but a downward departure may be considered as an offset to any upward departure that the sentencing court might consider. A downward departure certainly might be warranted where a defendant is having his sentence enhanced under two other enhancement provisions, §924(c) and the career offender guideline. Language that a downward departure may be warranted where the career offender designation overrepresents the seriousness of defendant's criminal history should also be inserted in the career offender guideline, U.S.S.G. § 4B1.1.

In our view, the proposal to amend the commentary by inserting language that an upward departure may be warranted is unnecessary and in any event, should not be inserted without balancing it by adding a reference to the availability of downward departures.

U.S. Department of Justice

Criminal Division

Washington, DC 20530-0001

February 4, 2002

Honorable Diana E. Murphy
Chair, U.S. Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Judge Murphy:

On behalf of the Department of Justice, we submit the following comments regarding the proposed amendments to the federal sentencing guidelines and issues for comment published in the Federal Register on November 27, 2001. We very much appreciate the Commission's consideration of many of the amendment proposals that we suggested last year. The Commission has once again taken on a significant agenda of issues, and we look forward to working with you and the other Commissioners during the remainder of this amendment cycle to improve federal sentencing policy and the federal sentencing guidelines.

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PROPOSED AMENDMENT 1 – CULTURAL HERITAGE RESOURCES

This proposed amendment would add a new guideline, §2B1.5, to address the theft of, damage to, destruction of, or illicit trafficking in cultural heritage resources. Overall, we strongly support this amendment and the proposed guideline, and we very much appreciate all the work the Commission has done in this area. We believe the new guideline will help protect cultural heritage resources, and thus will help serve an important government function. While we believe the proposed guideline, as published, is a vast improvement over current sentencing law, there are several improvements that we think could make the guideline even more effective.

A. "Pattern of Similar Violations" and Issue 1 for Comment

The enhancement for "pattern of similar violations" in subsection (b)(4)(B) is an important component of the proposed cultural heritage resources guideline, but we believe it should be broadened in order to be most effective. Proposed Application Note 5(B) defines "pattern of similar violations" as follows:

For purposes of subsection (b)(4)(B), "pattern of similar violations" means two or more civil or administrative adjudications of misconduct similar to the instant offense, in violation of any Federal, state, or local provision, rule, regulation, ordinance, or permit.

In an issue for comment, the Commission asks whether this enhancement should also cover prior convictions for similar misconduct, as well as conduct that has not resulted in a prior civil or administrative adjudication. We believe that the answer is "yes" to both. In short, the above enhancement should apply to two or more "acts" of misconduct, rather than two or more "civil or administrative adjudications" of misconduct. In many archaeological resource cases the government has credible evidence (accomplice statements, admissions by the violator, photographic and documentary evidence possessed by the violator, etc.) that the defendant committed other similar but uncharged offenses. In a few such cases, the prior offenses may be included in the sentencing guidelines calculations as relevant conduct. However, in most cases the prior offenses cannot be included in the relevant conduct "loss" determination, because, for a variety of valid reasons, no expert archaeological damage assessment has been or can be conducted concerning these violations. Yet the evidence of these uncharged offenses is sufficiently reliable to support the "pattern" enhancement at sentencing. By contrast, in normal theft cases, victims can identify the amount of a prior theft potentially included as relevant conduct.

To take into account the fact that the expanded enhancement we advocate should not apply where relevant conduct covers the prior acts, we recommend adding the following sentence to the end of Application Note 5(B):

> However, any such act of misconduct shall not be considered under this subsection if (i) it constitutes relevant conduct under section 1B1.3, and (ii) the value of any cultural heritage resource involved in such act of misconduct is fully taken into account in determining value under subsection (b)(1).

The modifications we recommend with respect to "pattern of similar violations" are important. Without them, we believe that most defendants will go unpunished for prior, similar offenses.

B. Expansion of Application of "Archaeological Value"

We recommend that "archaeological value," which the proposed guideline would apply to the calculation of the value of an "archaeological resource," also apply to the determination of the value of other cultural heritage resources. Application Note 2 of the proposed amendment provides that the value of a cultural heritage resource is its commercial value plus the cost of restoration and repair, except with respect to an "archaeological resource." In the latter case the value is the greater of its commercial value or its "archaeological value," plus the cost of

restoration and repair. "Archaeological value" is essentially a proxy for the loss of knowledge caused by the offense, as measured by the "cost of the retrieval of the scientific information which would have been obtainable prior to the offense . . . ."

We recommend that Application Note 2 be revised to make the "archaeological value" method of valuation applicable to all cultural heritage resources, not just "archaeological resources." Such a revision would assure that the proposed guideline takes into account the loss of archaeological knowledge in a case involving damage to an archaeological site from which an artifact is taken that is not an archaeological resource because it is less than 100 years old. Without a revision to address such cases, the guideline would result in a serious undervaluing of loss. Another possible approach to capturing this loss is to provide for it under the upward departure provision.

C. Upward Departure/Issue for Comment

Application Note 7 of the proposed guideline provides that an upward departure may be warranted in cases in which the offense level determined under the proposed guideline "substantially understates the seriousness of the offense." The proposed application note goes on to discuss an example in which, in addition to cultural heritage resources, the offense involved the theft of items that are not cultural heritage resources (e.g., theft of lawnmowers from a national cemetery in addition to historic grave markers or other cultural heritage resources). In an issue for comment, in addition to addressing cases of theft involving both cultural heritage resources and other items, the Commission asks whether proposed Application Note 7 should provide an upward departure "if the value of a cultural heritage resource . . . underestimates its actual value."

We are not convinced that there is a need for the proposed upward departure provision to address cases involving a combination of cultural heritage resources and other items. However, there is a need, we believe, to clarify that an upward departure is encouraged where the value of the cultural heritage resource underestimates the seriousness of the offense. We recommend adding the following after the second sentence of proposed Application Note 7:

> For example, an offense may result in a loss of knowledge or cultural importance associated with an archaeological or other cultural heritage resource for which the value of the cultural heritage resource as determined under this guideline results in a substantial understatement of the seriousness of the offense. This is particularly true where the offense involved a cultural heritage resource of profound uniqueness or significance.

D. Use of Destructive Devices/Issue for Comment

The Commission also seeks comment on whether the proposed amendment should include an enhancement if the offense involved the use of a destructive device. We believe that

the guideline should provide such an enhancement. In addition, the proposed upward departure recommendation above could also cover an extremely serious case, such as the use of a destructive device to damage or destroy a national monument.

E. Threshold Dollar Amounts

Subsection (b)(1)(A) of the proposed amendment provides a one-level increase if the value of the cultural heritage resource is between $2,000 and $5,000. Since the felony threshold under the Archaeological Resources Protection Act is $500, and the value of every cultural heritage resource should be given full consideration in sentencing determinations, we recommend that subsection (b)(1)(A) be revised to make the one-level increase applicable to values between $500 and $5,000. This is of particular importance in Civil War battlefield cases under the Archaeological Resource Protection Act. Because these cases typically involve very localized excavations for particular items located with a metal detector, the commercial value and costs of restoration and repair rarely exceed $2,000, even though there may be dozens of artifacts stolen and dozens of damaging unlawful excavations, and even though the case is a felony.

F. Technical and Minor Amendments

In addition to the recommendations above, we would like to work with the Commission staff with regard to several technical or minor amendments we believe are appropriate. For example, the definition of "museum" for purposes of the proposed guideline should include foreign museums that would otherwise meet the proposed definition. Similarly, we wish to assure that the definition of "cultural heritage resource" does not inadvertently exclude some designated archeological or ethnological material, particularly since the proposed guideline already subjects such material to an enhancement. These and other minor amendments would improve the guideline and likely reduce litigation in the future.

PROPOSED AMENDMENT 2 – IMPLEMENTATION OF THE FOREIGN CORRUPT PRACTICES ACT

This proposed amendment would change the Statutory Index reference for violations of the Foreign Corrupt Practices Act (FCPA), 15 U.S.C. § 78dd-1 et seq, from §2B1.4 (Bribery in Procurement of Bank Loan and Other Commercial Bribery) to §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right). We support this amendment.

A. Generally

FCPA violations involve payments to foreign officials for the purposes of influencing their official acts or decisions, inducing them to do or omit an act in violation of their lawful duty, securing any improper advantage, or inducing them to influence a foreign government -- all

Looking for comparable.

Add'l —

any improper advantage

If it's corruption of a pub. official — 201.1 is approp.

If its stealing campaign $ — use commercial bribery.

...uses of off in "T15" could sweep in

also can sweep in corruption cases. There are two ones we are interested in.

re Corrupting public officials or candidates.

201 [illegible] to extent [illegible] influence pub. off. or candidate, downward departure may be appropriate.

in order to assist the person making the payment in obtaining or retaining business.[1] We believe FCPA violations are akin to bribery of public officials, rather than commercial bribery, even though the purpose of the bribe is to obtain or retain business. The amendment would treat FCPA offenses as those involving bribery, and thus we believe it is warranted.

In addition, we believe this amendment will effectively implement the Organization for Economic Co-Operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which was signed by the United States in December 1997 and ratified in November 1998. Under the OECD Convention, each party is required to impose comparable criminal sentences for both domestic and international public corruption. The current treatment of FCPA violations as commercial bribery, under § 2B4.1, we believe is contrary to the intent of the Convention. As a leader in the fight against corruption around the world, the United States must meet its commitment in this area, and we believe this amendment will take another significant step in this direction.

B. Issue for Comment Regarding the Appropriate Guideline for 26 U.S.C. §§ 9012(e) and 9042(d) Offenses

In the Federal Register publication, the Commission invited comment on the appropriate guideline for offenses under 26 U.S.C. §§ 9012(e) and 9042(d), asking whether these offenses were more akin to public bribery or commercial bribery. Although §§ 9012(e) and 9042(d) address kickbacks to presidential and vice-presidential campaigns that are receiving public funding, the campaigns and officers acting on their behalf are not public entities or officers. Because they are instead private entities receiving public funds, §§ 9012(e) and 9042(d) offenses are, we believe, more akin to commercial bribery rather than public bribery, and more appropriately referenced to §2B4.1 than to §2C1.1. Thus, we think that §2B4.1 should remain the referenced guideline for 26 U.S.C. §§ 9012(e) and 9042(d) offenses in the Statutory Index.

C. Issue for Comment Regarding the Appropriate Guideline Sentence for Certain FCPA Offenses Involving Persons Other Than Public Officials

The Commission also invited comment on whether the different provisions of FCPA should be treated differently for sentencing purposes. The text of the Commission's synopsis and issue for comment suggests that payments under 15 U.S.C. §§ 78dd-1(a)(3), 78dd-2(a)(3), and 78dd-3(a)(3) are bribes of non-official third persons, of which the payor has some idea that a portion will be passed to the public official or candidate, and suggests that these payments should be treated differently than bribes of the public official or candidate himself. We think this is a

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[1]Violations can also involve payments to foreign political parties or officials of such parties, candidates for foreign political office, or other persons who act as conduits to foreign officials, political parties, officials of such parties, or candidates for foreign political office, if made for the purpose of influencing or inducing official action.

misreading of these FCPA provisions. The bribes under these sections are more properly understood as bribes of the public official or candidate through an intermediary. While many payments subject to FCPA prosecutions are not made directly to the official or candidate, our experience is that the direct recipient is but an agent of or consultant to the public official. To suggest that such payments should be treated differently or at a lower offense level, e.g., under 2B4.1, we think is inappropriate and would be contrary to the intent of the statute.

The Commission also invited comment as to whether bribes to foreign candidates under 15 U.S.C. §§ 78dd-1(a)(2), 78dd-2(a)(2), and 78dd-3(a)(2) should remain in § 2B4.1, since that section also applies to what the Commission terms as "similar offenses involving United States Presidential and Vice Presidential Candidates under 26 U.S.C. §§ 9012(e) and 9042(d)." These latter offenses, however, apply only to payment of a "kickback or any illegal payment in connection with any qualified campaign expense." The payments prohibited under the FCPA apply to payments intended to cause the candidate to use his influence with other public officials to affect their official acts or to cause the candidate, if elected, to take some official action. The focus of FCPA's prohibitions, therefore, is not on the candidate's campaign expenditures but payments intended to influence his conduct with respect to governmental actions. Accordingly, we believe these provisions should be covered by the same public corruption guideline, §2C1.1, as applies to bribes to public officials.

PROPOSED AMENDMENT 3 - CAREER OFFENDERS AND CONVICTIONS UNDER 18 U.S.C. §§ 924(c) AND 929(a)

Amendment 3 would make the career offender guideline applicable to those convicted of violations of 18 U.S.C. § 924(c) (using, carrying or possessing a firearm during or in relation to crime of violence or drug trafficking crime). We support the gist of the amendment, although we have identified what we believe is an anomaly in the way the amendment, as currently drafted, would apply. We hope to work with the Commission over the coming months to rectify this anomaly and to find a way to fully meet the intent of Congress and comply with the career offender directive in the Commission's organic statute.

A. Generally

We believe the definitions for the career offender guideline should be amended so that the career offender provision is more fully consistent with the statutory directive in the Commission's organic statute. Under sections 4B1.1 and 4B1.2, a defendant is a career offender if he was at least 18 years old at the time of the instant offense of conviction, the offense was a felony crime of violence or controlled substance trafficking offense, and the defendant was previously convicted of such offenses on two prior occasions. By statute, the Commission is required to assure that the guidelines specify a sentence at or near the maximum term authorized for such offenders. 28 U.S.C. § 994(h).

In the spring of 2000, the Commission promulgated Amendment 600 (effective November 1, 2000), which amended the career offender definitional guideline, § 4B1.2, to exclude violations of 18 U.S.C. § 924(c) from the application of the career offender provision (although it did include such violations for purposes of prior convictions). That guideline amendment was a response to amendments in the 105th Congress to 18 U.S.C. § 924(c) that, among other things, transformed mandatory fixed sentences into mandatory minimum sentences carrying a maximum of life imprisonment. Pub. L. No. 105-386.

In our view, a violation of 18 U.S.C. § 924(c) is a crime of violence and should be subject to the career offender statute. The gravamen of the offense consists of using or carrying a firearm during and in relation to a federal crime of violence or drug trafficking crime, or possessing a firearm in furtherance of such a crime. We see no reason to exclude the offense from the application of the career offender provision, especially given the fact that it is already explicitly included for purposes of prior offenses.

As we have indicated in the past, we also believe United States v. LaBonte, 520 U.S. 751 (1997), is instructive here. In that case, the Supreme Court struck down the Commission's decision not to use an enhanced statutory maximum penalty for repeat drug offenders sentenced under the career offender guideline on the grounds it was inconsistent with the statutory directive that sentences should be at or near the maximum term authorized. Likewise, we believe excluding section 924(c) offenses from those offenses triggering the career offender guideline is inconsistent with the same statutory directive, especially when viewed in light of the decision to include such convictions as countable prior offenses.

B. An Anomaly in the Application of the Amendment as Currently Drafted

1. Generally

We have identified an anomaly in the application of the amendment as currently drafted. Under the amendment, a small number of career offenders would actually receive lower sentences than they would if they had little or no criminal history.

The current guideline rules treat a section 924(c) count of conviction as something separate from the otherwise-applicable guidelines calculation. The guideline range is calculated for the other offense(s) (e.g. drug trafficking), double-counting the gun is avoided, a sentencing range is derived, and a consecutive sentence of 5 years or more is added on. Under the amendment, as currently drafted, while the offense level and criminal history category for some defendants will be increased, the guideline range would then be adjusted downward to account for the mandatory consecutive section 924(c) sentence.

The result is that under the proposal, most career offenders will get a higher offense level than the non-career offender, because the proposal has a default minimum offense level of 37, and a required criminal history category of VI. But a dichotomy is created. For the non-career

offender, the proposed guideline continues the current practice of adding the section 924(c) sentence on top of the sentence for the other offense(s). But for the career offender, the proposal reduces the bottom and top of the sentence range commensurate with the amount that must be imposed under section 924(c). (For example, if the guideline range for the underlying offense(s) is 100 - 125 months, and the section 924(c) conviction calls for 60 months, the range for the underlying offense(s) becomes 40 - 65 months.)

This dichotomy does not present a problem as long as the difference in the guideline ranges for the career and non-career offenders is greater than the size of the mandatory consecutive sentence under section 924(c). If the guideline range for the non-career offender is 30 - 37 months, and the guideline range for the career offender is 262 - 327 months, adding 5, 7 or even 10 years to the non-career offender's sentence is still going to result in greater punishment for the career offender.

However, when the underlying offense is more serious, thus bringing the chapter two and three offense level closer to the career offender offense level in §4B1.1, the consecutive time that is added only to the non-career offender's sentence can eliminate the distinction between the career and non-career offender. The same thing happens when the section 924(c) sentence is relatively great (such as for a machine gun (30 years) or where the case involves two section 924(c) counts (5 + 25 years)). The combination of these two circumstances exacerbates the problem. In these cases the career offender will often end up with a significantly lower sentence than his non-career offender counterpart.

2. Examples of the Anomaly

Example 1: A bank robber carries a machine gun during his robbery, makes an express threat of death, causes serious bodily injury and takes $60,000. He pleads guilty and gets the full three-level reduction for acceptance.

Current guidelines:

If he has no criminal history:		If he is a career offender:	
Base	20	Offense level of 34 (based on statutory max for armed robbery of 25)	
Threat of death	+2		
Injury	+4		
Loss amount	+2		
Acceptance	-3	Acceptance	-3
TOTAL	25	TOTAL	31

Guideline range: 57 - 71 months	Guideline range: 188 - 235 months
Add-on for 924(c): 360 months	Add-on for 924(c): 360 months
Total sentence range: 417 - 431 months	Total sentence range: 548 - 595 months

Proposed guidelines:

If he has no criminal history:		If he is a career offender:	
Base	20	Offense level of 37 (4B1.1(c)(A)(ii))	
Threat of death	+2		
Injury	+4		
Loss amount	+2		
Acceptance	-3	Acceptance	-3
TOTAL	25	TOTAL	34
Guideline range: 57 - 71 months		Guideline range: 262 - 327 months	
Add-on for 924(c): 360 months		Subtract 360 months (mandatory minimum) from sentence to be imposed, leaving nothing left for the robbery count	
Total sentence range: 417 - 431 months		Total sentence range: 360 months	

Example 2: Defendant is a manager of a large conspiracy that distributes 2 kilos of crack over its lifetime. In furtherance of the conspiracy, he discharges a firearm. He is convicted at trial of violating title 21, U.S.C. section 846 (life maximum) and section 924(c) (10-year minimum).

If he has no criminal history:		If he is a career offender:	
Base:	38	Offense level of 41	
Manager (role)	+3		
TOTAL	41	TOTAL	41
Guideline range: 324 - 405 months		Guideline range: 360 - life	
Add-on for 924(c): 120 months		Add-on for 924(c): 120 months	
Total sentence range: 444 - 525		Total sentence range: 480 months - life (+ 120)	

Proposed guidelines:

If he has no criminal history:		If he is a career offender:
Base:	38	Offense level of 41
Manager (role)	+3	
TOTAL	41	TOTAL 41
Guideline range: 324 - 405 months		Guideline range: 360 - life
Add-on for 924(c): 120 months		Subtract 120 months (mandatory minimum) from sentence to be imposed. Range for drug count becomes 240 - ? (No explanation for what you add to 120 months to get a total sentence of life)
Total sentence range: 444 - 525		Total sentence range: 360 months - life

Note: If the defendant is in criminal history category II, his total sentence range is 480 - life (+ 120), 10 years higher on both ends than the career offender.

The Commission's own application notes present another example where this anomaly is likely to occur. In note 2(c)(iii), the Commission explains guideline application if the defendant is convicted of a "10 years to life" drug conspiracy and two § 924(c) counts. The note indicates that the appropriate offense level is 42. This would be consistent with a defendant who was responsible for large quantities of drugs (level 38 in the drug quantity table) and played a leadership role (+4). The application note states that the section 924(c) counts add a minimum consecutive sentence of 30 years. If the judge wanted to impose a total sentence of 480 months, the note explains, he would impose 120 months on the drug count, and add 360 months (30 years) for the two § 924(c) counts. But if this defendant were not a career offender, level 42 would require a sentence of 360 - life on the drug count, even if the defendant had no criminal history. The 360 months for the § 924(c) counts would be made consecutive to the drug sentence. The non-career offender would therefore get an extra 20 years.

3. Possible Solution

One possible solution to avoid the anomaly would be to create a schedule of additional consecutive time (beyond the minimum) for someone who is a career offender with a section 924(c) conviction rather than a default offense level for § 924(c) career offenders (e.g., the proposed offense level of 37). The guideline could require that for those career offenders convicted of violating section 924(c), the sentence would be computed as otherwise applicable with a specific number of years added on for the 924(c) violation (the mandatory consecutive portion). The add-on could be the same for every career offender, or it could vary depending on

certain offense or offender characteristics. This would ensure that every career offender receives a higher sentence than if he were not a career offender.

We hope to work with the Commission over the coming weeks to explore this and other options. We believe some solution can be developed that will meet both congressional goals and the need for easily applied sentencing guidelines while at the same time avoiding anomalies like those outlined above.

PROPOSED AMENDMENT 4 - EXPANSION OF OFFICIAL VICTIM ENHANCEMENT

This amendment would address a recent Third Circuit decision in United States v. Walker, 202 F.3d 181 (2000), which has raised serious concerns within the Bureau of Prisons (BOP). In that decision, the court held that an official victim enhancement under §3A1.2(b) was not warranted where a prison inmate attacked his work supervisor (a food service department employee) within the prison. The court found that the work supervisor was not a "corrections officer" within the meaning of that provision.

We support the published amendment which would broaden the criteria of victims who, if assaulted during the course of another offense, would provide the basis for increasing the offense under §3A1.2. Currently the guidelines provide for a three-level increase only if the victim is a law enforcement officer or corrections officer. The proposed amendment is necessary, we believe, to reflect the staffing patterns and responsibilities of staff in Federal correctional institutions. The BOP relies on all prison staff, not just corrections officers, to supervise and control inmates. This amendment recognizes this fact.

We would recommend one minor modifications to the amendment. Neither the language of the guideline nor the Application Note makes clear that the enhancement applies when an assault occurs off prison property, for example, during a work assignment in the community while the inmate is supervised by a "prison employee," as defined by the Application Note. This could be remedied by amending the last portion of (b)(2) to read "in the custody or control of prison or other correctional facility authorities." However worded, the criteria for applying the enhancement, we believe, should be two-fold: the defendant was in official detention – whether pretrial or serving a term of imprisonment – and the defendant was under the personal control of detention authorities at the time of the assault.

The Commission further requested comment on whether the enhancement should be expanded, further than the proposed amendment, to include individuals who perform other functions in a prison or who assist law enforcement in the performance of their duties. We believe further expansion to include these individuals – even if those persons who do not supervise or have regular contact with or supervise prisoners – would be appropriate. Any assault in a prison setting threatens prison security and affects the prison's ability to maintain order. In addition, we believe it would be consistent with the principle underlying the guideline enhancement to include civilians assisting law enforcement within the scope of the guideline.

Assaulting persons who are assisting police poses an additional threat to public order that warrants such an enhancement.

PROPOSED AMENDMENT 5 - ACCEPTANCE OF RESPONSIBILITY

As we indicated in our letter to the Commission last year, many prosecutors have commented on the need for amendment of the guideline on acceptance of responsibility. In particular, the acceptance guideline, we believe, should contain stronger incentives for early guilty pleas that would permit the courts and the government to allocate their resources more efficiently. We believe the proposed amendment would do just that, and we support it.

The current acceptance of responsibility guideline allows for reduction in sentence by one level (in addition to the two for acceptance of responsibility generally) either for the timely provision of complete information to the government concerning the offender's involvement in the offense (subsection (b)(1)) or for the timely notification of authorities of an intention to enter a guilty plea (subsection (b)(2)). Notably, subsection (b)(2) of the guideline specifically expresses the goal of permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently. However, this goal is undermined by the alternative basis for reduction provided by subsection (b)(1). Under it, an offender who makes a timely disclosure but nevertheless waits until the eve of trial to plead guilty may receive this third level of reduction, even if such an offender has caused the government and the courts to devote resources to preparing the case for trial. Numerous prosecutors report encountering situations of this sort.

The proposed change is appropriate for two reasons: one, the reduction in the guideline range provided by the two-level decrease pursuant to subsection (a) we believe typically already accounts for a defendant informing the government of the details of his offense conduct. Two, restricting the additional adjustment is appropriate because a timely guilty plea optimizes the conservation of judicial and prosecutorial resources. There is no benefit from timely disclosure of the defendant's involvement in the offense that merits the additional adjustment when nevertheless the court must continue to have hearings and conferences and the government must continue to prepare for trial. Furthermore, the amendment would add a level of clarity to what the defendant must do to earn the additional adjustment that, ultimately, should benefit the plea negotiation process.

The amendment also resolves a circuit conflict over whether a reduction for acceptance of responsibility may be denied when the defendant commits a new offense unrelated to the offense of conviction. The proposed amendment, reflecting the position taken by a majority of courts, indicates that a defendant "ordinarily is not entitled" to the reduction. We agree with this view and support the amendment. We also think the bracketed application note, which proposes an exception for an "extraordinary case," should be deleted as superfluous, because the proposed amendment explicitly speaks only to the "ordinar[y]" case. Frankly, we have difficulty conceiving of any "extraordinary case" that would warrant the reduction despite the commission

of another offense while pending trial or sentencing on the instant offense. The commission of an additional crime casts doubt on the sincerity of contrition for another offense.

PROPOSED AMENDMENT 6 - CONSENT CALENDAR AMENDMENTS

We appreciate the Commission's ongoing efforts to address minor and technical issues in a timely and appropriate way. We support proposed amendment 6 – the Consent Calendar Amendments – but would recommend a minor modification in part 15 of the amendment.

Part 15 proposes several changes to §2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct) that further address the portion of the Victims of Trafficking and Violence Protection Act of 2000 that created the new offense at 18 U.S.C. § 1591, Sex Trafficking of Children, or by Force, Fraud or Coercion. In March 2001, the Commission passed an amendment that: (1) referenced 18 U.S.C. § 1591 offenses to §§2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct) and 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material); and (2) included an encouraged upward departure in §2G1.1 in cases where the defendant was convicted under 18 U.S.C. § 1591 and the offense involved a victim who had not attained the age of 14 years or the offense involved more than 10 victims.

Part 15 proposes three changes: (1) it broadens the conduct covered by the guideline to all commercial sex acts by substituting "commercial sex act" for the guideline's current reference to "prostitution"; (2) it addresses the increased punishment provided in section 1591 for offenses effected by "force, fraud, or coercion" by expanding Specific Offense Characteristic (b)(1) to include "fraud" in the characteristics of "physical force or coercion" that require a 4 level increase; and (3) it deletes the encouraged upward departure note because the note encourages a departure for conduct covered, at least in part, by the subsection (b)(2) (which requires a 4 level increase if the victim had not attained the age of 12 years and a 2 level increase if the victim had attained the age of 12 years, but had not attained the age of 16 years).

We support this amendment. However, we believe that the Commission may want to explore further amending this area of the guidelines in the future to insure that the guidelines reflect the seriousness of trafficking offenses as demonstrated by the congressional findings surrounding the Act and by the statute's maximum sentence of life imprisonment. For purposes of the current proposal and amendment year, we believe that section 2G1.1 should retain some encouraged upward departure for certain violations of 18 U.S.C. § 1591.

Section 2G1.1 now covers offenses committed in violation of 18 U.S.C. §§ 1591, 2421, 2422, 2423(a) and 8 U.S.C. § 1328. Three of these statutes specifically refer to crimes against children. Section 2422(b) proscribes the enticement of a child under 18 years to engage in illegal sexual activity, and carries a maximum penalty of 15 years' imprisonment. Section 2423(a) proscribes the transportation of a child under 18 years in interstate or foreign commerce with the intent that the child engage in illegal sexual activity, and also carries a 15-year maximum penalty.

Sex trafficking of children, in violation of 18 U.S.C. § 1591, carries a maximum term of life imprisonment, if the person transported had not attained the age of 14 years, and a maximum term of 20 years' imprisonment, if the child had attained the age of 14 years, but had not attained the age of 18 years. The statute also carries a maximum of life imprisonment if the offense was effected by force, fraud, or coercion, whether or not the victim was a minor. See 18 U.S.C. § 1591(b)(1). The term "coercion" can mean threats of serious harm to or physical restraint against any person, whether or not that person is the victim of trafficking. 18 U.S.C. § 1591(c)(2).

The congressional findings supporting the Victims of Trafficking and Violence Protection Act of 2000, P.L. 106-386 (October 28, 2000), indicate that trafficking should be considered tantamount to forcible rape. According to the findings, "[t]raffickers often make representations to their victims that physical harm may occur to them or others should the victim escape or attempt to escape. Such representations can have the same coercive effects on victims as direct threats to inflict such harm." 22 U.S.C. § 7101(b)(7). In Congress's view, "[t]rafficking includes all the elements of forcible rape when it involves the involuntary participation of another person in sex acts by means of fraud, force, or coercion." 22 U.S.C. § 7107(b)(9). In addition, Congress believed that the current penalties did not reflect the seriousness of the crime. Congress found that, "[i]n the United States, the seriousness of this crime and its components is not reflected in the current sentencing guidelines, resulting in weak penalties for convicted traffickers." 22 U.S.C. § 7101(b)(15).

We believe there may be circumstances where section 2G1.1 does not reflect the seriousness of trafficking offenses. We think the Commission should review this matter further and explore further amending the guidelines to reflect the seriousness of trafficking offenses. For purposes of the current proposal, we do not think completely deleting the existing upward departure provision is warranted. We recognize the need to amend the existing departure provision but believe the guideline should retain some upward departure language, such as: "an upward departure may be warranted if the defendant received an enhancement under subsection (b)(2) but that enhancement does not adequately reflect the seriousness of the defendant's promotion of a commercial sex act by a person who had not attained the age of 18 years." We hope to work with the Commission to fashion language that adequately reflects the seriousness of trafficking offenses over the coming weeks.

Conclusion

We appreciate the opportunity to provide the Commission with our views, comments, and suggestions. We look forward to working further with you and the other Commissioners to refine the Sentencing Guidelines.

Sincerely,

John P. Elwood
Counselor to the
Assistant Attorney General

— Career Offender 4A1.3
— Official Victim + Interpreting
— Cultural Heritage
— Foreign Corrupt Practices Act
BJB 8-16

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February 4, 2002

VIA HAND DELIVERY
The Honorable Diana E. Murphy
Chair, United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

RE: Comment on November 27, 2001 proposed amendments and issues for comment

Dear Judge Murphy:

I am writing to provide the Commission with the PAG's position on the proposed amendments and issues for comment published in the Federal Register on November 27, 2001. We are submitting comments relating to the proposed amendments regarding acceptance of responsibility (proposed amendment #5); career offenders (proposed amendment #3); official victims (proposed amendment #4); cultural heritage resources (proposed amendment #1); and the Foreign Corrupt Practices Act (proposed amendment #2). We look forward to appearing before the Commission later this month.

Acceptance of Responsibility (proposed amendment #5)[1]

The PAG opposes the proposed revision to U.S.S.G. § 3E1.1 that would limit judges' discretion to award a third offense-level reduction for acceptance of responsibility. The PAG believes the Commission should not so revise Chapter 3 at this time.

Denying judges the discretion to award defendants a third offense level reduction in select cases would add unnecessary further rigidity to the guidelines. Moreover, this unwelcome change would be in service of solving a problem that has been described only anecdotally. We are not aware of any statistical analysis or detailed study that

[1] This section was drafted primarily by PAG member Eugene Illovsky.

supports the proposition that judges have too much discretion in awarding the third point for acceptance of responsibility.

Under U.S.S.G. §3E1.1, certain defendants may have a third level deducted from their offense level if they have: (1) "timely provid[ed] complete information to the government" about their own involvement in the offense, §3E1.1(b)(1); or (2) "timely notif[ied] authorities of [their] intention to plead guilty," §3E1.1(b)(2). The proposed revision would eliminate subsection (b)(1) and make concomitant changes to the Commentary.

The Federal Guidelines now allow a judge the discretion to give a defendant the third level reduction, even if she pleads guilty close to trial, depending on the facts and circumstances of the particular case, if she has otherwise satisfied subsection (b)(1). This rule seems to recognize the unfairness in penalizing a defendant who has good reasons explaining the delay in pleading guilty and to embody the well-settled proposition that judges stand in the best position to evaluate those reasons. The proposed revision would eliminate that discretion and require the sentencing court to deny defendants the third level reduction, regardless of what delayed their guilty plea and despite their being forthcoming about their involvement.

The impetus for the proposed revision appears to be a concern mentioned in one paragraph of the Justice Department's January 2, 2001 letter report to the Commission. In that paragraph, DOJ's Criminal Division complains about the guideline because in some undefined number of cases "an offender who makes a timely disclosure [of information about her involvement in the offense] but, nevertheless, waits until the eve of trial to plead guilty may receive this third level of reduction in the offense level." This set of circumstances causes prosecutors concern because it makes it supposedly "difficult" to achieve U.S.S.G. § 3E1.1(b)(2)'s express goal of "permitting the government to avoid preparing for trial." Thus, DOJ insists that removing judicial discretion to give the extra one level reduction would create "an incentive for early guilty pleas that permit the government to avoid preparing for trial."

The PAG views the proposed revision as a (suboptimal) solution in search of a problem. DOJ's anecdotal statement about its resources being sapped by defendants who strategically delay their guilty pleas raises many questions. First, how widespread is the purported problem? How many cases are there nationally in which a defendant "waits until the eve of trial" to plead guilty? Second, of those cases, how many late guilty pleas are the defendant's fault and in how many is the lateness attributable to the government (or to no one in particular)? It would be unfair to penalize defendants whose guilty plea decision is delayed because they cannot get timely discovery or other information from the government (which is probably not an uncommon occurrence).

Third, what is the real resource drain associated with the class of "eve of trial" cases caused by defendants -- and is it enough of a cost to justify the curtailing of a sentencing judge's discretion? As previously noted, we are unaware of any statistical analysis supporting the position taken by the proponents of this amendment.

We note that DOJ's description of the problem elicits other questions. What, exactly, is the "eve of trial"? How much more incentive to plead guilty early do the guidelines really need? And, do prosecutors already control incentives in a way that makes any added incentive undesirable? For instance, during plea discussions in many cases, the government sets a deadline by which more favorable offers will be withdrawn. So, negotiating defendants who wait typically get a worse deal than those who decide to plead earlier. Often, the government will not recommend, and may even oppose, the third-level reduction for those who make their deals later. Given that the government can control plea incentives in this fashion, is it clear that the guidelines should be changed to add more? What systemic benefit will be had by removing the judges' discretion to give the reduction in appropriate cases?

To put it more pointedly, defendants in the federal criminal justice system already face myriad pressures to plead guilty as soon as possible. These pressures are almost entirely exerted by the government, in conjunction with its utilization of both charge-bargaining and the provisions of U.S.S.G. § 5K1.1. *See, e.g.*,Sterngold, James, New York Times, Court May Narrow Disparity in Way Illegal Re-entry is Handled, Sec. A, p. 6 (Apr. 1, 2000) (discussing disparities between handling of illegal re-entry cases by United States Attorneys' offices in San Diego and Los Angeles). Defendants also face multiple pressures to waive their rights, including the right against self-incrimination (through proffers) and the right to move for downward adjustments/departures and to receive exculpatory information (through plea agreements). *See, e.g. United States v. Ruiz*, 241 F.3d 1157 (9th Cir. 2001), *cert. granted*, No. 01-595, 2002 WL 10621 (U.S. Jan. 4, 2002). The government often applies these pressures not just in the name of justice or truth-seeking, or of alleviating court congestion, but to reduce its workload. This amendment only increases these pressures.

Under the proposed amendment, a defendant with a legitimate issue that required a motion to suppress would face a Hobson's choice: either challenge unconstitutionally seized evidence, or forego the challenge to lock in the third acceptance point and a reduced sentencing range. This is an exceedingly difficult decision for a defendant to make, and for defense counsel to provide informed and effective counsel. Placing more power in the government's hands could render it almost impossible, in certain cases with close suppression issues, for defense counsel to provide effective assistance.

This should be a concern for all in the criminal justice system. A reduction in the number of suppression hearings and challenges to the seizures of evidence should be sought only if doing so serves the ends of justice. The beneficial effects of such proceedings – to expose questionable law enforcement actions to the scrutiny of the Court – are far too important to be sacrificed at the altar of prosecutorial efficiency. Without further explanation, study or a satisfactory rationale, it seems that the proposed amendment serves only the interests of the government, not the interests of justice.

In sum, the PAG believes it would be unwise to tamper with this exceptionally important guideline simply to respond to the Department of Justice's passing, anecdotal claim that "eve of trial" guilty pleas are causing a substantial misallocation of government resources. A more compelling reason is required where the price for such a revision is a reduction of judicial discretion and the addition of an unwelcome rigidity to the guidelines.

The PAG believes U.S.S.G. § 3E1.1(b)(1) is working satisfactorily and should not be deleted. However, if the Commission wishes to pursue DOJ's concern, the PAG proposes that a statistical and economic analysis of the problem first be conducted. A working group could be formed to study and prepare a report (similar to the comprehensive 1991 Acceptance of Responsibility Working Group Report). Once the scope -- and even existence -- of the problem mentioned by DOJ is confirmed, then the proposed revision can be properly considered and weighed against its potential impact on defendants and courts.

We also oppose the second part of the proposed amendment that seeks to resolve a circuit split regarding whether a defendant must be denied the downward adjustment for acceptance of responsibility when he or she engages in any new criminal conduct before sentencing. We join the Defenders position in opposing this proposal. Sentencing judges are best equipped to determine whether in a particular case new criminal conduct justifies depriving a defendant of credit for acceptance of responsibility.

Career Offender (proposed amendment # 3)[2]

I. Introduction

Proposed Amendment 3 to the United States Sentencing Guidelines ("Amendment 3")[3] would work an unreasoned, uncalled for change to the current rules under U.S.S.G. §4B1.1 (career offender) for classifying 18 U.S.C. § 924(c) or § 929(a) convictions, allowing them to count as the present (or third) conviction needed to make a defendant a career offender for sentencing purposes. The Practitioners Advisory group opposes Amendment 3.

The only proffered justification for the proposed Amendment – to comply with the statutory command in 28 U.S.C. § 994(h) as construed in *United States v. LaBonte*, 520 U.S.C. 751 (1997) – is flawed. Neither § 994(h) or *LaBonte* require the amendment.

Additionally, we are aware of no outcry regarding any problem that Amendment 3 is needed to correct. Nothing has changed since the passage of Amendment 600 (effective November 1, 2000), in which the Commission decided "that such offenses do not qualify as a crime of violence or controlled substance offense for Career Offender purposes, except as a prior conviction." Indeed, if a court ever felt that the present treatment of § 924(c)/929(a) convictions is problem in a particular case, it has the ability to depart upward in the appropriate circumstances.

Finally, Amendment 3 is, at its core, an Amendment grounded in the criminal history section of the Guidelines -- it deals with the interaction between a current offense and past convictions and how they mix (and how a certain group of defendants should be treated) at sentencing. In light of the ongoing recidivism study by the Commission staff which is to be completed in fall 2002, the amendment is, at best, premature. If the Commission does not reject the Amendment, it should at least delay consideration until the 2003 or 2004 amendment cycles so that the Amendment can be considered in light of the results of the final recidivism study, comments on that study, and congressional action (if any) on this issue.

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2 This section was drafted by Timothy Hoover

3 66 Fed. Reg. 59,330, 59, 334, 2001 WL 1487654 (2001).

II. The Backdrop: the current treatment of 18 U.S.C. § 924(c) or § 929(a) convictions for Career Offender purposes

Under U.S.S.G. §4B1.1 (2001), a defendant is classified as a career offender if, *inter alia*, "the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense" and "the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense."

Presently, a prior conviction for violating 18 U.S.C. § 924(c) or § 929(a) is a "prior felony conviction" for purposes of the career offender guideline, "if the prior offense of conviction established that the underlying offense was a 'crime of violence' or 'controlled substance offense.'" U.S.S.G. §4B1.2, comment. (n.1).

However, if the only current "offense of conviction is for violating 18 U.S.C. § 924(c) or § 929(a)," the current conviction will not count as a crime of violence or controlled substance offense, and the defendant will not be sentenced as a career offender. U.S.S.G. §4B1.2 comment. (n.3).

Where a defendant is convicted only of violating 18 U.S.C. § 924(c) or § 929(a), but has two prior convictions for crimes of violence/controlled substance offenses, courts can depart upward per U.S.S.G. §2K2.4 comment. (n.1), which provides, in pertinent part:

> A departure may be warranted, for example, to reflect the seriousness of the defendant's criminal history, particularly in a case in which the defendant is convicted of an 18 U.S.C. § 924(c) or § 929(a) offense and has at least two prior felony convictions for a crime of violence or a controlled substance offense that would have resulted in application of §4B1.1 (Career Offender) if that guideline applied to these offenses. *See* Application Note 3.

As the introductory comments to Amendment 3 reflect, Amendment 3 would "reverse[] the decision made by the Commission in Amendment 600 (effective November 1, 2000) that such offenses [present convictions for 18 U.S.C. § 924(c) or § 929(a) only] do not qualify as a crime of violence or controlled substance offense for Career Offenders purposes, except as a prior conviction." Amendment 3 (introductory comments).

III. The proposal: Amendment 3 has *two* key components

A clear understanding of what exactly Amendment 3 does is essential to understanding why it should not be enacted. Amendment 3 does two things.

A. First -- and key -- change: reclassification

First, it changes the treatment of defendants who are convicted of violating only 18 U.S.C. § 924(c) or § 929(a). The amendment revises the current Guidelines such that current convictions under 18 U.S.C. § 924(c) or § 929(a) will be treated as "a felony that is either a crime of violence or a controlled substance offense." Thus, for these defendants who have two prior felony convictions for crimes of violence or controlled substances convictions, they will be treated as Career Offenders and subject to the enhanced sentencing provisions in the Career Offender Guidelines. This first major change may be referred to as its *reclassification* of current 18 U.S.C. § 924(c) or § 929(a) convictions for career offender purposes.

B. Second change: a litany of rules

Having reclassified these convictions, a litany of special rules are set out to determine the sentence for this newly minted category of career offenders as a result of 18 U.S.C. § 924(c) or § 929(a) convictions. The key provision of these special rules is that for these career offenders, under the reconstituted U.S.S.G. §4B1.1(b)(1), §4B1.1(c), the offense level will begin at 37 and the criminal history category will be VI, providing for a sentencing range of 360 months-life.

IV. The PAG position: amendment 3 should be rejected

Amendment 3 is a solution in search of a problem. It is not based on any empirical study or call for action by Congress or any of the players in the federal criminal justice system, and the only identifiable reasoning behind it is flawed. For these reasons, Amendment 3 should be rejected.

A. Justification flawed

The only justification that PAG could locate for Amendment 3 is found in the introductory comments to the proposed amendments, which provide that:

> Some have expressed doubt about whether that decision [in Amendment 600] complies with the statutory command in 28 U.S.C. § 994(h), as construed by the United States Supreme

Court in *United States v. La[B]onte*, 520 U.S. 751 (1997).

Amendment 3. Neither 28 U.S.C. § 994(h), nor its construction in *LaBonte*, require or support Amendment 3. The introductory comments to Amendment 3 do not cite any statistics, court decisions or particular court cases to support the amendment.

28 U.S.C. § 994(h) is the statutory framework for the Career Offender guidelines, and provides, in pertinent part:

> (h) The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years or older and–
>
> (1) has been convicted of a felony that is–
>
> (A) a crime of violence; or
>
> (B) . . . [a specifically defined controlled substance offense]; and
>
> (2) has been previously been convicted of two or more prior felonies, each of which is–
>
> (A) a crime of violence; or
>
> (B) . . . [a specifically defined controlled substance offense].

28 U.S.C. § 994(h).

At issue in *LaBonte* was the meaning of "maximum term authorized" in 28 U.S.C. § 994(h) and whether the Commission's interpretation of this term was inconsistent with the plain language of 28 U.S.C. § 994(h). In Amendment 506, the Commission interpreted the term to mean the maximum term available without statutory sentencing enhancements (such as those found in 21 U.S.C. § 841(b)(1)(A), (B)). *LaBonte*, 520 U.S. at 754-55. Resolving a circuit split, the Supreme Court held that the Sentencing Commission exceeded its authority in promulgating Amendment 506, because 28 U.S.C. § 994(h) is unambiguous, and "maximum term authorized" refers to the maximum term "available once all relevant statutory sentencing enhancements are

taken into account." *LaBonte*, 520 U.S. at 757 n.3, 762.

LaBonte dealt solely with this discreet issue of statutory interpretation related to going about determining the sentences of career offenders. In other words, once persons are determined to be career offenders, how do we treat them? *LaBonte* does not in any way touch on the initial question of what offenses are or are not considered crimes of violence or drug offenses for career offender purposes. The issue was not before the *LaBonte* court; indeed, there was no dispute that the three defendants whose cases were consolidated in *LaBonte* were all career offenders.

The seminal change in Amendment 3 is the first of its two major changes -- the reclassification of current 18 U.S.C. § 924(c) or § 929(a) offenses as crimes of violence/controlled substances offenses such that those defendants would now be career offenders. This reclassification has nothing to with *LaBonte* and is in no way required by *LaBonte*.

LaBonte does not direct the Commission in any manner regarding how to determine what offenses are crimes of violence or controlled substance offenses. While 28 U.S.C. § 994(h) defines controlled substance offenses, it does not in any manner define "crime of violence."

PAG believes that the total disconnect between *LaBonte*/28 U.S.C. § 994(h) and the heart of Amendment 3 is of major significance in evaluating Amendment 3, because this is the *only* posited basis for the enactment of Amendment 3, so far as we can tell. No other basis supporting Amendment 3 has been proposed.[4] If Amendment 3 is to stand or fall on what is required by *LaBonte*, then it *must* fall, because the drastic redefinition of 18 U.S.C. § 924(c) or § 929(a) offenses neither flows from or is suggested by *LaBonte*. Without the need for reclassification, the myriad new rules (the

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[4] The available statistics – not relied on in support of Amendment 3 as published – in fact indicate *that the amendment is not necessary*. With 979 defendants convicted of drug trafficking, and 50 convicted of firearms offenses being sentenced as Career Offenders in fiscal year 2000 (and constituting *over 75% of all defendants who received Career Offender status*), it appears that the current Career Offender classifications and rules are satisfactorily achieving lengthy sentences for a wide group of recidivist gun and drug offenders. United States Sentencing Commission, *2000 Sourcebook of Federal Sentencing Statistics*, Table 22 (2000); *see also id.* Table 14. Nevertheless, any analysis of the statistics ultimately is related to the rules that are put into place once an offense is classified as a crime of violence or drug trafficking offense – not whether it should be so classified in the first place.

second part of Amendment 3) are rendered unnecessary.

B. No reason for change

In opposing Amendment 3, PAG also finds it significant that there has not been any call, so far as well can tell, for the changes made in the amendment.[5] We could locate no court opinion, position paper or other monograph lamenting the current treatment of these convictions or calling for the changes outlined in Amendment 3.[6] There has been no congressional directive or legislation requiring such a change.

That there is no call for change should not *necessarily* be controlling, but here we believe it is especially significant given that the Commission's last review of the treatment of current 18 U.S.C. § 924(c) or § 929(a) convictions *was just over one year ago*, when it passed Amendment 600. This is an extremely brief period of time for any significant problematic trend to develop; as would be expected, none has.

Conversely, if there was a significant problem or objection to Amendment 600 that was missed during that amendment cycle, one would expect an immediate, forceful outcry. Again, none has occurred.

The treatment of current 18 U.S.C. § 924(c) or § 929(a) convictions is not viewed as a significant problem by the professionals in the federal criminal justice system or Congress.

C. If not rejected, then Amendment 3 should at least be held for consideration in a future amendment cycle in light of the recidivism study

The members of the PAG, among others, anxiously await the completion of the Commission's ongoing recidivism study. The format of the study, the data relied on, and its conclusions will guide not only future amendment proposals, but will shape the

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5 *See, e.g.*, Letter from Ellen S. Moore, Chair, Probation Officers Advisory Group, to The Honorable Diane Murphy regarding issues that POAG suggests should be clarified or addressed by the Commission (Aug. 5, 2001) (available at http://www.ussc.gov/POAG/position_jun.PDF) (last accessed January 29, 2002) (no mention of treatment of current 18 U.S.C. § 924(c) or § 929(a) convictions for career offender purposes).

6 For example, performing the terms and connectors query "Amendment 600" in the Westlaw database ALLFEDS on January 30, 2002 returns no documents.

debate regarding those amendments and, possibly, the entire structure of Chapter Four of the Guidelines. It is PAG's understanding that consideration of the structure of Chapter Four and the general rules of scoring prior convictions, found at U.S.S.G. §§4A.1.1, 4A1.2 and 4A1.3, has been deferred until after the study is finalized.

Amendment 3 is fundamentally a provision that deals with criminal history issues. If it is not rejected by the Commission, it should at least be held for consideration after the recidivism study is received. Given the lack of an identifiable problem that Amendment 3 is designed to address, and given that Amendment 3 was proposed just over one year after the effective date of Amendment 600, cautious, careful consideration of Amendment 3 could only help to identify whether there is any actual problem that would be served by the proposal in Amendment 3. Consideration of this amendment with at least some information as to why a change is needed could only serve to ensure that this proposal receives the vetting it deserves.

Without any particular problem identified, and without an informed backdrop to the amendment only one year after Amendment 600, if Amendment 3 is passed now the Commission would be "flying blind" – making a change the need for which is uncertain, the fairness of which is unknown, and the effects of which, while certainly harsh, would be unjustified.

V. Conclusion

Without question, the passage of Amendment 3 would have a significant effect on sentences for a small, limited class of persons with two prior qualifying felonies who are convicted only of 18 U.S.C. § 924(c) or § 929(a).[7] But while this would be a result of passing Amendment 3, it is not a reason to pass it, at least in the absence of any evidence of a problem with the current Guidelines treatment of such offenders. The effect is a result, not a justification.

Defendants now facing, for example, a 60 month (five year) or 120 month (ten year)[8] sentence under the current scheme would, for example, suddenly be looking at

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[7] Of course, situations where the defendant with two prior crime of violence/controlled substance convictions somehow manages to escape conviction on substantive drug trafficking counts, but is nonetheless convicted of 18 U.S.C. § 924(c), appear to be rare.

[8] Notably, the hands of the district judge *are not* tied in sentencing such a defendant who would otherwise receive 60 or 120 months or other statutory sentence. Significant upward departures are available for the exceptional case and have been utilized by district judges where

anything between 30 years and life. If the changes proposed in Amendment 3 are ever to be made, they should be carefully considered and supported. To do so now, with the discredited claim that *LaBonte* requires such a change, would introduce a level of arbitrariness and unfairness into the Guidelines that the Commission has continually strived to excise from federal sentencing.

PAG recommends that the Commission reject Amendment 3. In the alternative, consideration of Amendment 3 should be deferred to a future amendment cycle.

Official Victim (proposed amendment # 4)

The PAG takes no position on whether or not the enhancement should be expanded to cover prison employees as well as corrections officers. But, the PAG does oppose broadening the scope of the adjustment beyond prison employees as suggested in the issue for comment. We see no justification for including private attorneys, for example, within the definition of an "official victim."

Cultural Heritage Resources (proposed amendment # 1)[9]

Amendment 1 proposes to add to Chapter 2, Part A, a new guideline, § 2B1.5, to cover a variety of offenses involving the theft of, damage to, destruction of, or elicit trafficking in cultural heritage resources, including national memorials, archaeological resources, national parks, and national historic landmarks. We agree with the Sentencing Commission that cultural heritage resources crime is fundamentally different than the general property crimes covered in the guidelines. Moreover, we do not oppose the creation of a new guideline to address the different concerns created by this type of crime.

In a prophetic speech to the Governor of the then Washington Territory, Chief Seattle acknowledged the strong connection between Native American people and their traditional homeland. Even if "the last red man has vanished from this earth," the places dear to them will be "throng[ed] with the returning spirits that once thronged them, and that still love these places." Thus, no one disputes that these sites should be protected.

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appropriate. U.S.S.G. § 2K2.4 comment. (n.1).

[9] This section was drafted by John Butcher.

The Sentencing Commission has sought input on the formation Ad Hoc Committee on Native American Issues. The Federal Public Defender and Community Defender Organizations, joined with the Practitioners Advisory Group, has commented in favor in forming such an Ad Hoc Committee. The Sentencing Commission should wait to enact this amendment until it has a chance to have input from the Ad Hoc Committee on Native American issues. The issue of the theft and destruction of cultural heritage sites is of capital concern to many Native American tribes and organizations. They have firsthand experience with the actual problems that these crimes create. Thus, they are in a superior place to provide useful commentary to the commission.

The Ad Hoc Committee could address other harms that may not be apparent to the commission or covered in § 2B1.5. For example, the theft of a Zuni mask may not have a value exceeding $2,000, but would have a greater emotional impact upon the living members of the tribe than the theft of more valuable artifacts that may be more valuable but have no connection to living individuals. Likewise, an offender who intentionally violates a sacred tribal site that may be prohibited to nontribal members, could receive a significantly lesser sentence than some individual who impulsively picked up artifacts at a national park. The proposed § 2B1.5 seems to contain a bias to the interest of the Department of Interior that may not be shared by the Native American community.

If the Sentencing Commission goes forward with the enactment of § 2B1.5, without seeking input from the Native American Ad Hoc Committee, it should not adopt § 2B1.5(b)(4)(B), the enhancement for a pattern of similar violations. A civil or administrative adjudication is an unreliable indicator for sentencing purposes. An offender charged with a similar administrative adjudication is not entitled to an attorney. Moreover, usually such adjudications are made without the benefit of a jury and initially may be made by an administrative law judge. Thus, enhancement disadvantages the poor, who do not have the resources to contest these adjudications. The proposed § 2B1.5(b)(4)(B) would have the same impact as a two level increase of the offenders' criminal history category. However, civil and administrative adjudications are more analogous to those types of findings that are not counted for the purposes of criminal history under § 4A1.2. It would be more appropriate for the sentencing court to be able to look at such factors to determine whether the case is outside the heartland and whether an upward departure is appropriate. However, the guidelines should not assume that prior adjudications should have an equivalent impact on an offender's sentence as five criminal history points.

Application Note 7 encourages an upward departure in cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. Application Note 7 gives the example that an upward departure may be

warranted if, in addition to cultural heritage resources, the offense involved the theft of or damage to items that are not cultural heritage resources. Once again, reflecting on the Department of Interior bias, the example given is the theft of lawnmowers and other administrative property in addition to historical grave markers from a national cemetery. The Sentencing Commission should not provide enhancement if the offense also involved the theft of, damage to or the destruction of items that are not cultural heritage items. Under the example in Application Note 7, it would appear that such destruction would be its own offense and thus would be already covered in the guidelines. To the extent that such a destruction would not be an independent criminal offense, and counted under the guideline the extent of the upward departure should not exceed the corresponding number of levels from the loss table in § 2B1.1. As noted by the Sentencing Commission, the greater loss would be that of the cultural heritage, not the replaceable items which are similar to normal losses in burglary or theft.

It is doubtful that Application Note 2 would underestimate the actual value of a lost object. If anything, they will overstate the harm. For example, Application Note 2 (C)(iii) could unduly increase the punishment of an offender for a minor or insignificant artifacts. Also it could raise concerns of religious implications. Some cultures may require elaborate reburial ceremonies to be performed while others may not. Thus, religious practices should not drive the sentencing guidelines under the claim that they are necessary for the "appropriate reburial of" artifacts. For example, the Sandia Pueblo does not have any reburial ceremonies where other tribes do.

Many cases charged in federal court are not commercial in nature. They are crimes of opportunity by curious, hikers or hunters. Often the cases involve artifacts of limited significance or commercial value. Application Note 2(c)(iii) will greatly overstate the harm in this type of case.

Application Note 7 should provide for an upward departure if the harm caused is not adequately reflected by the calculation under Application Note 2. Similarly, Application Note 7 should also provide for a downward departure if Application Note 2 overestimates the cultural or actual harm caused by the criminal conduct. What may be appropriate as an award of restitution might not be appropriate for punishment under the sentencing guidelines. As noted, Application Note 2(C)(iii) may result in a calculation of loss that greatly overstates the harm or the historical significance of the artifact taken.

Enhancement for the use of destructive devices may be appropriate when such use poses a risk to human life. Certainly, the damage caused by the use of a destructive device should be considered part of the loss contemplated in Application Note 2, and thus, attributable to the defendant under the guidelines. A sentencing court

should certainly be able to depart upwards if the use of a destructive device is not adequately taken into account under the guidelines. For example, the use of a destructive device in a marine sanctuary and its resulting damage may be already appropriately counted under the guidelines, where the use of a destructive device in a museum would not be. Also, the use of a destructive device often would result in additional charges that would make it unnecessary for an enhancement or departure to be applied in the cultural heritage conviction.

It is appropriate for the Sentencing Commission to have an increase if a dangerous weapon was brandished during the course of the commission of this offense. However, § 2B1.5(b)(5)(B) should only apply if the firearm was possessed in direct aid of the offense. For example, a significant number of historical sites are in rugged country that are infested with rattlesnakes and other dangerous animals. Additionally, some sites are also places where hunters legitimately ply their sport. Thus, a hitchhiker with a "snake gun" or a hunter who comes across a site and impulsively takes an artifact should not be subject to the enhancement under § 2B1.5(b)(5)(B). Thus, the guidelines should differentiate between a hunter who comes across a site and takes an artifact and someone who goes into a museum or national memorial with a firearm.

For the above reasons, we would request that the proposed § 2B1.5 be tabled until it has a chance for comment by an Ad Hoc Committee on Native American Issues. We believe that such comment would be instructive and would allow the Commission to write a more responsive guideline. While the concerns of the Department of Interior may address some of the harms of the crime, we feel input of the true victims, the Native American tribes, would be more instructive. Additionally, Application Note 2(C)(iii) should be omitted as a means of calculating value as part of the guideline determination under § 2B1.5(b)(1). While this calculation may be appropriate for issues of restitution, it can lead to unwarranted disparities between the harm caused or the significance of the artifact taken and the sentence received by the defendant.

Foreign Corrupt Practices Act (proposed amendment # 2)[10]

Given the amorphous nature of the underlying criminal offense, the PAG is concerned about enacting any changes that will increase the potential sentences for individuals convicted of violating the Foreign Corrupt Practices Act

The proposed amendment of the Sentencing Guidelines for violations of the

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[10] This section was drafted by Preston Burton.

Foreign Corrupt Practices Act, 15 U.S.C. §§ 78 dd-1, 78 dd-2, and 78dd-3 would shift those offenses from U.S.S.G. § 2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery) to U.S.S.G. § 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right). Apparently this modification is fueled by the perception that the public corruption aspect of FCPA violations, though usually committed for commercial purposes from the perspective of the defendant, is the essence of the violation. Even so, the Commentary to amended Section 2B4.1 includes "public international organizations" as entities that, if involved in an otherwise commercial bribery scheme, trigger the application of the corruption guideline, Section 2C1.1, along with clearly governmental bribery schemes. Neither amended guideline defines "public international organizations," nor is it well-defined in the Foreign Corrupt Practices Act, see 15 U.S.C. §§ 78dd-1(f)(1)(B), 78dd-2(h)(2)(B), and 78dd-3(f)(2)(B), and it would appear to be a highly elastic term.

The proposed modification will increase the Base Offense Level for this controversial offense from level 8 to level 10. The Specific Offense Level provisions for both guidelines share the monetary tables from U.S.S.G. § 2B1.1. Compare U.S.S.G. § 2B4.1(b)(1) with U.S.S.G. § 2C1.1(b)(2). Additionally, the organizational fine provisions are identical. The public corruption guideline also includes an enhancement for multiple bribes (two-level enhancement) and an eight-level enhancement if the payment was made to influence an elected official or official holding a high-level position.

As a result, in most cases, the amended guideline will result in a significantly increased sentence for individuals found to have violated the FCPA. This is a troubling result because we are not aware of any statistical analysis or widely-held belief supporting the proposition that defendants convicted of this crime are presently being under-punished. Accordingly, we urge the Commission to move cautiously in making any revision that would increase the sentencing range for this group of offenders.

Conclusion

As always, we appreciate the opportunity to provide the Commission with our perspective on these important issues. Please do not hesitate to contact Jim or me if you have any questions or if the PAG can be of any further assistance.

Sincerely,

Barry Boss

cc: All Commissioners
Jim Felman, Esq.
Charles Tetzlaff, Esq.
Andy Purdy, Esq.
Timothy McGrath, Esq.

COMMENTS OF

THE NEW YORK COUNCIL OF DEFENSE LAWYERS

REGARDING PROPOSED NOVEMBER 27, 2001 AMENDMENTS TO

THE SENTENCING GUIDELINES

Respectfully submitted,

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Brian E. Maas, Chairman, Sentencing Guidelines Committee

February 4, 2002

COMMENTS OF THE NEW YORK COUNCIL OF DEFENSE LAWYERS REGARDING PROPOSED NOVEMBER 2001 AMENDMENTS TO THE SENTENCING GUIDELINES

Once again, we would like to thank the Sentencing Commission for the opportunity to present our views on the proposed amendments. The New York Council of Defense Lawyers ("NYCDL") is an organization comprised of more than 150 attorneys whose principal area of practice is the defense of criminal cases in federal court. Many of our members are former Assistant United States Attorneys, including previous chiefs of the Criminal Division in the Southern and Eastern Districts of New York. Our membership also includes attorneys from the Federal Defender Services offices in the Eastern and Southern Districts of New York.

Our members thus have gained familiarity with the Sentencing Guidelines both as prosecutors and as defense lawyers. In the pages that follow, we address those of the proposed amendments published in the Federal Registry on November 27, 2001 which are of interest to our organization.

The contributors to these comments, members of the NYCDL's Sentencing Guidelines Committee, are Brian Maas, Chairman and Jacqueline Wolff, Keith Krakaur, Nick DeFeis and Steven Kimelman.

I. Comments Regarding Proposed Amendment 5 to Eliminate Guideline Section 3E1.1(b)(1)

The Commission proposes an amendment to eliminate guideline Section 3E1.1(b)(1) which provides the high guideline range defendant who has qualified for the two point reduction for acceptance of responsibility with an additional reduction of one point if he assists the authorities with the investigation or prosecution of his own conduct. The elimination of this section would result in the one point reduction being available only to those defendants who agree to plead guilty at an early stage. The NYCDL objects to the elimination of Section 3E1.1(b)(1).

The Commission states that the basis for this proposed deletion is "it has been argued that subsection (b)(1) undermines the incentive to plead guilty in subsection (b)(2) because the defendant can receive the reduction even if the defendant had caused the government and the court to devote substantial resources to preparing the case for trial". This argument ignores the language of the Guideline itself. Subsection (b)(1) is very specific in that it requires the defendant to provide information regarding his involvement in the crime in a "timely" fashion. Commentary 6 reiterates the need for the disclosure to be timely. Under the current Guideline, if the disclosure is not timely thereby causing the government and the Court to devote substantial resources preparing for trial, the provision is not applicable. Indeed, as the government will naturally seek to have all information regarding the crime at the time of sentencing, it will be better served by the defendant who comes in early and reveals all factual information than by the defendant who simply states he wants to plead guilty but waits for the allocution in order to provide specifics. In short, a defendant complying with subsection (b)(1) may often save the government more time and money than the defendant complying with (b)(2).

Commentary 2 to the current Guideline acknowledges two circumstances where a defendant will come in early to assist authorities, but not agree to plead guilty: when the defendant seeks to make a constitutional challenge or when the defendant seeks to argue the inapplicability of the statute to his particular case. The proposed amendment, by eliminating the extra point reduction for such a defendant, will deny a benefit to defendants who provide information early but wish to preserve their constitutional or statutory rights. Thus, the proposed amendment will make it much less likely that these defendants will cooperate fully at an early stage with respect to the conduct at issue. Such a result is inconsistent with the goals of the Guidelines and should outweigh the theoretical, concern that a defendant could somehow manipulate the current Guideline to obtain the one point reduction while still requiring the Government to prepare for trial.

According to the most recently published Commission statistics, 95.5% of cases are resolved by plea instead of trial. Effective representation by defense counsel is thus almost entirely limited to the pre-plea stage. Eliminating subsection (b)(1) will not only penalize the defendant who comes in early, saving the government time and money, but will unnecessarily force a defendant to give notice of an intention to plead guilty before his attorney has exhausted all avenues to prevent the defendant from being unjustly convicted.

During the hearings preceding the enactment of 3E1.1(b), representatives of the Judicial Conference wisely stated their "concerns about tying discounts for acceptance of responsibility more closely to somebody's exercise of his right to go to trial or the timing of it...because there are compelling constitutional concerns and considerations in that area." Public Hearing on the Proposed Amendments to the Sentencing Guidelines February 25, 1992, Judge Mark Wolf, Judicial Conference of the United States, Committee on Criminal Law p. 15. Those concerns

remain today. Subsection (b)(1) should not be eliminated.

II. Comments Regarding Proposed Amendment 5 to Amend Application Note 4 of Guideline Section 3E1.1

The Commission proposes an amendment to Application Note 4 of the Acceptance of Responsibility Guideline, U.S.S.G. § 3E1.1 (2001), as follows:

"A defendant who. . . commits another offense while pending trial or sentencing on the instant offense, ordinarily is not entitled to a reduction under this guideline. [There may, however, be extraordinary cases in which an adjustment under this guideline is warranted even though the defendant. . . committed another such offense. . . .]"

The Commission's proposal is intended to resolve a circuit conflict on the issue of whether the court may consider a defendant's unrelated criminal conduct which occurs pending trial or sentencing in determining whether the defendant should receive a sentencing reduction for acceptance of responsibility. The United States Court of Appeals for the Sixth Circuit has held that a sentencing court may not consider such unrelated criminal conduct, see United States v. Morrison, 983 F.2d 730 (6th Cir. 1993), while the majority of the circuits hold that it may. See United States v. Prince, 204 F.3d 1021 (10th Cir. 2000); United States v. Ceccarini, 98 F.3d 126 (3d Cir. 1996); United States v. Byrd, 76 F.3d 194 (8th Cir. 1996); United States v. McDonald, 22 F.3d 139 (7th Cir. 1994); United States v. Pace, 17 F.3d 341 (11th Cir. 1994); United States v. O'Neill, 936 F.2d 599 (1st Cir. 1991); United States v. Rodriguez, 928 F.2d 65 (2d Cir. 1991); United States v. Cooper, 912 F.2d 344 (9th Cir. 1990); United States v. Watkins, 911 F.2d 983 (5th Cir. 1990). As set forth below, because the rationale of the Sixth Circuit in Morrison is both reasonable and supported by the text of § 3E1.1, the Commission should conclude that criminal conduct which occurs pending trial or sentencing and which is wholly distinct from the offense of conviction may not be considered in assessing whether a defendant has accepted responsibility for the offense of conviction.

Should the Commission decline to follow Morrison, however, it should still not adopt the proposed amendment which goes far beyond merely adopting the majority position, which holds that subsequent criminal conduct may be considered. Rather, the proposed amendment creates a presumption that, barring extraordinary circumstances, the reduction for acceptance of responsibility ordinarily should be denied when the defendant has committed an additional offense while awaiting trial or sentencing. Such an amendment would thereby unnecessarily curtail the discretion usually afforded the district court in deciding whether to award a two-point downward adjustment under § 3E1.1 and should be rejected.

A. The Sixth Circuit's Decision in United States v. Morrison is a Reasonable Interpretation of Section 3E1.1 and is Supported by the Text of the Guideline and Accompanying Commentary

Section 3E1.1(a) provides that a defendant is entitled to a two-point decrease in his offense level if he "clearly demonstrates acceptance of responsibility *for his offense.*" U.S.S.G. § 3E1.1(a) (2001) (emphasis added). In United States v. Morrison, the Sixth Circuit held that when determining whether to grant this two-level reduction, the district court may not consider subsequent criminal conduct that is unrelated to, or of a different type than, the offense for which the defendant is sentenced. Morrison, 983 F.2d at 735. The Morrison court properly interpreted the acceptance of responsibility notion as being grounded in the acceptance of responsibility for the charged offense, and held that the consideration of unrelated criminal conduct unfairly penalizes a defendant for a criminal disposition, when true remorse for specific criminal behavior is the issue. Id. This decision was based, in part, on the rationale that while a defendant's commission of the same type of crime while awaiting sentencing may be inconsistent with showing remorse for that type of criminal

conduct, there is no reason why a defendant "may be truly repentant for one crime yet commit other unrelated crimes." Id.

Consider, for example, a person who commits armed robbery and pleads guilty, but thereafter commits an unrelated mail fraud while awaiting sentencing. By pleading guilty to the armed robbery offense and admitting accountability for that crime, that person has clearly "accepted responsibility" for his offense, based on a general definition of "responsible." See The American Heritage Dictionary 712 (4th ed. 2001) (defining responsible as "[i]nvolving personal accountability"). The subsequent mail fraud offense does not negate the person's admission of culpability for the armed robbery. Arguably, only commission of an offense related to the first armed robbery, or, alternatively, commission of a subsequent armed robbery could reasonably be considered a failure to accept responsibility *for that crime*.

The majority in Morrison concluded that because the text of the Guideline pertains only to the offense of conviction, the Commentary logically should be interpreted to apply only to the offense of conviction as well. Morrison, 982 F.2d at 735. Indeed, the Commentary to § 3E1.1 makes clear that acceptance of responsibility is determined by reference only to the offense of conviction and, depending on the circumstances of a particular case, any relevant conduct. See U.S.S.G. § 3E1.1, comment. (n.1(a)) (appropriate considerations include admitting "the conduct comprising the offense(s) of conviction. . . [and] any relevant conduct"); U.S.S.G. § 3E1.1 comment. (n.3) (discussing admission of "conduct comprising the offense of conviction. . . [and] any additional relevant conduct); U.S.S.G. § 3E1.1, comment. (backg'd.) (discussing societal interest in rewarding "a defendant who clearly demonstrates acceptance of responsibility *for his offense*") (emphasis added).

As noted above, the majority of circuits have taken a different position holding that a court may deny the two-point reduction based on any subsequent criminal act, regardless of whether the new offense is related to or similar to the offense of conviction. Focusing on the broad language of Application Note 1(b), which directs a court to consider a defendant's "voluntary termination or withdrawal from criminal conduct or association," these courts have interpreted § 3E1.1 as requiring a defendant to display remorse for his illegal conduct in general, rather than just for the offense of conviction. On this view, any subsequent unlawful act committed while awaiting trial or sentencing negates the defendant's acceptance of responsibility for his illegal conduct. See, e.g., Ceccarani, 98 F.3d at 129; McDonald, 22 F.3d at 144; O'Neil, 936 F.2d at 600.

Such a broad interpretation is inconsistent with the text of both the Guideline and its Commentary. As stated above, the text of § 3E1.1(a) states that a defendant must clearly accept responsibility "for his offense" to qualify for the reduction, and the Guideline Commentary is consistent with this narrow definition of what constitutes acceptance of responsibility. Moreover, the central focus of the acceptance of responsibility provisions is a defendant's timely guilty plea and admission of culpable conduct for *the charged offense*. Thus, because the Guideline and Commentary emphasize the specific offense for which a defendant is sentenced, one can conclude, as should the Commission, that even the more broadly written "voluntary termination or withdrawal from criminal conduct or associations" should be interpreted to relate only to the offense of conviction. See U.S.S.G. § 3E1.1, comment. (n.1(b)).

Because the holding of Morrison is reasonable and is clearly supported by the text of the Guideline and its Commentary, the Commission should decline to adopt the proposed amendment that would, as written, ordinarily preclude a reduction for acceptance of responsibility

for subsequent criminal conduct, even where that conduct is unrelated to the offense of conviction and where the defendant has otherwise qualified for the reduction.

B. Alternatively, the Proposed Amendment Should Be Modified to Permit the District Courts to Exercise Their Discretion in Considering Whether a Defendant Should Be Denied a Downward Adjustment Based on Subsequent Criminal Conduct

Notwithstanding the above arguments, if the Commission concludes that an amendment to § 3E1.1 is warranted, the proposed amendment should be rejected because it creates an unwarranted presumption that the reduction will not be available to a defendant who commits any new offense. This approach is inconsistent with the cases on which it purportedly relies and unreasonably restricts a district court's discretion to fashion an appropriate sentence.

Under the current version of § 3E1.1, the district court has wide discretion whether to grant or withhold a downward adjustment for acceptance of responsibility. See, e.g., United States v. Morrison, 983 F.2d 730, 731 ("The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of witnesses. . . ."); United States v. Cooper, 912 F.2d 344, 345 (9th Cir. 1990) ("[W]hether or not a defendant has accepted responsibility for his crime is a factual issue, subject to the clearly erroneous standard of review."); United States v. Wivell, 893 F.2d 156, 159 (8th Cir. 1990) (stating that a district court's sentencing determination will be overturned only if it was "without foundation"). Contrary to the statement in the proposed amendment that "the majority view...[makes] clear that a defendant who commits another offense while pending trial or sentencing on the instant offense ordinarily is not entitled to a reduction under this guideline," the cases on which the amendment is supposedly based have, in fact, held that, in its exercise of its discretion, the district court *may consider* such criminal conduct to assist in its determination of whether the defendant should be granted the reduction. See, e.g., Prince, 204 F.3d at 1023 (holding

that the district court *may consider, in its discretion*, criminal conduct that occurs subsequent to the offense of conviction) (emphasis added); O'Neil, 936 F.2d at 600 (stating that a court may look to subsequent criminal conduct "in order *to help the court decide* whether the defendant is truly sorry for the crimes he is charged with") (emphasis added); Rodriguez, 928 F.2d at 67 (stating that a subsequent criminal act "is a *relevant consideration*" in deciding whether to grant the adjustment) (emphasis added). These cases *do not hold* that such criminal conduct ordinarily precludes a downward adjustment. See, e.g., McDonald, 22 F.3d at 144 ("While a defendant's continued criminal conduct *does not preclude him from receiving a reduction for acceptance of responsibility,* it is properly considered by a sentencing judge as it bears on the charged offense.") (emphasis added); O'Neil, 936 F.3d at 600 ("The fact that a defendant engages in later, undesirable, behavior does not necessarily prove that he is not sorry for an earlier offense. . . . ").

As recognized by the Commission, the district court is in the best position to judge a defendant's credibility when determining whether he has accepted responsibility for his crime. See U.S.S.G. § 3E1.1, comment. (n.5) ("The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility"). As such, the Commission should not unnecessarily, and unjustifiably, restrict the court's discretion by imposing the presumption created by the wording of the proposed amendment. Rather, the Commission should allow the district courts to use their discretion to fashion appropriate sentences in light of all the relevant factors, so that, at most, any amendment should make clear that a subsequent offense is one factor that may be considered in evaluating whether a defendant is entitled to credit for acceptance of responsibility.

* * * * *

Because it is both reasonable and supported by the text and commentary of the

guidelines, the Commission should adopt the position of the Sixth Circuit in United States v. Morrison and conclude that a defendant's criminal conduct that occurs pending trial or sentencing which is wholly distinct from the offense of conviction may not be considered by the district court in deciding whether the defendant should receive a sentencing reduction for acceptance of responsibility. However, should the Commission believe that the commission of subsequent dissimilar offenses is relevant, it should not impose a presumption that, absent extraordinary circumstances, a defendant should be denied the downward adjustment if he engages in criminal conduct that occurs subsequent to the offense of conviction. The district court's discretion should not be unnecessarily restricted in the manner set forth by the proposed amendment.

THE SECRETARY OF THE INTERIOR

WASHINGTON

FEB 04 2002

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

Dear Ms. Murphy:

I write in support of the proposed amendments to the Sentencing Guidelines for the United States Courts establishing a sentencing guideline for the protection of cultural heritage resources. The new guideline is long overdue and will help sentencing courts address relevant specific offense conduct of persons convicted of cultural resource crimes.

Though most Americans may think of looting as a crime that takes place during times of civil unrest, at the Department of the Interior we have come to know better. Surprisingly, these crimes occur frequently within our national parks and other public lands. In order to maximize the impact of our enforcement efforts, we have joined forces with other federal agencies to educate law enforcement officers regarding this pervasive criminal activity. Until we are able to completely deter such criminal conduct, we must work hard to use the criminal and civil enforcement tools at our disposal to diminish the looting of our national and Indian treasures. In the meantime, the proposed sentencing guideline will enhance consistency and certainty in sentencing looters.

The proposed sentencing guideline will give federal sentencing judges meaningful guidance when imposing sentences in cases where our precious cultural resources are damaged, destroyed or stolen. The sentencing adjustments that have been proposed within the guideline take proper account of such things as the unique character of our national landmarks and the irreplaceable character of the objects that most looters crave.

Thank you for your thoughtful consideration of these important issues.

Sincerely,

Gale A. Norton

[46]

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

FEB 1 2002

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

Dear Ms. Murphy:

On November 27, 2001, the United States Sentencing Commission proposed an amendment to the sentencing guidelines which establishes a new guideline to cover violations involving cultural resources crimes. 66 Fed. Reg. 59330 (Nov. 27, 2001). This proposed guideline covers specific violations committed under various statutes, including the Archaeological Resources Protection Act. 16 U.S.C. § 470aa *et. seq*. The main purpose of the Archaeological Resources Protection Act is to secure the protection of archaeological sites located on federal and Indian lands throughout the United States. 16 U.S.C. 470aa(b). I recommend that the Commission adopt the proposed amendment establishing a separate sentencing category for cultural resources crimes.

The Bureau of Indian Affairs currently holds 56 million acres of land in trust for individual Indians and Indian tribes. The Archaeological Resources Protection Act protects these lands by providing for criminal prosecution of unauthorized removal, damage or excavation of cultural resources. 16 U.S.C. § 470ee. The Bureau of Indian Affairs is very much aware of and concerned about the serious problem of looting and vandalizing archaeological resources on Indian lands and the damaging effects that these actions have on the cultural identity of Indian communities. In the past, the devastating impacts of looting on Indian lands have been compounded by the fact that when an Archaeological Resources Protection Act case was successfully prosecuted, the sentencing courts have been forced to apply a property damage guideline that was not designed to account for the value of these culturally significant objects. The proposed guideline addresses the inequities in sentencing and provides judges with uniform standards to apply when sentencing violators of cultural resources crimes. I support the proposed guideline which establishes an appropriately severe base offense level and in addition, establishes specific offense characteristics which may increase the length of the sentence imposed.

[417]

Hopefully, effective and uniform sentencing of violators of cultural resources crimes will act as a deterrent to the looting and vandalism of cultural and grave sites on Indian lands. I commend the Commission for its work in addressing this problem and urge the adoption of the proposed amendment to establish a new guideline for cultural resources crimes.

Sincerely,

Assistant Secretary-Indian Affairs

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
SOUTHWEST REGION
P.O. BOX 26567
Albuquerque, New Mexico 87125-6567

IN REPLY REFER TO:
300-Environmental Quality

JAN 1 1 2002

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

Dear Gentlemen:

Reference the proposed sentencing guidelines for Cultural Resources Crimes found in the Federal Register of November 27, 2001, the following comments are submitted for the Southwest Regional Office, Bureau of Indian Affairs.

Issue 1. The definition should include "tribal" in the list of entities for which a violation of provisions, rules, regulations, ordinances or permits is considered. Thus it should read " two or more civil or administrative adjudications of misconduct similar to the instant offense, in violation of any Federal, state, ***tribal***, or local provision, rule, regulation, ordinance or permit."

The enhancement should also consider prior convictions for similar instances of misconduct.

Issue 2. An enhancement should be provided for other offenses committed at the same time even if the other offenses are not cultural resource related.

Issue 3. The proposed amendment must include an enhancement for the use of a destructive device. The definition of a "destructive device" must be as broad as possible in light of the fact that some thefts of cultural resources do not necessarily involve devices which are detonated, such as rock saws, heavy equipment, etc.

If you have any questions, please contact Mr. William T. Walker, Environmental Officer, at (505) 346-7507.

Sincerely,

Acting Regional Director

[49]

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:
Memorandum

DEC 19 2001

To: Tribal Leaders, Cultural Preservation Specialists and Law Enforcement

From: Assistant Secretary - Indian Affairs

Subject: Proposed Sentencing Guidelines for Cultural Resources Crimes

Attached is a copy of the Federal Register notice publishing the United States Sentencing Commission's proposed amendments establishing sentencing guidelines for the theft, damage, destruction or trafficking in cultural heritage resources. The Sentencing Commission promulgates guidelines for the federal district courts, which when adopted, judges use in sentencing violators. At the present time, no specific guidelines exist for crimes involving cultural heritage resources and judges look to the closest related guideline, which is damage to property destruction. This guideline determines harm primarily based on the dollar value of the item and does not allow judges to take into account the irreplaceable nature of the cultural resources when determining sentences.

As a result, the Sentencing Commission was urged to specifically address cultural heritage resource crimes. Crimes committed against cultural resources, including violations of the Native American Graves Protection and Repatriation Act, 25 U.S.C. 3001, and the Archaeological Resources Protection Act, 16. U.S.C. 470, are serious attacks on tribal culture. These proposed guidelines establish a higher base offense level, or starting point, for cultural resources crimes than the base offense level for generic property damage. In addition, reflecting the seriousness of the underlying criminal conduct, the proposed guidelines establish five enhancements, or factors, which if present during the commission of the offense, may increase the length of a sentence. Some of the factors include instances when the violator committed the offense for private financial gain, when the violation occurred on specially protected places, or if the offense involves specially protected items, such as human remains, funerary objects or archaeological materials.

The Sentencing Commission has requested comments on these proposed guidelines and comments are due by February 4, 2002. It is important that the Sentencing Commission hear from Indian country about this proposed guideline and that you submit you comments in writing prior to February 4, 2002. Comments filed late will not be considered. Please send your comments directly to the Sentencing Commission at United States Sentencing Commission, One Columbia Circle, N.E., Suite 2-500, Washington, D.C. 20002-8002, Attention: Public Information. If you have any questions concerning these proposed guidelines, please feel free to contact Garry Cantley, BIA Western Regional Archaeologist (602) 379-6750; John Fryar, BIA ARPA Criminal Investigator (505) 248-7937; or Mary Anne Kenworthy, Solicitor's Office, Division of Indian Affairs, (202) 208-3330.

More information concerning the Sentencing Commission and the guidelines can be found at http://www.ussc.gov.

AMERICAN ASSOCIATION OF MUSEUMS

January 31, 2002

United States Sentencing Commission
One Columbus Circle, NE
Suite 2—5000
Washington, DC 20002-8002

Attention: Public Information

Dear Commissioners:

The American Association of Museums (AAM), on behalf of the U.S. museum community, appreciates the opportunity to provide comments to the Commission on the proposed new sentencing guideline, Sect. 2B1.5, addressing crimes to cultural heritage resources. Our comments are related to the Commission's notice in the *Federal Register* of November 27, 2001 (Vol. 66, No. 228, pp. 59330-40).

Headquartered in Washington D.C., AAM is the national service association representing the American museum community. AAM provides identification and dissemination of standards and best practices, direct services, leadership on museum issues, and representation in the area of government and public affairs. Since its founding in 1906, AAM has grown to more than 16,200 members, including more than 10,800 museum professionals and trustees, 3,000 museums, and 1,900 corporate members.

General Comments.

- The museum community is grateful for the thoughtful way the Commission's staff proceeded in addressing this issue. During a number of meetings, both before and after the *Register* text was produced, Commission staff listened to museum community concerns about the need for increased penalties in this area and specific problems that needed to be addressed. They were also very helpful in providing guidance to us about Federal sentencing procedures and realities.

- We think that this excellent—even model—coordination between the staff's legal professionals and those who would be affected by the proposed new rules is reflected in an excellent draft guideline. We think in general that the guideline would be a notable improvement over current sentencing procedures.

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- We do have some comments in specific areas that we think would improve the effectiveness of the proposed guideline, based on the realities of museum practices and responsibilities to the public.

Specific Comments.

1. Issue: Valuing archaeological resources

   - Text references: Proposed Section 2B1.5(b)(1); Commentary, *Application Notes* 2(B)—*Register* p. 59331, columns 2 and 3.

   - Current proposed amendment and commentary: Proposes "The value of an archaeological resource is (i) the greater of its commercial value or its archaeological value; and (ii) the cost of restoration and repair."

   - AAM comment: Loss of any archaeological object will entail loss of both archaeological value and commercial value, and these harms are different. Thus this valuation should not be the greater of the two, but both together.

   - AAM recommendation: Change "or" to "and" in Commentary 2(B), so that the text would then read, "The value of an archaeological resource is (i) its commercial value and its archaeological value, and (ii) the cost of restoration and repair."

2. Issue: Creating harsher punishments for theft, etc. of some cultural heritage resources in museums than for the same offenses involving other types of cultural heritage resources in museums, simply on the basis of type.

   - Text references: Proposed Section 2B1.5(b)(2) and (3)—*Register* p. 59331, column 2.

   - Current proposed amendment: proposes, in (2), an increase of 2 levels "If the offense involved a cultural heritage resource from, or located, prior to the offense, on or in (A) the national park system: (B) a National Historic Landmark; (C) a national monument or national memorial; (D) a national marine sanctuary; (E) a national cemetery; (F) a museum; or (G) the World Heritage List." The proposed amendment goes on, in (3), to add an additional increase of 2 levels for thefts, etc. of certain types of cultural heritage resources, namely human remains, funerary objects, designated archaeological or ethnological material, and a pre-Columbian monumental or architectural sculpture or mural.

   - AAM comment: We applaud and support the inclusion of museums explicitly in (2). We also agree that offenses involving the types of objects listed in (3)

deserve increased severity of punishment, even if the offenses did not involve prior location in the institutions, including museums, listed in (2).

However, in the case of cultural heritage resources of the types listed in (3) from, or located, prior to the offense, in *museums*, the effect of (2) and (3) together as currently written would be additive, and that has an unintended negative effect. The effect is that it would create "haves" and "have nots" with respect to severer punishments strictly on the basis of types of objects. The position of the museum community is we do not think that it is advisable to create inequities in punishment and in deterrence between types of museum objects simply on the basis of type. Many, if not most, museum objects have intangible social value that cannot be fully captured in these guidelines, and this would have the effect of ignoring those values in most cases while recognizing it in a few special cases.

At the same time, as noted above, we agree that the cultural heritage resources listed in (3) deserve enhanced punishment even if they were not taken from one of the types of institutions listed in (2).

- AAM recommendation: We think that both of these "goods"—not creating a special class of museum objects by type, and recognizing the special heinousness of offenses relating to the cultural heritage resources in (3)—can be attained by revising the relationship between (2) and (3) in the following way:

  - Maintain the text of (2) as is.

  - Revise the text of (3) so as not to "double up" with (2), as follows

    (3) If the offense involved a cultural heritage resource not from, or located, prior to the offense, on, in, or in the custody of the entities listed in (2) above, but constituting (A) human remains; (b) a funerary object; (C) designated archaeological or ethnological material; or (D) a pre-Columbian monumental or architectural sculpture or mural, increase by 2 levels.

    (Added text underlined for visibility. See below, item 9, for the reason for "in the custody of")

  This change would have the effect of capturing an increased level of punishment of 2 levels for *any* object of the type listed in (3). If it came from the entities listed in (2), it would get the increased 2 levels from (2), and if it came from any other source, it would get the increased 2 levels from (3). But it would not create a situation where offenses relating to some objects from museums got 2 levels and others 4 strictly on the basis of type of object.

3. Issue: The definition of "pattern of similar violations."

- Text references: Proposed Section 2B1.5(b)(4)(B); Commentary, *Application Notes* 5(B); *Issues for Comment* (1)—*Register* pp. 59331-3.

- Current proposed amendment and commentary: Proposes "If the offense...(B) involved a pattern of similar violations" and "For the purposes of subsection (b)(4)(B), 'pattern of similar violations' means two or more civil or administrative adjudications of misconduct similar to the instant offense, in violation of any Federal, state, or local provision, rule, regulation, ordinance, or permit."

- AAM comment: We applaud this provision and particularly support the definition's inclusion of violations relating to non-Federal as well as Federal rules, regulations, ordinances and permit. Please see two attachments relating to a recent case of theft from a museum in Wisconsin, which was prosecuted under state law. The first attachment is a letter to the judge in the case, at the sentencing phase, which provides the museum community's view on the severity of the crime with respect to non-monetary as well as monetary damages. The second attachment related to this issue provides a summary of the resolution of the case, as printed in AAM's monthly, *AVISO*.

  We do think, however, that even one prior "adjudication of misconduct," rather than two, should be sufficient to trigger the increase in levels. Misconduct sufficiently clear to trigger one prior formal adjudication is enough of a warning to cease and desist in the conduct. It should not need two such prior events to trigger the additional levels. That prior case, plus the current adjudication, establishes a pattern.

  In addition, we note that, in *Issues for Comment* (1), *Register* p. 59333, "The Commission requests comment on the extent of this enhancement. For example, in addition to civil or administrative adjudications, should the enhancement cover prior convictions for similar misconduct as well? Should the enhancement cover similar misconduct for which there has not been a civil or administrative adjudicate?" Our answer to both questions is "Yes," for the following reasons: 1. Prior convictions are certainly as clear evidence of offense as civil and administrative adjudications, and 2. Where there was sufficient evidence to trigger a formal action, such as a dismissal from a position or formal reprimand for a similar offense in the past, the enhancement should have effect, even if there were no prior conviction or civil or administrative adjudication. We are thinking here particularly of those with access to cultural heritage resources by virtue of employment at, or connection to, a cultural heritage site, such as a museum. The level of trust inherent in such positions creates a need for a higher level of deterrence and punishment. See especially AAM's letter to the sentencing judge in the Wisconsin case for the reasoning.

- AAM recommendation: Change "two" to "one" in *Application Notes* 5(B). Add "or convictions" after "adjudications." Add a sentence at the end of 5(B) to the

effect that where there was sufficient evidence to trigger a formal action, such as a dismissal from a position or formal reprimand, for a similar offense in the past, the enhancement should have effect, even if there were no prior conviction or civil or administrative adjudication.

4. Issue: Adjustment for offenses by "insiders."

   - Text reference. Not addressed in the proposed guidelines; see 2001 Commission Guidelines Manual, pp. 287ff—Section 3B1.3, Abuse of Position of Trust or Use of Special Skill, Application Note 1.

   - Current proposed commentary. Not addressed. However, in the Abuse of Trust section noted above, Application Note 1 indicates: " 'Public or private trust' refers to a position of public or private trust characterized by professional or managerial discretion (i.e., substantial discretionary judgment that is ordinarily given considerable deference)." It goes on to say, "Notwithstanding the preceding paragraph, because of the special nature of the United States mail an adjustment for an abuse of a position of trust will apply to any employee of the U.S. Postal Service who engages in theft or destruction of undelivered United States mail"

   - AAM comment. This is an issue about which the museum community feels very strongly. We view the existing adjustment for abuse of trust as inadequate to the realities of the cultural heritage world. Our experience has been that crimes, and the realistic potential for crimes, are not confined to the management/supervisory level but rather to the larger group cultural heritage workers with access who are trusted. This includes not only those who work at museums, but also, for example, those National Park Service employees who could similarly know where archaeological sites are located and take illegal action, including excavating such sites, or selling the location information.

     The Wisconsin case we have noted above involved not only theft of museum objects but also theft by someone in a position of trust inside the victim museum. We have enclosed a copy of our letter to the sentencing judge in that case. Let me quote from that letter, to provide some general background about museums and museum professionals:

     Loyalty to the mission of the museum and to the public it serves is the essence of museum work. Mr. Wooley broke his commitment as a museum professional to the Society and to the public when he stole irreplaceable and invaluable items from the Native American ethnographic collection. Many of the stolen items are covered under the federal Native American Graves Protection and Repatriation Act of 1990 (25 U.S.C. Sec. 3001 et seq.) which governs the surveying of museum collections and the notification of tribes of affected items. While it is fortunate that the Society

was able to recover the items removed by Mr. Wooley, the theft cannot be minimized.

Museums in the United States are grounded in the tradition of public service. They are organized as public trusts, holding their collections and information as a benefit for those whom they were established to serve. Members of their governing authority, employees, and volunteers are committed to the interests of these beneficiaries. Museums must not only comply with applicable local, state, and federal laws but also act ethically to maintain their integrity so as to warrant the high level of public trust without which they cannot function in their communities. For your reference I am enclosing a copy of the AAM's Code of Ethics for Museums.

As stewards of the public trust, museum professionals must be held to the highest ethical standards of a public servant. Mr. Wooley has not only broken the law; he has also damaged the reputation, and thus the ability to serve the community, of the museum in which he once worked. But the most important victim of his crime is the public. Despite the vigorous efforts of the museum to recover these artifacts, some are not yet recovered, and thus the public may never be able to learn from seeing all these objects themselves.

In our opinion, this individual has victimized the entire public, whose trust he has violated in the most heinous way. A museum is not simply a collection of exhibits. It is an expression of its community's deepest values and aspirations—a preserver and displayer of the heritage that the community wants most to convey, not only to those who do not know it, but also to its children. It is a place where members of the community can come in times of adversity to gain strength by remembering who they are and who they would like to be. That is why willful damage to a museum's ability to serve its public, especially by a member of the museum's own staff, is so unusually wicked.

For these reasons, we strongly believe that there should be an enhancement of <u>at least</u> two levels for offenses committed by those who have some formal connection to the victim entity, where that entity is one of the entities listed in subsection (b)(2) of the proposed guideline, i.e., the national park system, etc., and including museums.

We want to emphasize that that formal connection:

1. Should not be limited to those who receive monetary compensation from the victim entity, and

2. Should not be limited on the basis on the offender's formal authority level in the institution.

The reasons for this relate to some additional, more specific information on the nature of the operations of museums, and we think that this applies to most, if not all, of the entities listed in subsection (b)(2).

1. Monetary compensation. Museums depend on a host of volunteers to operate. In fact, most, if not all, museums in this country would close immediately if they could not attract far more volunteers, often for essential functions (e.g., trustees), than they can afford to have as paid staff. For example, according to a standard museum community reference, a specialized museum in New York City lists 53 full-time paid staff, 40 part-time paid staff, 400 part-time volunteers, and 25 interns; an historical museum in Wyoming lists 75 full-time paid staff, 100 part-time paid staff, 210 part-time volunteers, and 9 interns. Since this is the case, at many institutions a high level of access to collections and other cultural heritage resources must be entrusted not only to paid staff but also to unpaid. Thus, it should be the level of trust, and the connection of employee, paid or unpaid, over time that should trigger such an enhancement, not whether or not they have been paid. We have suggested the idea of "formal connection," including being listed on the victim entity's records as a volunteer, so that those who are simply passing through, i.e., package delivery people, would not trigger this enhancement. But should the museum's regular, but not in-house, caterer, for example, trigger such an enhancement? If there has been an ongoing relationship, and trusted access to locations containing the entity's cultural heritage resources, we think "yes."

2. Formal authority in the institution. Again, because of the special nature of the entities listed in subsection (b)(2), including museums, we think that rules which might apply elsewhere with respect to the offender's special levels of decision-making responsibility in the institution should not apply here. The relevant test here is trusted access. Not only unpaid staff, but also support staff, janitors, guards and other paid staff at lower levels may well have quite broad access both to the physical premises, such as through employee entrances that may not be guarded, and the daily routines of the museum. In a museum, there are, in short, a great many people who have the potential to do damage to the collections and exhibits. It is a credit to our society that they in fact do so much good in almost all cases. But where they do not, society is particularly vulnerable.

- AAM recommendation: We urge the Commission to revise the provision relating to abuse of position of trust to cover those who have, or have had, a formal connection to a museum, regardless of whether they are monetarily compensated, and regardless of their formal position of authority in the museum, as noted above. We suggest that such a revision should apply to the other entities noted in subsection (b)(2), but others with more expertise about non-museums in that

subsection should advise on that. We recommend that such a revision be based on the existing exception relating to Postal employees currently in the 2001 Commission Guidelines Manual, pp. 287ff. In the case of Postal employees, the exiting revision is clearly based on trusted access, and that is exactly the case with those with a formal connection to a museum

We think that such a revision should be explicit in the new guidelines, perhaps in the Application Notes (or in Chapter Three of the Commission's *Guidelines Manual*), and it might take the form of the following:

Notwithstanding Application Note 1 in Section 3B1.3, because of the special nature of United States museums [and the other entities in Section 2B1.5(b)(2)] an adjustment for an abuse of a position of trust will apply to any worker currently or previously noted in the records of the museum, whether paid or unpaid, and regardless of level of formal responsibility in the museum damaged by the offense (including, but not limited to, paid employees, volunteers, and trustees) who have trusted access to the museum.

(Underlined text shows addition.)

We think that it is important that this exception for museum workers be made explicit because the *Federal Sentencing Guidelines Handbook*, p. 915,[1] notes that because "Postal employees are an exception to the general requirement that a position of public or private trust requires professional or managerial discretion...the fact that a defendant's duties resemble those of postal workers does not qualify him for an abuse of trust enhancement." The *Handbook* cites two cases (footnote 318)[2] where Circuit courts reversed district court decisions that sought to invoke the abuse of position of trust provision by analogy to the postal service exception. Clearly, without such an explicit exception for museum workers, only those with formal positions of authority would be subject in practice to the abuse of position of trust provision—and, given the realities of museum practice noted above, that would create a gaping loophole and inequity.

As the Commissioners explore this topic, we urge them to consider the case law with respect to embezzlers. If a specific exception for museum or other cultural heritage workers with trusted access is, for various reasons, not possible, we recommend that the closest analogy to "insider" crime at a museum or other cultural heritage institution is particularly "abusive" embezzlement. As pp. 916-7 of the *Handbook* point out, there is ample case law successfully invoking the abuse of position of trust in embezzlement cases, including in cases where the

[1] Roger W. Haines, Jr., Frank O. Bowman, III, and Jennifer C. Woll, *Federal Sentencing Guidelines Handbook* (Nov. 2001: West Group).

[2] "U.S. v. Jankowski, 194 F.3d 878 (8th Cir. 1999) (reversing abuse of trust enhancement for armored car messenger despite the district court's finding that his position was 'like that of a postal employee'); U.S. v. West, 56 F.3d 216, 220 (D.C. Cir. 1995) (reversing the enhancement for a courier whose job resembled that of a mail carrier)."

criminal did not have traditional "professional or management discretion."[3] If a specific exception is not possible, we urge the Commission to make explicit in an Application Note or other commentary its view that offenses by museum and other cultural heritage insiders, given the facts noted above about museum operations, are analogous to embezzlement.

We further recommend that in making such a change to enhance penalties for offenses by insiders, the Commission consider leaving it to Commission staff to determine whether it would be better to have the enhancement or adjustment in the new cultural heritage guideline or in the Chapter Three section, but in either case, we urge the Commission strongly, given the facts of trusted access in museum and other cultural heritage institutions, to adopt the principle of providing such an enhancement or adjustment.

5. Issue: Enhancement due to "sophisticated means."

- Text references: We note that in the Commission's *Guidelines Manual* for 2001, p. 68, item (8), referring to enhancements connected to Section 2B1.1 offenses, there is an existing enhancement of 2 levels when "(C) the offense otherwise involved sophisticated means."

- AAM comment: We understand that the formulation "sophisticated means" replaced a previous formulation of "more than minimal planning." The intent of both formulations in the context in (8), it seems, is to punish more severely those whose crimes, through either forethought or elaborate devices, allow them to evade prosecution for longer periods, thus raising the potential for additional crime in the interim. It seems to us that the current formulation might not capture all of the items in the former formulation and vice-versa, to the detriment of appropriate sentencing. For example, criminals might use sophisticated means (e.g., a helicopter) without prior planning (driving by an airport after the commission of the crime), or might have an elaborate plan that allows for skillful evasion without "sophisticated means" (e.g., survivalists hiding the wild, or terrorists hiding in this country with no special equipment, or a museum thief developing a complex plan to dispose of otherwise highly recognizable cultural objects.)

[3] U.S. v. O'Connell, 252 F.3d 524 (1st Cir. 2001) (noting defendant, a bookkeeper, had unfettered access to the $850,000 line of credit); U.S. v. Craddock, 993 F.2d 338 (3rd Cir. 1993) (teller for company that paid out Western Union wire transfers was unlike bank teller, for he could bypass security measures designed to guard against fraud); U.S. v. Gordon, 61 F.3d 263, 269 (4th Cir. 1995) (holding that "head teller" abused a position of trust by giving security information to defendants who robbed the bank); U.S. v. Williams, 966 F.2d 555 (10th Cir. 1992) (military pay account technician unlike bank teller, because he could approve payroll charges without approval); U.S. v. Ehrlich, 902 F.2d 327 (5th Cir. 1990) (bank loan clerk who embezzled, using her specialized knowledge of the bank's billing position, her authority to initiate loan transactions, and her authority to balance loan accounts).

- AAM recommendation: The Commission may want to consider ways that this intent—if we understand it correctly—can more accurately be expressed. This might be done by reviving and adding the prior formulation to the present one, by adding "or more than minimal planning" after "sophisticated means" in (C). This would give more flexibility, so that offenses related to either of formulations would have the enhancement.

6. Issue: Appropriateness of proposed structured upward departure vs. possible enhancement level for damage or destruction of non-cultural heritage resources.

   - Text references: Commentary, *Application Notes* 7; *Issues for Comment* (2)—*Register*, pp. 59332-3.

   - Current proposed commentary: proposes "7. Upward Departure Provision.—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. For example, an upward departure may be warranted if, in addition to cultural heritage resources, the offense involved theft of, damage to, or destruction of, items that are not cultural heritage resources (such as an offense involving the theft from a national cemetery of lawnmowers and other administrative property in addition to historic gravemarkers or other cultural heritage resources). In such a case, the extent of the upward departure should not exceed the number of levels in [Section] 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the dollar amount involved in the theft of, damage to, or destruction of, the items that are not heritage cultural items."

   - AAM comment: AAM understands "departure" as providing the sentencing judge with the authority to act outside established guidelines, with their prescribed enhancement levels, in cases where there are "Circumstances that...cannot, by their very nature, be comprehensively listed and analyzed in advance." 2001 Commission Guidelines Manual, p. 383, Grounds for Departure. We understand "structured upward departure" (p. 59331) as providing some guidance or "structure" to such a judge where there should be increased punishment. We understand "enhancement," on the other hand, as providing greater restriction than "departure" on the judge's ability to increase or decrease punishments in a given case.

     In this case, where there could be a vast array of items that are not cultural heritage resources involved in a given crime, we think that "departure" rather than "enhancement" may be preferable. We do think, however, that the judge should have somewhat more guidance in making his or her decision than is currently provided in Application Note 7. That note currently takes into account—rightly, so far as it goes—only the monetary value of the items that are not cultural heritage items.

There are two other measures of value that need to be taken into account in addition. All of the entities noted in the proposed Section 2B1.5(b)(2), including national parks, National Historic Landmarks, national monuments, national memorials, national marine sanctuaries, national cemeteries, museums, or entities on the World Heritage List, have as their principal function the education of the general public. As such, they are recognized by society as having a special status, which usually includes some degree of public funding and/or tax benefits as public charities. Thus, a disruption of their activities that causes them significantly to lessen or curtail their access to that public for a period is a damage to the public of a different and more wide-spread sort than would be found in such a lessening or curtailment of access to a private home or business. An example of this case would be where the thieves burned part of the museum building not including museum collections (or the Park Service visitors' facility) to cover evidence of their crime, or smashed security equipment without which the entity could not open to the public. (Note: this consideration would also seem to apply to publicly accessible libraries, which may, thus, merit inclusion in (b)(2) as well.)

In addition, in the case of museums, and perhaps of others of the entities noted above, theft of, or damage to, the museum's collections or exhibited materials from other institutions, damages the museum's reputation, and thus its ability to borrow materials for exhibition and attract, and raise funds to serve, its public. (Please see AAM's attached letter to the Wisconsin judge for more on this line of reasoning.)

AAM thinks that both of these additional factors should be recognized in the Commission's Application Notes as well as the monetary factor.

- AAM recommendation: Add the following to the end of Application Note 7: "the items that are not cultural heritage items, except, in cases involving the entities listed in Section 2B1.5(b)(2), where the offense also significantly impairs or prevents public access to one of said entities involved in the offense, or where the offense causes sufficient damage to the reputation of said entity involved in the offense that its ability to serve the public, including but not limited to borrowing materials for exhibition, or attracting, or raising funds to serve, the public, is impaired in ways that the sentencing judge finds are clearly demonstrated."

  (Added text is underlined for visibility.)

7. Issue: Upward departure for underestimation of value.

   - Text references: see above, Issue 5.

   - Current proposed commentary: see above, Issue 5; "Generally, should proposed Application Note 7 provide an upward departure if the value of a cultural heritage

resource, as determined under subsection (b)(1) and Application Note 2, underestimates its actual value?"

- AAM comment: Yes, it should. "Upward departure" seems appropriate here, because there are elements of the value of a cultural heritage object that may not be captured entirely by commercial and archaeological values, even when added together, and cannot be easily categorized in an enhancement scheme. Such elements include the loss to the public, for a time or permanently, of access to part of its cultural heritage, particularly where such loss of access is to rare or unique objects, or objects with particular connection to the local heritage of a particular community. Indeed, those adults and children who have never had contact with the object prior to the offense may now not have the opportunity for such contact in their lifetimes. See AAM's attached letter to the Wisconsin judge and her decision. Judges should have some room for a punishment regime that prevents further crime, as in the Wisconsin case, taking into account the above factors.

- AAM recommendation: Add, at the end of Application Note 7, the following: "In addition, there may be cases in which the offense level determined under subsection (b)(1) and Application Note 2 of this guideline understates the value of the cultural heritage resource. In such cases, an upward departure may be warranted. For example, an upward departure may be warranted if, in addition to the commercial value and archaeological value of the object, there is loss to the public, for a time or permanently, of access to part of its cultural heritage, particularly where such loss of access is to rare or unique objects, or objects with particular connection to the local heritage of a particular community."

8. Issue: Enhancement if the offense involved destructive devices.

- Text references: Proposed Section 2B1.5(b)(5), or a possible (6); *Issues for Comment* (3)—*Register*, pp. 59331 and 59333.

- Current commentary: Asks "Should the proposed amendment include an enhancement if the offense involved the use of destructive devices?"

- AAM comment: Yes, it should, for three reasons. First, because of the increased potential for physical harm to the public and to the victim entity's staff in entities, as these are, which actively encourage the public to visit. Second, for the potential of broad-scale damage to the facility housing the cultural heritage object, which would damage the public's access as well as possibly damaging other objects directly or indirectly (i.e., by damaging the climate control and security control necessary for their display and conservation). And third, for the potential for damage to object itself. Even if these devices are not used in the crime, their presence, as with firearms, heightens the risk enormously if there might be a confrontation.

- AAM recommendation: Create a subsection (b)(6), paralleling the proposed subsection (b)(5). This might be done, possibly, by substituting the words "destructive devices" or "explosives" for "dangerous weapons" but otherwise repeating the text of (5) for the new (6). We think this merits a separate enhancement from that already proposed for "dangerous weapons," which we interpret as firearms, knives, etc. Having both such conventional hand weapons and a bomb creates a much more dangerous situation than hand weapons only.

9. Issue: Objects in transit to or from a museum.

   - Text references: Proposed Section 2B1.5(b)(2); *Application Notes* 3.

   - Current proposed amendment and commentary: Proposes [subsection (b)(2)] "If the offense involved a cultural heritage resource from, or located, prior to the offense, on or in (A) the national park system..." (Underlining added for visibility).

   - AAM comment: It is not uncommon for museums to have formal custody of cultural heritage objects, either for traveling exhibitions, acquisitions, or deaccessioned items—i.e., items that have been formally removed from the museum's collections—that are in transit from or to the museum when the offense occurs. The current proposed guideline does not take this fact of museum life into account. This oversight can be easily remedied.

   - AAM recommendation: Add "or in the custody of" to the proposed subsection (b)(2), so that the revised language would read:

     "(2) If the offense involved a cultural heritage resource from, or located, prior to the offense, on, in, or in the custody of (A) the national park system..."

     (Underlining added for visibility of additional text)

10. Issue: Cultural heritage resources rendered incapable of restoration as a result of the offense.

    - Text references: Proposed Section 2B1.5(b)(1); *Application Notes* 2(C)(iii)—*Register* pp. 59331-2.

    - Current proposed amendment and commentary: The amendment and Application Note 2 address questions of valuation, including the cost of restoration and repair, but they do not address cases, such as when a gold object has been melted down, when an object is rendered incapable of restoration.

- AAM comment: Such a profound level of damage, and the permanent loss to the public of the object, as opposed to its temporary loss for educational purposes when it can be restored and repaired, should trigger additional penalty.

- AAM recommendation: We notice that the 2001 Commission Guidelines Manual, p. 386, provides a Section 5K2.5 as follows:

  "Property Damage or Loss (Policy Statement)

  If the offense caused property damage or loss not taken into account within the guidelines, the court may increase the sentence above the authorized guideline range. The extent of the increase ordinarily should depend on the extent to which the harm was intended or knowingly risked and on the extent to which the harm to property is more serious than other harm caused or risked by conduct relevant to the offense of conviction."

  That appears to allow for an upward departure that would take into account a rendering of the object unfit for repair or restoration. We ask the Commission to consider whether this does in fact fit that case. We would like to be sure that it does, and if it does not, we recommend that the Commission craft a more explicit provision assuring a higher sentence for such a case.

This concludes our specific comments. While we have the concerns noted about points of detail in the proposed amendment to create a new Section 2B1.5, I want to reiterate our general comment that this is, in general, an excellent improvement over current sentencing guidelines, and that the museum community has greatly appreciated the thoughtful dialogue between the Commission's staff and museums as these guidelines were under consideration.

We look forward to the Commission's action on this proposed amendment.

Sincerely,

Jason Y. Hall
Director,
Government and Public Affairs

Cc: Edward H. Able, President and CEO
Museum Attorneys Group
Museum Working Group

AMERICAN ASSOCIATION OF MUSEUMS

July 23, 2001

The Honorable Moria G. Krueger
Judge, Dane County Circuit Court Branch 7
City County Building
210 Martin Luther King Jr. Blvd.
Madison, WI 53709

Dear Judge Krueger:

The American Association of Museums, headquartered in Washington D.C., is the national service association representing the American museum community. AAM provides identification and dissemination of standards and best practices, direct services, leadership on museum issues, and representation in the area of government & public affairs. Since its founding in 1906, AAM has grown to more than 16,300 members, including more than 11,400 museum professionals and trustees, and 3,000 museums.

It has come to my attention that Mr. David Wooley, former Curator of Anthropology at the Wisconsin Historical Society, has been found guilty of 14 counts of felony theft of stolen items from the Society. It is extremely distressing when a museum suffers a loss of this magnitude under any circumstances; it is doubly so when the loss is caused by a member of the museum's own staff.

Loyalty to the mission of the museum and to the public it serves is the essence of museum work. Mr. Wooley broke his commitment as a museum professional to the Society and to the public when he stole irreplaceable and invaluable items from the Native American ethnographic collection. Many of the stolen items are covered under the federal Native American Graves Protection and Repatriation Act of 1990 (25 U.S.C. Sec. 3001 et seq.) which governs the surveying of museum collections and the notification of tribes of affected items. While it is fortunate that the Society was able to recover the items removed by Mr. Wooley, the theft cannot be minimized.

Museums in the United States are grounded in the tradition of public service. They are organized as public trusts, holding their collections and information as a benefit for those whom they were established to serve. Members of their governing authority, employees, and volunteers are committed to the interests of these beneficiaries. Museums must not only comply with applicable local, state, and federal laws but also act ethically to maintain their integrity so as to warrant the high level of public trust without which they cannot function in their communities. For your reference I am enclosing a copy of the AAM's Code of Ethics for Museums.

1575 EYE STREET NW, SUITE 400
WASHINGTON DC 20005
202.289.1818
FAX 202.289.6578

As stewards of the public trust, museum professionals must be held to the highest ethical standards of a public servant. Mr. Wooley has not only broken the law; he has also damaged the reputation, and thus the ability to serve the community, of the museum in which he once worked. But the most important victim of his crime is the public. Despite the vigorous efforts of the museum to recover these artifacts, some are not yet recovered, and thus the public may never be able to learn from seeing all these objects themselves.

In our opinion, this individual has victimized the entire public, whose trust he has violated in the most heinous way. A museum is not simply a collection of exhibits. It is an expression of its community's deepest values and aspirations—a preserver and displayer of the heritage that the community wants most to convey, not only to those who do not know it, but also to its children. It is a place where members of the community can come in times of adversity to gain strength by remembering who they are and who they would like to be. That is why willful damage to a museum's ability to serve its public, especially by a member of the museum's own staff, is so unusually wicked.

On behalf of America's museums, I urge you to impose the strongest penalties available to you in his sentencing.

Sincerely,

Edward H. Able, Jr.
President and CEO

AMERICAN ASSOCIATION OF MUSEUMS

AVISO®

January 2002

Washington Wire

Former Curator Sentenced to 15 Years for Theft

In a shocking case in the museum community, a former curator of anthropology at the Wisconsin Historical Society (WHS), Madison, was convicted of 14 counts of felony theft on Nov. 19. David Wooley, 52, was found guilty of stealing objects from the society's Native American ethnographic collection. The total value of the purloined objects is estimated at $150,000, says WHS Director Ann Koski.

Following a two-day hearing, the judge ruled that Wooley be sentenced to 15 years in prison and 30 years' probation. After serving 45 months, he will be eligible for parole. Parole requirements specify that, among other restrictions, the former curator may not enter any WHS property or any historical society; may not buy, sell, collect, or trade Native American artifacts; and is prohibited from employment in any institution or business that deals with Native American artifacts. In addition, according to Koski, Wooley must make full restitution to the parties involved, including WHS and Native American tribes.

Wooley admitted to taking 34 objects, but was convicted of stealing 35 items from the museum. Koski says that at least 175 items were found missing, based on a December 1994 inventory. Only 35 objects have been recovered. In a similar incident, Wooley also has been charged with taking objects from the Lac du Flambeau tribe's George W. Brown Museum and Cultural Center, Lac du Flambeau, Wis.

Though art theft is not uncommon, it is rarely perpetrated by an insider. Because of this special circumstance, AAM was asked by WHS to intervene during the sentencing phase of the trial so that Wooley would be punished appropriately. AAM President and CEO Edward H. Able, Jr., wrote to Judge Maria G. Krueger, advocating tough justice: "As stewards of the public trust, museum professionals must be held to the highest ethical standards of a public servant. Mr. Wooley has not only broken the law; he has also damaged the reputation, and thus the ability to serve the community, of the museum in which he once worked."

AAM's position is apropos as the U.S. Sentencing Commission on Nov. 14 unanimously voted to propose increased penalties for

("Washington Wire" continues on pg. 3)

AAM Notes

Ethics Among Issues Addressed at November Board Meeting

AAM's board of directors met at the AAM offices in Washington, D.C., Nov. 1-3. The following is a summary of the board's decisions and the issues discussed at the meeting.

▲ Approved the slate of nominees for the 2002 board election and the mailing schedule. (The slate with candidates' statements was mailed to all voting members in December. Also see "2002 AAM Board Election," this page.) Elected three members of the board to serve on the 2003 Nominating Committee.

▲ Received the membership's vote tally, which indicated the overwhelming approval of the proposed constitutional change allowing all members, regardless of professional affiliation or work status, the right to vote for officers and board members-at-large. As a result, the board amended the association's bylaws. In turn, the guidelines for Standing Professional Committees and Professional Interest Committees/Councils were amended. (For further details, see "AAM Membership Extends Full Voting Rights to All Members," December *Aviso*, pg. 3.)

▲ Reviewed and voted to approve the *AAM Guidelines for Museums on Developing and Managing Business Support*. (The *Guidelines* are available under "Hot Topics" on the AAM Web site, www.aam-us.org.)

▲ Met with the Accreditation Commission to review the commission's annual report, which included the review of the AAM Professional Standards Endowment, and the commission's plans for the expansion of this endowment.

▲ Received an update on the completion of phase I of the Museums & Community Initiative and a synopsis of phase II. (For more information, see the "AAM News" section of the AAM Web site: www.aam-us.org.)

▲ Received a report on the FY 01 audit and reviewed the year-to-date financial status of the association.

▲ Under the direction of the Board Development Committee and an outside facilitator, reviewed AAM's governance. Discussion topics included: 1) board meetings; 2) elements to enhance effectiveness of the board; 3) advocacy and AAM affiliated groups; 4) attention to vision and long-range planning.

▲ Reviewed the revised format for AAM's Strategic Agenda, including benchmarks of accomplishments and discussed what work still needs to be done.

The next AAM board meeting will be held in Dallas, May 10-11, immediately preceding the association's annual meeting. ▲

2002 AAM Board Election

A slate of nominees and call for petitions for the 2002 AAM board election were mailed to voting members in December. Under AAM's constitution and bylaws, to nominate by petition a member for vice chair, 676 signatures (5 percent) of individual or institutional voting members are required. To nominate by petition a member for board member-at-large, 406 signatures (3 percent) of individual or institutional members are required. Petitions must be received at AAM headquarters no later than Jan. 14 at 5 p.m. EST. Petition forms may be obtained by contacting Shelon Atwater, 202/218-7682; e-mail: satwater@aam-us.org.

The slate of candidates recommended by AAM's Nominating Committee and approved by the AAM Board of Directors appears on pg. 4.

("AAM Notes" continue on pg. 4)

AAM Awards for Excellence deadline extended to Jan. 14!

▲ Recognize outstanding peers
▲ Salute generous supporters
▲ Highlight your institution

Nominate someone or apply for an AAM Award for Excellence!
For details, see pg. 5.

(Continued from pg. 1)

federal cultural heritage crimes. The commission maintains that the theft and/or damage of museum objects and archaeological sites should be more severely punished than stealing ordinary fungible goods. The proposed sentencing guidelines also penalize illegal importation of antiquities; issue fines based on a stolen cultural object's commercial or archaeological value, whichever is greater; and, with AAM's support, would result in harsher punishment in cases of art/cultural heritage object theft from cultural institutions. ▲

IMLS Examines GOS Grants

As part of a periodic review of its grant programs, the Institute of Museum and Library Services (IMLS) is restructuring its General Operating Support (GOS) grants to better assist museums meet the challenges of the 21st century and support public service and outreach. FY 2003 would serve as a transition year and the redesigned program would be implemented in FY 2004. (The program will remain unchanged for FY 2002. The deadline for this funding cycle is Jan. 15.)

AAM has met with IMLS to discuss the process of gathering input from the field as well as the president, Congress, and other museum stakeholders. Preliminary feedback indicates that museums favor the grants' broad eligibility requirements and flexible way in which the funds may be used. IMLS expects the redesigned program to reflect these priorities and will continue to seek comments through focus groups, forums, and a survey, which is expected to be distributed this spring.

If your museum is not selected for one of the survey activities and would like to comment on the redesign of GOS, AAM urges sending a letter to IMLS that responds to questions posed at regional museum meetings in the fall, including: What are the most salient features of the GOS program that should be retained? What criteria should be used for future awards? What are the current and pressing issues that might be targeted by a new funding program?

Congress continues to express concern over the GOS program, including its open-ended nature in terms of measuring outcome. AAM is in agreement with IMLS that these issues must be addressed. AAM is committed to preserving the characteristics valued by the field. ▲

AAM Monitoring Impact of Flight Security Act on Museums

In response to calls for heightened security at airports since the terrorist attacks of Sept. 11, Congress passed and President Bush signed the Aviation Security Act on Dec. 19. The primary provision of the legislation is that all baggage screeners become federal employees. It also requires, within 60 days of its enactment, the screening of all checked luggage, and by Dec. 31, 2002, the installation of explosive detection equipment to examine all baggage.

A new federal agency has been created to oversee the screening at all airports and place a federal manager at every airport. Further, the president has announced his intention to nominate John W. Magaw for the new position of undersecretary for the Transportation Security Administration. Magaw previously served as the head of the Secret Service and is currently the acting executive director of the Office of National Preparedness within the Federal Emergency Management Agency. In the meantime, the Federal Aviation Administration (FAA) has undertaken efforts to tighten security at airports, including limiting travelers to one carry-on bag and one personal item.

AAM has written to Congress, the secretary of transportation, and the FAA about the needs of museums, which use commercial air carriers to transport objects, and is pursuing opportunities to influence the development of regulations. AAM is working with the Registrars Committee to gather information about museum use of commercial air carriers. If heightened security has hindered your museum's air shipments, please send the information to: Eileen Goldspiel, AAM Government and Public Affairs, e-mail: egoldspiel@aam-us.org. ▲

Education Act Makes Museums Directly Eligible for Funds

On Dec. 13, the House of Representatives overwhelmingly passed bipartisan legislation to reauthorize the Elementary and Secondary Education Act. The reform package requires schools to test students in grades 3 through 8 each year in reading and math. It also targets federal funds more directly for the poorest schools and consolidates several programs to give states and local school districts more flexibility in spending some federal education funds.

Of particular interest is the expanded eligibility for community-based organizations, such as museums, to apply directly for 21st Century Community Learning Centers grants. Previously, museums only were eligible for funds when local school districts served as the primary applicant. AAM successfully petitioned for this change. (In the past, the program has provided three-year grants to school districts that work with partners to keep inner-city and rural public schools open after school, on weekends, and during the summer as safe havens for enhanced learning.) The new program will make block grants to states, which in turn will award sub-grants. The bill also includes opportunities for museums to work in partnership with local school districts on professional development for teachers and math and science partnerships.

As *Aviso* went to press, the Senate had passed the legislation and the president was expected to sign it before Christmas. Once the bill is signed into law, AAM recommends that museums interested in applying for these funds contact their state's department of education for specific rules. A copy of the 1,000-plus-page bill is available on the Web at http://edworkforce.house.gov. For more information, contact: Eileen Goldspiel, AAM Government and Public Affairs, 202/289-9125; e-mail: egoldspiel@aam-us.org. ▲

AAM Opposes Cuts to Smithsonian's Budget

On Dec. 13, AAM sent a letter to the director of the Office of Management and Budget (OMB), urging him to increase the Smithsonian Institution's FY 2003 budget. Recent press reports have indicated that the president's budget, which is overseen by OMB, includes cuts to the museums' budget. Reported cuts include transferring funding of three research facilities (Astrophysical Observatory, Environmental Research Center, and Tropical Research Institute) to the National Science Foundation; suspending restoration of the Old Patent Office building, which houses the National Museum of American Art and the National Portrait Gallery; reducing the budgets of the National Air and Space Annex and the National Museum of the American Indian; and reprogramming general operating funds for increased security.

AAM's letter urges OMB Director Mitch Daniels to avoid cutting the Smithsonian's budget, citing President Bush's words of Dec. 11: "All around this beautiful city are statues of our heroes, memorials, museums, and archives that preserve our national experience, our achievements and our failures, our defeats and our victories." Also in the letter, AAM President and CEO Edward H. Able, Jr., wrote: "as a living institution, the Smithsonian will need federal resources to preserve our national remembrance of our culture, which now includes remembrance of the Sept. 11 events themselves."

Suspending the Old Patent Office renovation would continue to deny the public access to the collections of the National Portrait Gallery and the National Museum of American Art, and create additional storage costs, notes Able. In addition, the Smithsonian's ability to raise private funds for the National Air and Space Annex and the National Museum of the American Indian, which has relied heavily on private support, could be harmed. The letter also defends the role of museums in scientific and other research, citing the contributions of the three Smithsonian research facilities and the damage that would be done by dismantling their infrastructures.

The letter also argues that diverting money from general operation funding, which protects the collections, for increased security would be shortsighted. Instead, AAM's letter calls for additional funding. ▲

David Tarler
1209 12th Street, NW
Washington, DC 20005-4305

United States Sentencing Commission
Attention: Public Information
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002

January 4, 2002

Dear Commissioners:

As an attorney and an archeologist whose responsibilities include, among other things, training Federal attorneys on heritage resources protection law, I am responding to the United States Sentencing Commission's publication of a proposed amendment providing for a new guideline to cover a variety of offenses involving cultural heritage resources, and three issues for comment (66 Fed. Reg. 59,330-33 (2001)). I urge the Commission to adopt the guideline amendment, and I also offer comments concerning: (1) the valuation of cultural heritage resources; (2) the sentencing enhancement based on the value of these resources; (3) whether the enhancement for a "pattern of similar violations" should cover similar conduct even when a civil or administrative adjudication has not occurred; and (4) what conduct merits an upward departure or additional enhancement in sentence. Although I serve as a consultant to the Department of the Interior's Consulting Archeologist, my opinions do not necessarily reflect the position of the Department of the Interior.

I commend the Commission for addressing current guideline deficiencies in sentencing offenses involving cultural heritage resources that I discussed in my March 5, 2001 letter responding to the Commission's first call for comment (66 Fed. Reg. 7962, 7991-92 (2001)). The proposed guideline amendment raises the base offense level for crimes committed against our irreplaceable cultural heritage, mandates the application of "archaeological value" for purposes of sentencing, places the criminal provisions of the Native American Graves Protection and Repatriation Act clearly within the Federal sentencing guidelines, and provides a sentencing enhancement for commercial looters. In doing so, it fulfills the purposes of criminal punishment for these offenses, promotes the goals of uniformity and proportionality in sentencing, and furthers the effort to fight looting and preserve the archeological record, which is a tenet of the "National Strategy for Federal Archeology" espoused by each Secretary of the Interior since 1991. Also, in proposing a stand-alone guideline, the Commission is sending the message that all cultural heritage resources possess a value that transcends economics. I strongly support the adoption of this stand-alone guideline for offenses involving cultural heritage resources.

Valuation of Cultural Heritage Resources

With regard to application note 2, "archaeological value" is restricted to one, age-based class of cultural heritage resources, namely "archaeological resources." Cultural heritage resources that do not meet the Archaeological Resources Protection Act definition of "archaeological resource" will be valued only at their commercial value (plus cost of restoration and repair). I suggest that the Commission direct sentencing courts to use "archaeological value" to determine the value of any cultural heritage resource,

regardless of age, so long as the evidence for archeological value is probative, because "archaeological value" can be used to value virtually all cultural heritage resources, and commercial value never fully measures the intrinsic value of a cultural heritage resource, and should be used by prosecutors and the courts only when "archaeological value" is not available or probative.

The term "archaeological value" derives from the Archaeological Resources Protection Act. There, it only applies to archeological resources (because ARPA only deals with "archaeological resources"), which, by definition, must be at least 100 years old, but the methodology used to determine archeological value can be used to value virtually all cultural heritage resources. ARPA easily could have set the threshold age for an archeological resource at 50 years, instead of 100 years, and, in fact, most land managing agencies do use a 50 year-old threshold in the regulations they have issued pursuant to their "Organic Act" authority (see, for example, National Park Service regulations, at 36 C.F.R. 1.4(a)). Consequently, the application of archeological value to determine the value of cultural heritage resources should not turn on whether the cultural heritage resource is 100, 90, or 50 years old, but only whether the evidence offered for archeological value is probative. I recommend that the Commission change the proposed sentencing guideline to direct courts to use "archaeological value" to determine the value of any cultural heritage resource by eliminating subsection (A); replacing the beginning of subsection (B) with the words "(B) The value of a cultural heritage resource . . ."; and replacing the beginning of sub-subsection (i) of subsection (C) with the words "'Archaeological value' of a cultural heritage resource, including an archaeological resource, means . . .."

The Sentencing Enhancement Based on Value

Concerning the enhancement based on the value of the cultural heritage resources, the proposed guideline amendment places the threshold at a sum exceeding $2,000, but I believe that the threshold should be a sum exceeding $500. This lower amount represents the dividing line between a misdemeanor and a felony violation of the Archaeological Resources Protection Act. ARPA is the only law specifically protecting cultural heritage resources to provide a value amount as the basis for determining whether an offense deserves to be enhanced from a misdemeanor to a felony. Thus, ARPA constitutes the best evidence of Congressional will with regard to a value-based enhancement for offenses involving cultural heritage resources, namely that the value amount should be $500. Consequently, I recommend that this amount be used not only for charging and conviction, but for sentencing purposes, too, and that the Commission replace the beginning of 2B1.5(b)(1) with the words "(1) If the value of the cultural heritage resources (A) exceeded $500 but did not exceed $5,000, increase by 1 level . . .."

The "Pattern" Enhancement

With regard to the issue for comment concerning the "pattern" enhancement, so long as this enhancement avoids any double counting, I believe that similar conduct should qualify for the "pattern" enhancement even where no civil or administrative adjudication, or, for that matter, criminal conviction, occurred. The number of civil or administrative adjudications for cultural heritage resources offenses is so small that restricting the scope of the enhancement to these narrow classes of misconduct will constructively make the "pattern" enhancement a nullity. Even extending the "pattern" enhancement to actual criminal convictions would be too narrow.

The detection rate of offenses committed against archeological resources on the public lands, and the apprehension rate of the offenders, can be distinguished from most cases of theft of Government property. For one thing, land managing agencies don't know where all the archeological sites are located (and the actual number grows every year, when the resources reach the threshold age), and, therefore, they can't know the actual number of offenses. For another thing, lack of resources prevents them from effectively policing even the 700,000 known sites on their lands. Thus, in Fiscal Year 1997, only 9 percent of the 1,372 reported violations led to an arrest or citation (Archeology and Ethnography Program, Dept'l

Consulting Archeologist, National Park Service, Dept. of Interior, The Federal Archeology Program: Secretary of the Interior's Report to Congress 1996-97, at 37 (1999)). Because the number of apprehensions relative to the number of violations - both actual and reported - is overwhelmingly disproportionate, a defendant convicted of an offense involving a cultural heritage resource will almost never have prior civil or administrative adjudications, or criminal convictions, of misconduct similar to the instant offense. Consequently, I believe evidence which proves, for purposes of sentencing, that a defendant committed two or more acts of misconduct similar to the instant offense, in violation of any Federal, state, or local provision, rule, regulation, ordinance, or permit should constitute evidence of a pattern of similar violations because this evidence provides a more accurate means of determining misconduct similar to the instant offense, gives effect to the "pattern" enhancement, and ensures the general goal of proportionality in sentencing.

Upward Departure or Additional Enhancement

Finally, concerning the issue for comment on upward departure or additional enhancement, I recommend that the Commission include several examples of offense conduct meriting an upward departure or additional enhancement. "Extreme conduct" should be an appropriate reason for upward departure or enhancement (and see U.S. v. Shumway, 112 F.3d 1413, 1424 (10th Cir. 1999), where the defendant desecrated the remains of a Native American infant). Damage to reputation is an appropriate reason for upward departure or enhancement (and see U.S. v. Medford, 194 F.3d 419, 425 (3d Cir. 1999), where the thefts damaged the reputation of the Historical Society of Pennsylvania). A cultural heritage resource offense which is, in effect, a hate crime, with the offender motivated by hate for the particular racial, ethnic, religious, or social group, or individual, affiliated with the cultural heritage resource, deserves an upward departure or enhancement. Additionally, an offender who destroys or injures a cultural heritage resource for the purpose of avoiding detection and apprehension should be subject to an upward departure or additional enhancement in sentence.

I urge the Commission to adopt this stand-alone sentencing guideline amendment for offenses involving cultural heritage resources. Also, I hope you will consider my comments on the proposed amendment favorably.

Sincerely,

David Tarler

David Tarler

United States Department of the Interior

NATIONAL PARK SERVICE
1849 C Street, N.W.
Washington, D.C. 20240

IN REPLY REFER TO:

JAN 2 - 2002

A3815(2275)

United States Sentencing Commission
Attention: Public Information
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002

Dear Commissioners:

As the Department of the Interior and National Park Service official delegated to carry out the Secretary of the Interior's responsibilities for the Federal archeology program, I am responding to the United States Sentencing Commission's publication of a proposed amendment providing for a new guideline to cover a variety of offenses involving cultural heritage resources, and three issues for comment (66 Fed. Reg. 59,330-33 (2001)). I urge the Commission to adopt the guideline amendment, and I also offer comments concerning the valuation of cultural heritage resources, the sentence enhancement based on the value of these resources, whether the enhancement for a "pattern of similar violations" should cover similar conduct even when a civil or administrative adjudication has not occurred, and what conduct might merit an upward departure or enhancement in sentence.

I commend the Commission for addressing current guideline deficiencies in sentencing offenses involving cultural heritage resources that I discussed in my March 9, 2001 letter responding to the Commission's first call for comment (66 Fed. Reg. 7962, 7991-92 (2001)). The proposed guideline amendment raises the base offense level for crimes committed against our irreplaceable cultural heritage, mandates the application of "archaeological value" for purposes of sentencing, places the criminal provisions of the Native American Graves Protection and Repatriation Act clearly within the Federal sentencing guidelines, and provides a sentencing enhancement for commercial looters. In doing so, it fulfills the purposes of criminal punishment for these offenses, promotes the goals of uniformity and proportionality in sentencing, and furthers the effort to fight looting and preserve the archeological record, which is a tenet of the "National Strategy for Federal Archeology" espoused by each Secretary of the Interior since 1991. Also, in proposing a stand-alone guideline, the Commission is sending the message that all cultural heritage resources possess a value that transcends economics. I strongly support the adoption of this stand-alone guideline for offenses involving cultural heritage resources.

With regard to application note 2, "archaeological value" is restricted to one class of cultural heritage resources, namely "archaeological resources," based solely on age (at least 100 years). Cultural heritage resources that do not meet the Archaeological Resources Protection Act definition of "archaeological resource" will be valued only at their commercial value (plus cost of restoration and repair). I suggest that the Commission direct sentencing courts to use "archaeological value" to determine the value of any cultural heritage resource, regardless of age, so long as the evidence for archeological value is probative, because "archaeological value" can be used to value most cultural heritage resources, and commercial value never fully measures the intrinsic value of a cultural heritage resource, and should be used by prosecutors and the courts only when "archaeological value" is not available or probative.

The term "archaeological value" derives from the Archaeological Resources Protection Act. There, it only applies to archeological resources (because ARPA only deals with "archaeological resources," which, by definition must be at least 100 years old), but the methodology used to determine archeological value can be used to value most cultural heritage resources. ARPA easily could have set the threshold age for an archeological resource at 50 years, instead of 100 years, and, in fact, most land managing agencies do use a 50 year-old threshold in the regulations they have issued pursuant to their "Organic Act" authority (see, for example, National Park Service regulations, at 36 C.F.R. 1.4(a)). Consequently, the application of archeological value to determine the value of cultural heritage resources should not turn on whether the cultural heritage resource is 100, 90, or 50 years old, but only whether the evidence offered for archeological/scientific value is probative. I recommend that the Commission change the proposed sentencing guideline to direct courts to use "archaeological value" to determine the value of any cultural heritage resource by eliminating subsection (A); replacing the beginning of subsection (B) with the words "(B) The value of a cultural heritage resource . . ."; and replacing the beginning of sub-subsection (i) of subsection (C) with the words "'Archaeological value' of a cultural heritage resource, including an archaeological resource, means . . .."

Concerning the specific offense characteristic enhancement based on the value of the cultural heritage resources, the proposed guideline amendment places the threshold at a sum exceeding $2,000, but I believe that the threshold should be a sum exceeding $500. This lower amount represents the dividing line between a misdemeanor and a felony violation of the Archaeological Resources Protection Act. ARPA is the only law specifically protecting cultural heritage resources to provide a value amount as the basis for determining whether an offense deserves to be enhanced from a misdemeanor to a felony. Thus, ARPA constitutes the best evidence of Congressional will with regard to a value-based enhancement for offenses involving cultural heritage resources, namely that the value amount should be $500. Consequently, I recommend that this amount be used not only for charging and conviction, but for sentencing purposes, too, and that the Commission replace the beginning of 2B1.5(b)(1) with the words "(1) If the value of the cultural heritage resources (A) exceeded $500 but did not exceed $5,000, increase by 1 level . . .."

With regard to the issue for comment concerning the "pattern" enhancement, so long as this enhancement avoids any double counting, I believe that similar conduct should qualify for the "pattern" enhancement even where no civil or administrative adjudication, or, for that matter, criminal conviction, occurred. The number of civil or administrative adjudications for cultural heritage resources offenses is so small that restricting the scope of the enhancement to these narrow classes of misconduct will constructively make the "pattern" enhancement a nullity. Even extending the "pattern" enhancement to actual criminal convictions would be too narrow. The detection rate of offenses committed against archeological resources on the public lands, and the apprehension rate of the offenders, can be distinguished from most cases of theft of Government property. For one thing, land managing agencies don't know where all the archeological sites are located (and the actual number grows every year, when the resources reach the threshold age), and, therefore, they can't know the actual number of offenses. For another thing, lack of resources prevents them from effectively policing even the 700,000 known sites on their lands. Thus, in Fiscal Year 1997, only 9 percent of the 1,372 reported violations led to an arrest or citation (Archeology and Ethnography Program, Dept'l Consulting Archeologist, National Park Service, Dept. of Interior, The Federal Archeology Program: Secretary of the Interior's Report to Congress 1996-97, at 37 (1999)). Because the number of apprehensions relative to the number of violations - both actual and reported - is overwhelmingly disproportionate, a defendant convicted of an offense involving a cultural heritage resource will almost never have prior civil or administrative adjudications, or criminal convictions, of misconduct similar to the instant offense. Consequently, I believe evidence which proves, for purposes of sentencing, that a defendant committed two or more acts of misconduct similar to the instant offense, in violation of any Federal, state, or local provision, rule, regulation, ordinance, or permit should constitute evidence of a pattern of similar violations because this

evidence provides a more accurate means of determining misconduct similar to the instant offense, gives effect to the "pattern" enhancement, and ensures the general goal of proportionality in sentencing.

Finally, concerning the issue for comment on upward departure or enhancement, I recommend that the Commission include several examples of offense conduct meriting an upward departure or enhancement. "Extreme conduct" should be an appropriate reason for upward departure or enhancement (and see U.S. v. Shumway, 112 F.3d 1413, 1424 (10th Cir. 1999), where the defendant desecrated the remains of a Native American infant). Damage to reputation is an appropriate reason for upward departure or enhancement (and see U.S. v. Medford, 194 F.3d 419, 425 (3d Cir. 1999), where the thefts damaged the reputation of the Historical Society of Pennsylvania). A cultural heritage resource offense might be, in effect, a hate crime, with the offender motivated by hate for the particular racial, ethnic, religious, or social group, or individual, affiliated with the cultural heritage resource, and this kind of conduct should deserve an upward departure or enhancement. Additionally, an offender who destroys or injures a cultural heritage resource for the purpose of avoiding detection and apprehension should be subject to an upward departure or enhancement in sentence.

The Department of the Interior is the steward responsible for the greatest number of archeological sites and historic properties on the public lands. Consequently, Congress has charged the Secretary of the Interior with leadership and coordination responsibilities for our national archeology and historic preservation program. As the person who has been delegated the Secretary's responsibilities for the Federal archeology program, I urge the Commission to adopt this stand-alone sentencing guideline amendment for offenses involving cultural heritage resources, and hope you will consider my comments on the proposed amendment favorably. Also, I invite the Commission to call on the Office of the Departmental Consulting Archeologist for any assistance you might require, at 202/343-4101.

Sincerely,

Francis P. McManamon, Ph.D.
Chief Archeologist, National Park Service
Departmental Consulting Archeologist, Department of the Interior

United States Department of the Interior

NATIONAL PARK SERVICE
1849 C Street, N.W.
Washington, D.C. 20240

IN REPLY REFER TO:

A3815(2265)

JAN 2 4 2002

United States Sentencing Commission
Attention: Public Information
One Columbus Circle, NW
Suite 2-500
Washington, DC 20002-8002

Dear Commissioners:

The Native American Graves Protection and Repatriation Act (NAGPRA) was signed into law by President George H. Bush on November 16, 1990. Responsibilities for implementing the civil provisions of the statute were assigned to the Secretary of the Interior. The National NAGPRA Program has been established to carry out some of the Secretary's responsibilities regarding this statute. I am responding to the United States Sentencing Commission's publication of a proposed amendment providing for a new guideline to cover a variety of offenses involving cultural heritage resources [66 Fed. Reg. 59, 330-33 (2001)]. However, I will limit my comments on the proposed amendment to those provisions that relate to the criminal provisions of NAGPRA. The proposed guideline provides appropriate guidance to the Federal courts in sentencing those who violate NAGPRA. Notwithstanding our full support for the proposed guideline, I respectfully offer the following recommendations to improve it before the Sentencing Commission makes its final decision concerning the guideline.

Base Offense Level:

I strongly support establishment of a base offense level of 8 for offenses involving the theft of, damage to, destruction of, or illicit trafficking in cultural heritage resources [subsection 2B1.5(a)]. The application note defining "cultural heritage resource" makes it clear that the term includes "cultural items" as defined in NAGPRA.

Special Offense Characteristic-Value:

The proposed amendment would establish a 1 level enhancement if the value of the cultural heritage resource exceeds $2,000 but does not exceed $5,000 [subsection 2B1.5(b)(1)(A)]. The application note regarding the value of cultural heritage resources stipulates that the commercial value and the cost of restoration and repair will generally be used, except in the case of archaeological resources where the greater of the item's commercial value or archaeological value will be used.

The Commission should change the lower threshold for the 1 level enhancement from $2,000 to $500. The lower amount represents the dividing line between a misdemeanor and a felony violation of the Archaeological Resources Protection Act. ARPA is the only law specifically protecting cultural heritage resources to provide a specific value amount as the basis for

determining whether an offense deserves to be enhanced from a misdemeanor to a felony. Thus, ARPA constitutes the best evidence of Congressional will with regard to a value-based enhancement for offenses involving cultural heritage resources.

Special Offense Characteristic-Source Location:

The proposed amendment would establish a 2 level enhancement if, prior to the offense, the cultural heritage resource was located on or in a special Congressionally designated area, including the national park system, a National Historic Landmark, a national monument or national memorial, a national museum sanctuary, a national cemetery, a museum, or the World Heritage List [subsection 2B1.5(b)(2)].

The Commission should add "tribal lands" to the list in subsection 2B1.5(b)(2) and add a definition in the application notes that reads as follows: "'Tribal land' has the meaning given the term in 25 U.S.C. §3001(15)." NAGPRA provides special protection to cultural items found on tribal land. The intentional removal or excavation of cultural items from Federal lands may only be conducted following issuance of an ARPA permit and consultation with the appropriate Indian tribe or Native Hawaiian organization. Congress has provided additional protection on tribal lands by requiring the consent of the appropriate Indian tribe or Native Hawaiian organization prior to the intentional removal or excavation of cultural items.

Special Offense Characteristic-Types of Cultural Heritage Resources:

The proposed amendment would establish a 2 level enhancement if the offense involves human remains, a funerary object, a designated archeological or ethnological material, or a pre-Columbian monument or architectural sculpture or mural [subsection 2B1.5(b)(3)]. The application notes provide definitions of "human remains" and "funerary object."

The Commission should add "sacred object" and "object of cultural patrimony" to the list in subsection 2B1.5(b)(3) and add two definitions in the application notes that read as follows: "'Sacred object' means specific ceremonial objects which are needed by religious leaders for the practice of religions by their present day adherents" and "'Object of cultural patrimony' means an object having ongoing historical, traditional, or cultural importance central to a group or culture itself, rather than property owned by an individual, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual." NAGPRA provides special protection to sacred objects and objects of cultural patrimony, as well as to human remains and funerary objects. Extending the 2 level enhancement more generally to offenses involving sacred objects and objects of cultural patrimony would be equitable.

Special Offense Characteristic-Pecuniary Gain:

The proposed amendment would establish a 2 level enhancement for offenses committed for pecuniary gain or otherwise involving a commercial purpose [subsection 2B1.5(b)(4)(A)]. This enhancement would necessarily apply to all violations of 18 U.S.C. 1170, since a financial incident is one of the elements of the offense. For purposes of sentencing violations of 18 U.S.C. 1170, the proposed enhancement for a pattern of similar pecuniary or commercial violations [subsection 2B1.5(b)(4)(B)] would be moot as presently written.

Proposed Enhancement-Fiduciary Trust:

In the synopsis of the proposed amendment, the Commission recognizes the trust responsibilities of the United States for cultural heritage resources. For some of these resources, the United States is a trustee for the public generally, but for other resources it acts as a fiduciary specifically on behalf of Indian tribes and Native Hawaiian organizations.

The Commission should add a 2 level enhancement if the offense involves a cultural heritage resource for which the United States acts as a fiduciary on behalf of Indian tribes or Native Hawaiian organizations. Acts of theft of, damage to, destruction of, or illicit trafficking in cultural heritage resources for which the United States acts as a fiduciary are particularly heinous in that they violate Native peoples' moral values which the United States has a legal and moral obligation to protect. Therefore, an appropriately harsh punishment is in order. This enhancement would apply where it is determined that: 1) an Indian tribe or Native Hawaiian organization is the owner of the cultural item pursuant to 25 U.S.C. 3002 (a); or 2) the cultural item is to be expeditiously returned to an Indian tribe or Native Hawaiian organization pursuant to 25 U.S.C. 3005.

Thank you for your consideration of these recommendations. Please contact me at 202/343-1215 if you have any questions.

Sincerely,

Robert Stearns

Robert Stearns, Ph.D.
Manager, National NAGPRA Program

United States Department of Agriculture | Forest Service | Washington Office | 14th & Independence SW
P.O. Box 96090
Washington, DC 20090-6090

File Code: 5300/ 2360
Date: FEB 4 2002

United States Sentencing Commission
Attn: Public Information
One Columbus Circle, NE
Suite 2-500
Washington, DC 20002-8002

Dear Commissioners:

As Directors of Law Enforcement and Investigations, and Recreation, Heritage and Wilderness Resources for the Forest Service, one of the primary responsibilities is the protection and management of heritage cultural resources on all National Forest System lands in the United States. As such, we are responding to the United States Sentencing Commission's publication of a proposed amendment providing for a new guideline to cover a variety of offenses involving heritage cultural resources, and three issues for comment (66 Fed. Reg. 59, 330-33 (2001)). First, we thank the Commission for addressing an issue of critical importance to this agency. The Forest Service has an obligation to the public, under statutes passed by Congress, to protect these fragile and non-renewable resources. Heritage resource crime goes far beyond economic considerations. Nations, communities, and individuals maintain cultural identity through connections to places and objects. These crimes not only hinder the progress of science but they are a direct assault on the spirit and emotions of our people.

The Forest Service has responsibility for the 191.6 million acres of national forests and grasslands within the National Forest System, making it one of the largest land managing agencies in the Untied States. Our agency's stewardship responsibility for the many resources in and on these 191.6 million acres includes more than 277,000 known heritage sites, as well as countless sites yet undiscovered. Between 1999 and 2001, there were 301 reports of heritage cultural resource offenses within national forests and grasslands but the actual number of violations is unknown and likely exponentially higher. Limited resources are available for enforcing the law in this vast area, and convictions are few, so public land agencies need stronger tools to fulfill the public trust. We strongly urge the Commission to adopt the guideline amendment and we offer comments on the three Issues for Comment:

1. The phrase "pattern of similar violations" is ambiguous and open for interpretation. The enhancement in subsection (b)(4)(B) for a "pattern of similar violations" should be substantially broadened to apply to any defendant who is shown by competent evidence (including but not limited to criminal, civil, or administrative adjudications) to have any past history of two or more violations of Federal, state or local laws protecting heritage cultural resources.

2. There will be cases where the value of a heritage cultural resource, as determined under subsection (b)(1) and Application Note 2, underestimates the actual value. The use of only the commercial value and the cost of restoration and repair to determine the value of

the heritage cultural resource, unless they are archaeological resources, will not indicate the seriousness of the offense, an upward departure will be warranted. the value of these resources, as will the use of archaeological value and the cost of restoration and repair. In such cases, where the offense level determined under the guidelines substantially understates

3. Please include an enhancement for offenses that involve the use of destructive devices. Use of explosives can cause indiscriminate damage and demonstrates a callous disregard for public safety.

In addition to the above three comments, please make a change in Section 2B1.5 (b)(2). Insert ..."or lands administered by the Forest Service" following (A) the national park system. Section 2B1.5(b)(1)(A) and the second Application Note 2(A) should be consistent with the proposed amendments to the Penalties section of ARPA and should state that "If the value of the heritage cultural resources (A) exceeded $500 but not exceeded $5000, increase by 1 level.

Application Note 2 (A) should be eliminated from the sentencing guidelines. The method established by the ARPA Uniform Regulations (.14(a)) for the determinations of archaeological value can be applied effectively to cultural resources less than 100 years of age.

The Forest Service has trust responsibilities to carry out the mandates of Federal law with respect to American Indian and Alaska Native tribes. We therefore appreciate the effort of the Commission to include enhancements for offenses that involve human remains or funerary items.

Once again, thank you for addressing the concerns of our agency. Along with our Federal Preservation Officer, Michael Kaczor, as supported by our national leadership, we view this amendment as a needed and important tool to strengthen our ability to protect our Nation's cultural heritage. Our input was derived from those who work directly with and have experience with heritage/cultural law enforcement, who have direct experience with the issues and impacts of heritage-related crimes, and who are glad to provide more detailed information at your request. Please call either of our staffs for any additional assistance.

Sincerely,

for

WILLIAM F. WASLEY
Director
Law Enforcement and Investigations

for

RICHARD W. PATERSON
Acting Director
Recreation, Heritage, and Wilderness Resources

SAA
SOCIETY FOR AMERICAN ARCHAEOLOGY

January 30, 2002

United States Sentencing Commission
Attention: Public Information
One Columbus Circle, NE
Suite 2-500
Washington DC 20002-8002

Dear Commissioners:

I am writing to you as President of the Society for American Archaeology (SAA). With more than 7000 members, SAA is an international organization dedicated to research, interpreting, and protecting archaeological heritage of the Americas. Since its inception in 1934, SAA has endeavored to stimulate interest and research in American archaeology; advocate and aid in the conservation of archaeological resources; encourage public access to and appreciation of archaeology; oppose all looting of sites and the purchase and sale of looted archaeological materials; and serve as a bond among those interested in the archaeology of the Americas.

Because preservation of our nation's cultural heritage has been one of the Society's central objectives, SAA played an important role in the enactment of the Archaeological Resources Protection Act of 1979 (ARPA) (16 USC 470aa-mm) and the Native American Graves Protection and Repatriation Act (25 USC 3001-3013). It is SAA's position that these and other statutes should be used as effectively as possible to protect cultural heritage resources from the devastating effects of looting and vandalism.

Given this position, I am writing to you on behalf of SAA to express our organization's strong support for the adoption of the proposed amendments to sentencing guidelines, policy statements, and commentary published in the Federal Register (Volume 66, Number 228) on November 27, 2001. We commend the Sentencing Commission for proposing these amendments to the sentencing guidelines and feel that they will greatly enhance efforts to protect cultural heritage resources.

The Society appreciates the opportunity to provide the following responses to the "Issues for Comment" identified by the Sentencing Commission.

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Issue for Comment 1:

Large numbers of looters and vandals are not apprehended and are not prosecuted either criminally or civilly due to the vastness of the public and Indian lands on which cultural heritage resources are located, the relatively low level of law enforcement protection available for most of these lands, and the sophisticated methods of operation employed by many heritage looters and vandals. Therefore, it is the Society's position that the enhancement in subsection (b)(4)(B) for a "pattern of similar violations" should be substantially broadened to apply to any defendant who is shown by competent evidence (including but not limited to criminal, civil, or administrative adjudications) to have any past history of two or more violations of Federal, state, or local laws protecting cultural heritage resources.

Issue for Comment 2:

Cases will arise in which the value of a cultural heritage resource, as determined under subsection (b)(1) and Application Note 2, is underestimated. As is noted in the discussion of Application Note 2(A) below, the use of only the commercial value and the cost of restoration and repair to determine the value of cultural heritage resources, unless they are archaeological resources, will not indicate the value of these resources as appropriately as will the use of archaeological value and cost of restoration and repair. (This issue and the need to modify Application Note 2 are discussed more fully below.) Also, there are resources of such extreme and irreplaceable importance to the cultural heritage of the nation that even the use of archaeological value and the cost of restoration and repair will not be reflective of their true heritage value and will substantially understate the seriousness of the offense. A timely example of this type of cultural heritage resource is the Liberty Bell, which was recently damaged by a vandal. An example from the prehistoric cultural heritage of the United States is the Cliff Palace ruin at Mesa Verde National Park in Colorado. This site played an important role in the designation of Mesa Verde National Park as a World Heritage Site in 1978. For these reasons, it is the Society's position that Application Note 7 should be revised to affirmatively state that, "There will be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure will be warranted." The third sentence of Application Note 7 should be eliminated or should be revised to cite examples of the types of nationally important cultural heritage resources discussed above.

Issue for Comment 3:

It is the Society's position that, although the use of explosives with regard to a cultural resource crime may be covered by other statutes and sentencing guidelines, it would nevertheless be appropriate to include this enhancement in this guideline.

Additional Comments

The Society also wishes to comment on two other issues in the proposed amendments to the sentencing guidelines. The first issue pertains to Sec. 2B1.5(b)(1)(A) and the second to Application Note 2(A).

Sec. 2B1.5(b)(1)(A):

Sec. 2B1.5(b)(1)(A) states that, "If the value of the cultural heritage resources (A) exceeded $2,000 but did not exceed $5,000, increase by 1 level." In one of the important 1988 amendments to ARPA, the penalties section of the Act (16 USC 470ee(d)) was amended to lower the felony threshold from $5,000 to $500. The basis for this amendment was the fact that many violations causing serious harm to cultural heritage resources result in hundreds rather than thousands of dollars in monetary damages to these resources. Therefore, it is the Society's position that Sec. 2B1.5(b)(1)(A) of the proposed amendments to the sentencing guidelines should be consistent with the amended penalties section of ARPA and should state that, "If the value of the cultural heritage resources (A) exceeded $500 but did not exceed $5,000, increase by 1 level."

Application Note 2(A):

In relation to determining the value of cultural heritage resources for the purposes of subsection (b)(1), Application Note 2(A) states that, "Except as provided in subdivision (B), the value of a cultural heritage resource is its commercial value, and the cost of restoration and repair." Subdivision (B) of Application Note 2 allows the use of commercial value or the archaeological value and the cost of restoration and repair for determining the value of cultural heritage resources for the purposes of subsection (b)(1), but only for "archaeological resources" as defined by ARPA (16 USC 470bb(1)). Under this definition, an archaeological resource must be at least 100 years of age. In this regard, it is important to note three facts.

First, many cultural heritage resources important in the history of the United States are less than 100 years old and do not meet the ARPA definition of an archaeological resource (examples include sites and artifacts from World Wars I and II, the Civilian Conservation Corps, and the atomic power development period). Second, the archaeological value of cultural heritage resources less than 100 years old usually will more truly reflect the heritage value of these resources than does their commercial value. In addition, many of these resources either will not have a commercial value, or their commercial value will be difficult to ascertain. Third, the method established by the ARPA Uniform Regulations (.14(a)) for the determination of archaeological value can be applied effectively to cultural heritage resources less than 100 years of age. Therefore, it is the Society's position that the provisions of Application Note 2(B) should apply to determining the value of all cultural heritage resources for the purposes of subsection (b)(1) and that Application Note 2(A) should be eliminated from the proposed amendment to the sentencing guidelines.

Thank you for your consideration of SAA's comments on the proposed amendments of the sentencing guidelines. The Society strongly supports the Sentencing Commission's identification of the need for sentencing guidelines for cultural heritage resource crimes and views adoption of such guidelines as the highest possible priority in efforts to protect our nation's cultural heritage. If the Society may be of any further assistance in this process, please do not hesitate to contact Stuart Binstock, Manager of Government Affairs for the SAA, at 202-789-8200 and he will be able to assist you.

Sincerely,

Robert L. Kelly

Robert L. Kelly
President

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Nancy C. Wilkie, President

January 31, 2002

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

Dear Commissioners:

On behalf of the Archaeological Institute of America, I would like to submit the accompanying comments on the proposed amendments to the Sentencing Guidelines on Cultural Heritage Resource Crimes published in the Federal Register, Vol. 66, Number 228, on November 27, 2001 (Proposed USSG § 2B1.5). The AIA strongly endorses the efforts of the United States Sentencing Commission to increase the penalties for the commission of cultural heritage resource crimes in the attempt to make the punishment commensurate with the serious nature of these offenses and with the loss that they cause to the archaeological, historical and cultural record of humankind.

The AIA is grateful to the Sentencing Commission for undertaking this task and for affording the opportunity to submit these comments. Please do not hesitate to contact me at 507/646-4231, if I can be of any further assistance in the Sentencing Commission's deliberations.

Sincerely,

Nancy C. Wilkie

Nancy C. Wilkie
President

[84]

Comments of the Archaeological Institute of America
2002 Proposed Amendments to the Sentencing Guidelines on
Cultural Heritage Resource Crimes (Proposed USSG § 2B1.5)

The Archaeological Institute of America [AIA] is a professional and academic association with approximately 10,000 members throughout the United States, of which 2500 are professional archaeologists. Founded in 1879 by Harvard Professor Charles Eliot Norton and chartered by an Act of Congress in 1906, for over a century the AIA has cultivated the interests of and educated the American public about the past. Of particular concern to both the professional and avocational members of the AIA is the preservation of archaeological sites, historic monuments and museum collections, which form the basis for our understanding and knowledge of the past. The AIA today leads the debate concerning the trade in illicit antiquities. It was one of the first organizations in the United States to call for adherence to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property and to incorporate UNESCO principles into its Code of Ethics. The AIA has been instrumental in the enactment of United States cultural heritage legislation from the Antiquities Act of 1906 to the Convention on Cultural Property Implementation Act of 1983.

The AIA strongly endorses the 2002 Proposed Amendments to the Sentencing Guidelines (Proposed USSG § 2B1.5), which would provide enhancements and valuation rules for offenses involving the theft of, damage to, destruction of, or illicit trafficking in cultural heritage resources. While the AIA strongly supports these proposed Guidelines, we also suggest some changes that would have the effect of clarifying and carrying out more completely the intent of the proposal to provide offense levels that are commensurate with the full harm caused by cultural heritage resource crimes.

When objects are looted from archaeological sites, the damage that is caused often far exceeds the monetary value of the objects themselves. Much of the historic and scientific information of archaeological sites is contained in the context and relationship of individual objects to other objects, as well as to architectural remains, living floors, and floral and faunal remains. The ability to discern these relationships enables archaeologists, often working collaboratively with different types of scientists, to reconstruct past societies and to deduce a wealth of information concerning past life. Thus, the theft of objects of relatively low commercial or market value can cause destruction and harm of considerable magnitude to the historical and cultural record.

The currently existing Sentencing Guidelines are not able to take this full harm into account because they do not provide adequate levels of punishment for offenders. The initial two-level enhancement of the proposed Guidelines for cultural heritage resource crimes is a starting point for a calculation that takes this increased harm into account. The calculation of the monetary value of the damage caused can be based on either commercial value or archaeological value. The use of archaeological value is particularly appropriate in cases where the object is of low commercial value but the harm caused to an archaeological site is high. Thus, archaeological value takes into consideration the cost of retrieving the information that could have been obtained if the offense had not been committed. This provision is discussed in greater detailed below.

A third enhancement is provided if the offense involved commercial advantage or private financial gain. The AIA particularly supports this enhancement. While it is difficult to discern the exact workings of the international market in stolen and looted antiquities, the illegal market includes individuals who deal in large quantities of looted objects with considerable potential for financial gain. At least at the international level, these individuals facilitate the market between local looters, who receive relatively small payments for objects, and ultimate purchasers who pay considerable sums. The profit motive is high, while the chance of successful prosecution is relatively low, because of the complex interaction of laws of different nations and the perception of cultural heritage crimes as "victimless." Thus, an enhancement based on commercial gain motivation is one way to provide sufficient punishment that is a meaningful deterrent to the commission of cultural heritage resource crimes. It also provides a legitimate distinction between those who traffic in cultural objects for pecuniary gain and those who take objects to satisfy their own interest but who are not motivating others to do likewise.

Another enhancement is proposed for offenses involving specially protected resources or resources from specially protected places. In the latter, seven locations are specified. One of these locations is museums, and we will offer specific comment below. In the former category is included four types of cultural heritage resources that have merited special treatment in federal law. Again, we will comment on this provision further. The AIA supports both of these types of enhancements because the places and types of objects included have all been recognized by federal law, international agencies, or international conventions as having particular value to the cultural history of humankind.

Following are responses to the issues on which comment was requested, as well as specific

recommendations to improve the proposed Sentencing Guidelines and thereby carry out more fully the intended purpose of these amendments.

Issues for Comment:

1. Enhancement for "Pattern of Similar Violations": Section 2B1.5(b)(4)(B), Application Note 5

For numerous reasons, including difficulty of policing archaeological sites and historic monuments, the apprehension and successful prosecution of those who commit cultural heritage resource crimes are difficult to attain and not as frequent as are warranted. The AIA thus supports the proposed enhancement for a "pattern of similar violations" when the defendant is shown through prior adjudications to have previously engaged in similar misconduct.

2. Upward Departure Provision: Application Note 7

The AIA supports a provision allowing an upward departure in situations in which the offense level understates the seriousness of the offense. The example given in Application Note 7, in which a non-cultural heritage resource is damaged, destroyed or stolen, would warrant an upward departure. However, there are additional circumstances in which the offense level, to the extent it is based on the commercial value of the cultural heritage resource that has been stolen, damaged or destroyed, may well still be inadequate. This situation is addressed further in Recommendation 4, below.

3. Enhancement for Use of Explosives

The AIA supports an enhancement for use of explosives, both because it poses an additional danger to human life and because it can cause an extreme amount of damage to archaeological sites and historic monuments.

Recommendations:

1. Definition of Museum: Section 2B1.5(b)(2)(F) and Application Note 3(A)

As previously mentioned, one of the locations specified under Section 2B1.5(b)(2)(F) is museums. However, the definition of museum used in Application Note 3(A) is the definition provided in 18 U.S.C. § 668(1),

which requires a "museum" to be located within the United States. The AIA suggests expanding the definition to include museums located outside of the United States. Theft from a museum collection is equally egregious, wherever the theft occurs. With an expanded definition, this provision would apply to thefts from a museum when the stolen object is later brought to the United States. Museums, both in the United States and abroad, serve a valuable public function in collecting and preserving archaeological and cultural objects and making them available to the public for education and to scholars for research.

Theft from a museum imposes a special range of burdens–risk of injury to the object; deprivation to the public, which is denied the opportunity to view the object; deprivation to the scientific community, which is denied the opportunity to study the object and thereby add to our knowledge of the past; dismemberment of a collection so that the other objects in a particular group may also lose some of their meaning and historical or scientific value. Museums in some foreign countries may be the only repository of the few cultural objects in the country that are available for the public to view and study, and the citizens of these countries may not be able to visit collections in other countries. Thus, the loss of the commercial value of the object may be considerably smaller than the cultural and historical loss caused by the theft of an object from a museum collection. The recent case of nearly three hundred antiquities that were stolen from a museum in Corinth (Greece) and that surfaced in Miami is an illustration of the type of theft that inclusion of foreign museums in this section of the proposed guidelines would assist in deterring.

2. Particular Protected Categories of Cultural Heritage Resources: Section 2B1.5(b)(3) and Application Note 4

Section 2B1.5(b)(3) lists particular types of cultural heritage resources that have been designated by United States law as meriting special protection. A cultural heritage resource crime involving one of these particular types of objects receives an enhancement of two levels. The types of cultural heritage resources in this section are: (A) human remains; (B) a funerary object; (C) designated archaeological or ethnological material; and (D) a pre-Columbian monumental or architectural sculpture or mural. Human remains and funerary objects both receive special protection under the Native American Graves Protection and Repatriation Act, while the import of Pre-Columbian monumental or architectural sculptures and murals is specifically regulated under the Pre-Columbian Monumental or Architectural Sculpture and Murals Act of 1972, 19 USC. §§ 2091-95.

Subsection (C) of Section 2B1.5(b)(3) includes archaeological and ethnological material that has been designated for import restrictions under the Convention on Cultural Property Implementation Act of 1983, 19 U.S.C. §2601 *et seq* [CPIA]. The CPIA is the United States' implementing legislation for the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. The UNESCO Convention, among other things, calls on States Parties to the Convention to provide means of respecting each others' export regulations for archaeological and ethnological materials that are subject to theft and looting, which injures archaeological sites and indigenous communities. Pursuant to the CPIA, 19 U.S.C. §§2602-03, the United States may impose import restrictions on designated archaeological and ethnological materials that are illegally exported from the country of origin. In order to clarify the definition of "designated archaeological and ethnological material," we suggest that the citation to the CPIA in Application Note 4(A) be changed to read: "19 U.S.C. §§2601(7) and 2604", thereby referring to the more specific sections of the CPIA

In addition, the CPIA recognizes a second category of cultural objects, that is "stolen cultural property." The CPIA prohibits the import into the United States of "any article of cultural property documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution in any State Party that is stolen from such institution . . .", 19 U.S.C. §2607. In what seems to have been an inadvertent oversight, the proposed Sentencing Guidelines do not recognize this category of cultural heritage resources for an enhancement, although it is also specifically recognized by federal law as deserving special legal treatment. In fact, this section of the CPIA provides the most specific protection for archaeological sites, historic monuments, churches and other religious institutions located in foreign countries. It is also objects stolen from these types of institutions and locations that are most likely to involve a crime in the United States.

The AIA therefore suggests that a category be added to this section of the proposed Sentencing Guidelines to include "stolen cultural property." Furthermore, Application Note 4(A) would require an additional reference to "19 U.S.C. §§2601(6), 2607" in order to incorporate this category of "stolen cultural property" into the Sentencing Guidelines. The addition of this category of stolen cultural property would be the only means of providing enhanced protection to some categories of cultural heritage resources stolen from foreign countries as these may not otherwise be included in the specific categories listed in Section 2B1.5(3) of the proposed Sentencing Guidelines. This also seems an appropriate and logical complement to the inclusion of "designated archaeological and ethnological