material" protected under the CPIA.

3. Definition of "Cultural Heritage Resource" and Application Note 1

Application Note 1 provides the definition of "cultural heritage resources." Any object that does not fall within this definition will not be included under any provisions of the proposed Sentencing Guidelines. Therefore to be sure that all of the cultural heritage objects specifically listed in other sections of the proposal are, in fact, included, the AIA proposes adding to the definition of "cultural heritage resources" the following two categories: (1) "any designated archaeological or ethnological material, as defined in 19 U.S.C. §§ 2601(7) and 2604"; (2) "any object constituting stolen cultural property, as defined in 19 U.S.C. §§ 2601(6) and 2607". While some of these objects would be covered under the definition of an "object of cultural heritage, as defined in 18 U.S.C. § 668(a)" in Application Note 1(F), particularly ethnographic objects, religious objects and museum objects, which may be both under 100 years in age and worth less than $100,000, would not be included in the proposed amendments. Thus explicitly adding those objects that are covered by the CPIA to the definition of cultural heritage resources will allow this gap to be closed.

4. Value of Cultural Heritage Resources: Application Note 2

Application Note 2 provides that the determination of the value of a cultural heritage resource is based on its commercial value and the cost of restoration and repair. However, the valuation of an archaeological resource is "(i) the greater of its commercial value or its archaeological value; and (ii) the cost of restoration and repair." "Archaeological value" includes "the cost of the retrieval of the scientific information which would have been obtainable prior to the offense, including the cost of preparing a research design, conducting field work, conducting laboratory analysis, and preparing reports as would be necessary to realize the information potential." The definition of archaeological resource provided in Application Note 1 (the definition given in 16 U.S.C.§ 470bb(1)) would exclude from this alternate valuation method many objects that are otherwise subject to the proposed amendments. The types of information which are included in this valuation method for "archaeological resources" could be derived from other types of cultural heritage resources, in addition to those that fall within the category of archaeological resources. The AIA therefore suggests that the method of valuation indicated in Application Note

2(B) should be expanded to apply to all cultural heritage resources.

Delaware NAGPRA & Historic Preservation

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

11 Jan 02

Dear Sir or Ma'am,

The new proposed sentencing guidelines (Federal Register/Vol. 66 No. 228) look promising. It is important to take notice of the different pecuniary effects historic preservation crimes inflict. I was glad to see this pointed out. There are indeed intellectual, emotional, and spiritual connections to properties here that may be damaged or stolen. Hence, unlike a car, the stolen property here affects a culture, and is irreplaceable.

I think it would be a good idea to publicize the crimes and their penalties. This may deter the crimes. And as stated above that has to be the goal since no amount of jail time or money can ever replace the damaged or lost articles. Even if the articles are recovered the loss of the feeling of security, in the case of unearthed human remains, or the provenance information is lost forever.

Now to the issues for comment: I feel and hope the goal of harsh sentencing is not to punish bet to deter. I think it is important for the United States to state that it cherishes our historic sites and the information potentially gleaned from the sites belong to all Americans. So robbing the sites of the information is akin to stealing from the national treasury. It is also a civil rights offense. The United States has a long history of stealing from and depriving the Native American. It is not the right of non-natives, or native people, to steal from the graves or archaeological sites of Native Americans. The Native American is neither a vanquished foe to be looted nor a vanished people. Native Americans are American citizens and enjoy (theoretically) the same, no additional (again according to the law while not always in practice) protections.

By all means the enhancement should cover prior convictions for similar misconduct. This should be the case even if there has not been a civil or administrative adjudicate. The goal, again, is to deter. The sentencing must be strong enough to make the crime not worth it.

The criminal should also be held accountable for all damage. So I agree also with idea that the proposed Application should provide an upward departure if the value of a cultural heritage resource underestimates its actual value.

And thirdly the use of destructive devices is a disturbing act. It is reminiscent of the Taliban using destructive devices to destroy the priceless historical treasure in their land. I believe it his is terrorism. It is, weather consciously or not, an attempt at culturally and historic cleansing. The country would be in an uproar if something of perhaps little monetary value were destroyed (for instance Grants tomb) but unlimited value as far as pride and identity are concerned. This should also be the case of Native American cultural resources.

Sincerely,

David M. Scholes, M.A.
NAGPRA Director
Delaware Nation

Advisory Council On Historic Preservation

The Old Post Office Building
1100 Pennsylvania Avenue, NW, #809
Washington, DC 20004

February 4, 2002

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

Re: Comment on Proposed Amendments to Sentencing Guidelines Published at 66 F.R. 59330 (November 27, 2001)

Dear Honorable Diana E. Murphy:

The Advisory Council on Historic Preservation ("Council") welcomes the opportunity to comment on the proposed amendment to the sentencing guidelines regarding offenses against cultural heritage resources.

The Council is an independent Federal agency created by the National Historic Preservation Act. Among other things, the Council advocates full consideration of historic values in Federal decision-making; reviews Federal programs and policies to promote effectiveness, coordination, and consistency with national preservation policies; and recommends administrative and legislative improvements for protecting our Nation's heritage with due recognition of other national needs and priorities.

We support the addition of the proposed guideline § 2B1.5. As your request for public comment indicates, cultural heritage resources are irreplaceable and possess an intrinsic value that transcends the monetary considerations normally involved with other types of properties. In enacting the National Historic Preservation Act, Congress declared that "the spirit and direction of the Nation are founded upon and reflected in its historic heritage" and that "the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans." 16 U.S.C. § 470(b)(1) and (3). Providing higher offense levels when theft, damage, destruction or illegal trafficking relates to a cultural heritage resource is consistent with this declaration, and hopefully deters people from diminishing our Nation's shared heritage.

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If you have any questions, please contact me at 202-606-8596.

Sincerely,

Javier Marqués
Assistant General Counsel

NATIONAL TRUST
for HISTORIC PRESERVATION

February 4, 2002

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

Re: Proposed Amendments to Sentencing Guidelines For Crimes Involving Cultural Resources

Dear Commissioners:

The National Trust for Historic Preservation in the United States (National Trust) strongly endorses the Proposed Amendments to the Sentencing Guidelines for United States Courts published in the Federal Register on November 27, 2001 (66 Fed. Reg. 59,330 (2001)). The proposed amendments to § 2B1.5 would provide more stringent penalties for offenses involving theft of, damage to, destruction of, or illicit trafficking in cultural heritage resources, including national memorials, archaeological resources, national parks, and national historic landmarks. These stricter penalties are necessary because current sentences are too lenient to provide sufficient deterrence for these crimes, particularly in light of the fact that crimes involving cultural resources are often highly lucrative. We are concerned that, in the absence of stricter penalties, those who commit these crimes will continue to treat financial penalties as simply a cost of doing business.

The National Trust for Historic Preservation has a strong interest in the preservation of our nation's cultural heritage. Congress chartered the National Trust in 1949 as a private charitable, educational, and nonprofit organization to "facilitate public participation in the preservation of sites, buildings and objects significant in American history and culture," and to further the purposes of federal historic preservation laws. 16 U.S.C. §§ 461, 468. The National Trust has grown to include more than 250,000 individual members and approximately 3,500 member organizations. In addition, the Trust operates seven regional and field offices around the country, as well as 21 historic sites open to the public.

The Notice specifically requests comments on the following issues:

Issue 1: Pattern of Similar Violations

The first issue seeks comment on whether the enhancement for a "pattern of similar violations" should be expanded beyond "civil or administrative adjudications for prior misconduct similar to the instant offense" to include convictions, and/or misconduct which has not been subject to civil or administrative adjudication. In our view, the enhancement should be expanded to include these additional factors. It is important to recognize that those who excavate, remove, traffic, damage, or otherwise alter or deface cultural heritage resources are not always prosecuted individually for those offenses. For example, the Archaeological Resources Protection Act (ARPA) authorizes the seizure of tools and vehicles used in the violation without necessarily prosecuting the individuals. For these reasons, the National Trust believes that the enhancement in subsection (b)(4)(B) regarding "pattern of similar violations" should be expanded to include not only "convictions" for similar misconduct, but also other misconduct that may not have been subject to prior civil or administrative adjudication. In addition, we believe the pattern of "similar violations" should be construed to include a broad range of misconduct related to damage or loss of cultural resources, such as trespass or theft involving cultural resources on private or state lands.

Issue 2: Underestimating Actual Value of Cultural Heritage Resources

The second issue seeks comment on whether, among other things, the guidelines should provide an upward departure if the value of a cultural heritage resource, as determined by applying subsection (b)(1) and Application Note 2 of the guidelines, nonetheless "underestimates its actual value." The National Trust believes that an upward departure would be warranted in these circumstances. Although this situation would be unlikely to arise for "archaeological resources," which are valued by considering the greater of their commercial value or their archaeological value, (Application Note 2(B)), this upward departure could be important for cultural heritage resources that do not specifically qualify as "archaeological resources" under ARPA – for example, resources that are less than 100 years old. 16 U.S.C. § 470bb(1). This category of "non-archaeological" cultural heritage resources is valued only by its commercial value (plus, in all cases, the cost of restoration and repair). Application Note 2(A). There may be cases where the "archaeological value" of a "non-archaeological" resource would be higher than its commercial value, and would more accurately reflect its "actual" value, especially if the scientific costs of retrieving the data would be high. In addition, there may be extremely significant or unusual resources whose actual value is simply not reflected accurately by the formulas provided. In such circumstances, an upward departure of the offense level would be appropriate.

Issue 3: Enhancement for Use of Destructive Devices or Explosives

The third issue seeks comment on whether the guidelines should include an enhancement for crimes involving the use of destructive devices or explosives. In virtually every case, the use of explosives and other destructive devices will exacerbate the magnitude of irreparable harm to cultural resources and sites. Indeed, the term "destructive devices" should be expanded to include "techniques" that are destructive to the resources as well. *See, e.g., United States v. Fisher*, 977 F. Supp. 1193 (S.D. Fla. 1997), *aff'd*, 174 F.3d 201 (11th Cir. 1999) (use of prop wash deflectors to steer prop wash into the ocean floor to remove sediment in searching for buried underwater shipwreck created approximately 600 large craters that damaged Cape Canaveral National Seashore). Therefore, the National Trust supports increasing the offense level based on the use of explosives or other destructive devices and techniques on cultural resources.

In addition to these comments on the proposed amendments, the National Trust would like to suggest a clarification that we believe would more fully incorporate the intent of these guidelines.

Value of Cultural Heritage Resources.

In determining the value of cultural heritage resources, Application Note 2(B) provides that, for archaeological resources as defined in ARPA (at least 100 years of age), the determination of value is based on the greater of its commercial value or its archaeological value (plus the cost of restoration and repair), while Note 2(A) provides that all other cultural heritage resources are valued for purposes of section 2B1.5(b)(1) is based on its commercial value and the costs of repair and restoration. The term archaeological value is more all-encompassing than the term commercial value and includes the costs of retrieving any scientific information that would have been obtainable prior to the offense. There are many cultural heritage resources, including archaeological resources less than 100 years of age and historic resources and properties, which would benefit from such a valuation. Therefore, the National Trust suggests applying the standard used for archaeological value to all cultural heritage resources.

The National Trust appreciates the opportunity to comment on the United States Sentencing Commission's Proposed Amendments to the Sentencing Guidelines. If we can provide you with additional information or otherwise be of assistance in the development of the final guidelines, we will be happy to do so.

Sincerely,

Elizabeth S. Merritt

Elizabeth S. Merritt
Deputy General Counsel

Anita C. Canovas
Assistant General Counsel

AHAMAKAV CULTURAL SOCIETY

Fort Mojave Indian Tribe

P.O. 5990 MOHAVE VALLEY, AZ 86440 (928)768-4475

February 4, 2002

Diana E. Murphy, Chairperson
United States Sentencing Commission
One Columbia Circle, N.E., Suite 2-500
Washington, D.C. 20002-8002

RE: Proposed Amendments to Sentencing Guidelines for Theft, Damage, Destruction to, or Trafficking in Cultural Heritage Resources

Dear Ms. Murphy:

The AhaMakav Cultural Society, which is the Historic and Cultural Preservation Office of the Fort Mojave Tribe, has received and reviewed the proposed changes in sentencing guidelines for cultural resource crimes, and we are fully in support of the proposed changes, although we feel that Section 2B1.5 should be revised in part (2) to add: "(H) an Historic Property of cultural or religious importance to a Federally recognized Indian Tribe." We also feel that part 3 of Section 2B1.5 should be changed to add another type of cultural heritage resource to those listed: "(E) an item of cultural patrimony of a Federally recognized Indian Tribe." The latter type of cultural resource is defined in the Native American Graves Protection and Rapatriation Act as something necessary for the continuation of traditional cultures, and such items are sought after by collectors and looters.

If you have any questions, call us at (928)-768-4475.

Sincerely,

Chad Smith

Chad Smith, Tribal Archeologist,
Cultural Resource Manager

xc: Elda Butler, Director, AhaMakav Cultural Society
Nora Helton, Tribal Chairperson

[100]

CADDO TRIBE OF OKLAHOMA

Cultural Preservation Department
Post Office Box 487
Binger, Oklahoma 73009
405-656-2901 405-656-2344
Fax # 405-656-2892

January 17, 2002

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

Re: Proposed Sentencing Guidelines for Cultural Resource Crimes

Dear Members of the Sentencing Commission:

Thank you for the opportunity to comment on a very important aspect of the legal guidelines that over the years have directly impacted the Caddo Nation of Oklahoma.

Too often, organized, commercial looters have been given a mere "slap on the wrist" when it came to sentencing under destruction of government property laws. Our Cultural Preservation Department and present Chairwoman LaRue Parker, has visited numerous Caddo cemeteries and village sites in northeast Texas, many on federal property owned and managed by the Fort Worth District Corps of Engineers. Of these sites, most all have been defiled and looted to some extent. To date, the only law enforcement measures taken, have been under codes related to theft or destruction of government property with a fine of only fifty dollars. To complicate matters for the Caddo Nation, the state of Texas does not have an unmarked burial law in place, so the looting runs rampant on private and state land at a much more rapid pace.

It is stated in the Federal Register notice that "Cultural heritage resource crimes are fundamentally different than general property crimes because, unlike other property crimes where the primary harm is pecuniary, the effect of cultural heritage resource crimes is in great part non-pecuniary in nature. Punishment of these crimes should reflect these intrinsic differences." We wholeheartedly agree, however, the fact remains that Native American tribal governments, and the people they serve, are probably more impacted by these crimes than any group. Financially, we have spent an untold amount of time, effort, and funding to visit, document, and participate in all aspects related to curtailing the looting activities of sites of importance to the Caddo Nation. Members of the preservation staff have participated in cultural resource law training; training through the Federal Law Enforcement Training Center on the Archaeological Resources Protection Act; and have received National Park Service funding to document the extent of the looting of Caddo sites and cemeteries on federal land in Texas, Oklahoma, Arkansas and Louisiana. These

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investments we have made seem to have very little return when a looter is finally caught in the act of digging up a Caddo cemetery; a cemetery that is looked upon as a sacred place to the Caddo Nation, an irreplaceable resource to the archeological community, and to the looter, nothing more than items of curiosity that has a monetary value and can be sold. The looters continue to pay the fines and continue to destroy what little physical evidence is left of an important history and culture.

The Caddo Nation is very pleased that the Sentencing Commission will increase penalties for these Cultural Heritage Resource crimes. As stated in the Federal Register notice, the "system of value" or "monetary value" that has been in place, is "inappropriate". One of the reasons that this is the case is that laws that are in place to protect cultural resources have historically left out one of the single most important components of assessing value to the resource, that is; the views and beliefs of the Indian tribes that are being impacted by the illegal actions. Traditionally, as found in ARPA, the damage assessments are based on the commercial value or archeological value plus the cost of restoration and repair. However, there is obviously a "humanistic value" involving the loss of important cultural, sacred, and ceremonial sites to the Indian tribes that are losing their culture. We have argued to District Attorneys involved in ARPA cases that any damage assessments should involve not only the law enforcement officers and archeologists, but tribal representatives and tribal religious practitioners as well.

I will now comment on the 3 issues. The first issue, regarding "pattern of similar violations" and the proposed definition in Application Note 5. We agree that this is one of the only ways to curb this illegal activity. If a pattern is shown, it shows the maliciousness of the act and the disregard for existing law. Many looters, as I have mentioned earlier, will "pay the fine" and continue to loot because the benefits far outweigh the punishment. In this case, and with the wording as it is, looters would have to make tough decisions and weigh the cost of their illegal actions.

The second issue regarding whether it is appropriate to use the applicable numbers of levels from the loss table or the loss commentary in Section 2B1.1 for the determination of the non-cultural heritage resource harm caused. We believe that it would be inappropriate to use the table that is being used for cultural heritage resource crimes. These should be treated as separate offenses, with the non-cultural resource crime beginning at the base level of general property destruction. As for "whether an upward departure should be provided if the value of the cultural heritage resource, as determined under proposed subsection (b)(1) and Application Note 2, underestimates its actual value" who would determine whether or not the value was underestimated? For example, a Caddo pottery vessel may have an "actual value" on the buyers market of $350, the collectors and antiquities dealers are the only ones giving the pricing or "actual value" its validity, moreover, they could care less whether or not the vessel was taken from a ceremonial burial with the human remains tossed aside in the backdirt, they only care about the object. Here, the argument would be that in determining "actual value" all circumstances surrounding the illegally taken items should be considered. Where the items were taken from, i.e. a museum, private collection, tribal museum, or burial ground should be

considered. Another consideration should be what type of item it is. Is it a burial or funerary object, a sacred object or item of cultural patrimony? There may be a sacred object that has little or no monetary value on any buyers market but has a priceless value to the Native American tribe to which it belongs. All of these circumstances should be considered when determining "actual value" and the appropriate upward departure.

The third issue on "whether the proposed guideline should include an enhancement for the use of explosives". We fully believe that there should be an enhancement for the use of explosives. As in the case of a "two-level enhancement and a minimum level of 14 if a firearm was possessed or a dangerous weapon (including a firearm) was brandished", there should also be a very stiff penalty, along with an overtly clear message to anyone transporting and using explosives in this kind of illegal activity that they will suffer for the consequences of their actions.

Thank you for the opportunity to comment on these proposed federal regulations.

Sincerely,

Robert Cast
Historic Preservation Officer
Caddo Nation of Oklahoma

THE CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD NATION
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E-mail: csktcouncil@ronan.net

Tribal Preservation Department
February 1, 2002

United States Sentencing Commission
Attention: Public Affairs/Public Comment/Public Information
One Columbus Circle, NE, Suite 20500
Washington, DC 20002-8002

RE: Sec. 2B1.5, Theft of, Damage to, or Destruction of Cultural Heritage Resources, Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources

Dear Commissioners:

This letter represents the comments of the Confederated Salish and Kootenai Tribes of the Flathead Reservation (CSKT), Preservation Department on the proposed new sentencing guidelines for the "Cultural Heritage Resources (Sec.2B1.5)". We support and welcome the new sentencing guidelines proposed by the United States Sentencing Commission. We believe there needs to be specific guidelines for Cultural Resources and that the previous process of using "Damage to Property Destruction Guideline" was completely inadequate to address the loss of irreplaceable cultural resources.

The most welcome factor in the guidelines is the emphasis on the non-monetary value of damaged Cultural Resources and the harm this does to the culture of a people.

I suggest that the desecration of human remains carry a harsher penalty than the proposed level 8. Grave robbing is the most hideous offence and the basic human rights of respect for the dead should be afforded to all people, whether they were placed in a formal cemetery, or placed on the land in an unmarked grave. Destroying graves for recreation, personal gain, or economic profit, should not be tolerated by any society. This activity is discussed in section 2B1.f(a)(3) with numerous other activities. The issue of desecration of human remains should be addressed separately with a section of its own.

The specific comments on the three points requested are:

The guidelines should provide consideration for all past conduct which could have been considered harmful to a cultural heritage resource, no matter what forum or stage of the adjudication. In some instances, land managers can issue warnings or citations, which are not subject to the "beyond reasonable doubt" standard of a criminal trial, but indicate a pattern of violations, which should be taken into account by the court. The level of enhancement should be at least 2 levels, as identified in the proposed guidelines, or up to the statutory maximum.

In the event that both non-cultural and cultural heritage resources are harmed, it would be preferable that the person be charged under two statutory violations and run the sentences cumulatively. However, if the conduct merges into a single crime, the value of the cultural heritage resources and non-cultural heritage resources should be aggregated for purposes of enhancement, but as well enhancing the sentence with the recognition of the non-pecuniary nature of the cultural heritage resources values.

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The sentence should be enhanced for use of explosive devices, as it is increased for dangerous weapons. Additionally, the sentence should be enhanced for use of heavy equipment, aggravating the damage.

We want to reemphasize our appreciation that the United States Sentencing Commission recognizes the voluminous distinction between destruction of non-renewable cultural resources and burial sites, and stealing of government property. The deliberate desecration of burials and cultural sites wields a blow to Tribal cultures that can never be calculated into dollars. The loss of these precious resources robs all United States Citizens from knowing and appreciating their rich and diverse histories.

If you have any specific questions or wish to contact CSKT, please contact myself or Joe Hovenkotter at (406) 675-2700 extensions 1077 and 1169 respectively.

Sincerely,

Marcia Pablo

Marcia Pablo
CSKT Historic Preservation Officer & Director
The Tribal Preservation Department

CONFEDERATED TRIBES
of the
Umatilla Indian Reservation
Department of Natural Resources
CULTURAL RESOURCES
PROTECTION PROGRAM
P.O. Box 638
73239 Confederated Way
Pendleton, Oregon 97801
Area code 541 Phone 276-3629 FAX 276-1966

Transmitted Via Facsimile: 202-502-4699

January 28th, 2002

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

RE: Sec. 2B1.5. Theft of, Damage to, or Destruction of Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources

Dear Commissioners:

This letter represents the comments of the Confederated Tribes of the Umatilla Indian Reservation (CTUIR), Cultural Resources Protection Program of the Department of Natural Resources on the proposed new sentencing guidelines for "cultural heritage resources." Staff at the CTUIR are very impressed with the proposed guidelines and regret only that they were so long in coming. The guidelines, as proposed, are a significant step toward putting teeth in the enforcement and deterrence effects of the cultural resources protection laws. I do, however have a few specific comments.

The most important factor in these guidelines is stressing the non-monetary value of the resources and the large class of individuals harmed by the crimes. The guidelines cover this issue sufficiently, but more could always help.

I would recommend that the desecration of human burials be enhanced more than 2 levels because of the nature of the action. That is, people should know that grave-robbing is wrong, injuring both the deceased ancestor as well as the living relatives of those burials. Destroying graves for recreation, personal gain or economic profit is particularly heinous and the CTUIR views it as a hate crime against Native Americans. This activity is discussed in section 2B1.5(a)(3) with numerous other activities. The section should be expanded to focus specifically on grave desecration or another section should be added.

Needless to say, and as the proposed guidelines clearly point out, there is a serious difference between stealing U.S. government property and looting Indian burials or archaeological sites. As noted in the synopsis, the guidelines under the theft statutes do not adequately reflect the exact nature of the deeply personal harm both to the tribes who retain rights to these resources and to the U.S. public who are deprived of the knowledge that could be gathered from sites.

The guidelines asked for specific comments on three points. On the three points requesting comments I would add this:

(1) The guidelines should provide enhancement for all past conduct which could have been considered harm to a cultural heritage resource, no matter what forum or stage of the adjudication. In some instances, land managers can issue warnings or citations, which are not subject to the "beyond reasonable doubt" standard of a criminal trial, but indicate a pattern of violations which should be taken into account by the court. The level of enhancement should be at least 2 levels, as identified in the proposed guidelines, or up to the statutory maximum. It cannot be stressed enough that whomever is destroying an Indian grave or archaeological site for personal or economic gain is committing a crime against the tribal members who created the site, the tribes who are related to those sites and the public at large. It is in this way that the harm is increased many fold, and this should be taken into account during the sentencing phase.

(2) In the event that non-cultural heritage resources are harmed as well as cultural heritage resources, it would be preferable that the person be charged under two statutory violations and run the sentences cumulatively. However, if the conduct merges into a single crime, the value of the cultural heritage resources and non-cultural heritage resources should be aggregated for purposes of enhancement, but as well enhancing the sentence with the recognition of the non-pecuniary nature of the cultural heritage resources values.

(3) The sentence should be enhanced for use of explosive devices, as it is increased for dangerous weapons. Additionally, the sentence should be enhanced for use of heavy equipment, aggravating the damage, and demonstrating a callous disregard for the resources destroyed.

In short, I cannot say enough good things about these guidelines. Had I known that the guidelines in place only looked at the monetary value of the resources destroyed, I would have been pushing for these type of guidelines years ago. For too long, the sentencing guidelines have ignored the fundamental recognition contained in ARPA that archaeological and cultural resources are "an accessible and irreplaceable part of the Nation's heritage[.]"

Finally, I would like to express my appreciation to the commission for considering these proposed guidelines. If you have any specific questions or concerns, please feel free to contact me or Audie Huber, Intergovernmental Affairs Manager, at 541-966-2334.

Sincerely,

Jeff Van Pelt

Jeff Van Pelt, Manager
Cultural Resources Protection Program

JVP/ah

cc: All THPO tribes

[107]

COQUILLE INDIAN TRIBE

P.O. Box 783 • 3050 Tremont • North Bend, OR 97459
Telephone 541-756-0904 • FAX 541-756-0847

January 25, 2002

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

Re: Proposed amendments establishing new guidelines for sentencing for cultural resource crimes

Dear Sirs:

The Coquille Tribe agrees that cultural resource crimes should be dealt with at a higher level than just "property damage." In most instances the loss of tribal cultural resources is not about money. In most instances, the cultural resource- whether it is material, physical, and tangible object or artifacts; or the often less tangible psychological and esthetic values of place and landscape- is not only irreplaceable and consequently invaluable, the "making another one" option does not exist.

A crime against a cultural resource is also a crime against people. It is an assault on their beliefs, traditions, and customs; and in many instances an assault on the sustainability of a people to maintain their cultural identity.

The Coquille Tribe supports the proposed guidelines to establish a higher base level for cultural resource crimes, as published in the Federal Register November 27, 2001.

Sincerely,

Edward L. Metcalf, Chairman

C: Culture Committee

[1087]

GUIDIVILLE
IndianRancheria

P.O. BOX 339 • TALMAGE, CA 95481 • PH: 707/462-3682 • FAX: 707/462-9183

January 8, 2002

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

Attention: Public Information

Dear Commissioners:

The Guidiville Indian Rancheria Tribal Council (Tribe) would like to take this opportunity to thank you for your consideration given to the important issue of Cultural Resources Crimes in the United States.

The Tribe is under the impression that the United States Sentencing Commission (Commission) is considering adoption of the guidelines as published in the Federal Register on Tuesday, November 27, 2001 as a deterrent to criminal activity involving Cultural Resources. In light of the fact that most tribally associated cultural resources are located on Indian Reservations and Indian Rancherias, special provisions to protect these areas need to be made in the guideline.

Enhancement provisions should be made at §2B1.5 (b)(2), which should include reference to Federal Indian Reservations and Rancherias.

In closing we would like to again thank the Commission for giving consideration to this important issue.

Sincerely,

Merlene Sanchez
Tribal Chairperson

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THE HOPI TRIBE

Wayne Taylor, Jr.
CHAIRMAN

Elgean Joshevama
VICE-CHAIRMAN

January 28, 2002

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

Re: Proposed Sentencing Guidelines for Cultural Resource Crimes

Dear Sentencing Commission,

This letter offers the support of the Hopi Tribe for the United States Sentencing Commission's proposed amendments establishing sentencing guidelines for the theft, damage, destruction or trafficking in cultural resources, published in the Federal Register, Vol. 66, No. 228, Tuesday, November 27, 2001.

The Hopi Tribe agrees that crimes committed against cultural resources, particularly violations of the Native American Graves Protection and Repatriation Act, are serious attacks on our cultures. In recent letters to Judge Broomfield at the Phoenix Federal Court and the Assistant U.S. District Attorney in Durango, regarding separate cases of desecration of human remains and Archaeological Resources and Protection Act case sentencing, we stated that we believed these cases deserved special recognition.

The Hopi Tribe therefore supports the proposed guidelines that establish a higher base offence level for cultural resource crimes than the current base level for generic property damage. We also therefore support the enhancements that may increase the length of the sentence, including if the offense involves specially protected items, such as human remains, funerary objects or archaeological materials.

If you have any questions or need additional information, please contact Leigh J. Kuwanwisiwma, Director, Hopi Cultural Preservation Office at 928-734-3751. Thank you for your consideration.

Respectfully,

Wayne Taylor, Jr.
Chairman
HOPI TRIBE

Enclosure: November 15, 2001, letter, Daily Sun Article
xc: Office of the General Counsel
Gary Cantley, Bureau of Indian Affairs
Forest Supervisors and Archaeologists, Coconino and San Juan National Forests
Robert Kennedy, Assistant U. S. Attorney, Durango
Raul V. Rood, Paul K. Charlton, Diane Humetewa, U.S. Attorney's Office, Phoenix

P. O. Box 123 — KYKOTSMOVI, AZ. — 86039 — (928) 734-3000

[1107]

THE HOPI TRIBE

Wayne Taylor, Jr.
CHAIRMAN

Phillip R. Quochytewa, Sr.
VICE-CHAIRMAN

November 15, 2001

Robert Kennedy, Assistant U.S. Attorney
103 Sheppard Drive, Suite 125
Durango, Colorado 81303

Dear Counselor Kennedy,

This letter is in support of officials of the U.S. Forest Service and Bureau of Land Management, Mancos-Dolores Ranger District, in the regard to a violation of the Archaeological Resources and Protection Act that occurred on October 1, 2000, case 01-02-P-1001.

The Hopi Tribe has been consulted by officials of the Mancos-Dolores Ranger District regarding this case, which involves the looting of an archaeological site at Reservoir Group Ruins, 5MT4450, in Montezuma County, Colorado. The Reservoir Ruins archaeological site is an ancestral site of Hopi Clans, and a Traditional Cultural Property of the Hopi Tribe. The Hopi Tribe is aware that the investigation revealed that the site had been looted and many artifacts illegally removed, that the looting of the site included the excavation of the human remains, and that those human remains were left scattered around the site by the perpetrators.

The Hopi Tribe is pleased that the perpetrators have been charged with a violation of the Archaeological Resources Protection Act. While we are pleased the artifacts were recovered and the perpetrators apprehended, the desecration of this site cannot be measured by any sentence imposed, and the Hopi Tribe cannot adequately express the thoughts and effects of this act on Hopi Tribal members.

Furthermore, in your deliberations on their case, we request that you consider the severity of this offense in light of the Archaeological Resource Protection Act, and we refer you to the attached article and U.S. Attorney Paul K. Charleton in Phoenix, who recently successfully prosecuted an Archaeological Resource Protection Act case involving looting of a site and disturbance of human remains on the Coconino National Forest. As in that case, the Hopi Tribe believes that the desecration of the Reservoir Ruins site and the remains of our ancestors by these perpetrators deserves special recognition.

If you have any questions or need additional information, please contact Leigh J. Kuwanwisiwma, Director, Cultural Preservation Office at 928-734-3571. Thank you for your consideration.

Respectfully,

Wayne Taylor, Jr.
Chairman
HOPI TRIBE

Enclosure: Daily Sun

cc: Mike Zamold, Laura Kochanski, Brooke Simpson, National Forest
Paul K. Charlton, U.S. Attorney, Paul V. Rood, Diane Humetewa, Assistant U.S. Attorneys

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50 CENTS
Today's weather
High: 58 Low: 27
Sun Forecast, A8

Daily Sun

A Pulitzer Newspaper serving Flagstaff & northern Arizona since 1887

WORLD SERIES
D-backs let Game 4 slip away
B1

Anasazi pot robbers get short prison terms

The Forest Service vows continued tough enforcement of the archaeological site preservation law.

BY ANNE MINARD
Sun Staff Reporter

When it comes to fighting for the past, the U.S. Forest Service is downright vicious.

That's the message following the felony conviction last month of two former Yavapai County sheriff's deputies who will go to federal prison Nov. 13 for digging up local Anasazi remains.

Officials from the Coconino, Kaibab, and Prescott national forests — along with assistant U.S. attorneys and a host of other investigators— gathered at the Forest Service supervisor's office Wednesday to celebrate a job well done in convicting "pot robbers" Sgt. Tony Mascher, of Seligman, and Deputy John Day Price, of Chino Valley.

The two will serve short prison terms and several years of close supervision for ransacking burial sites and cultural remains on Anderson Mesa southeast of Flagstaff.

The case against Mascher and Price was begun in May 2000 when Wesley Bernandini, a doctoral student at Arizona State University, trekked up Anderson Mesa to start his dissertation work. He's mapping the same Anasazi sites that Mascher and Price were raiding.

He heard the sounds of digging and loud talking — and realized pretty quickly that something illegal was going on, recounted Peter Pilles, a Forest Service archaeologist. Bernandini retreated and immediately got in touch with Forest Service investigators. The first to arrive held Mascher and Price at their campsite for about an hour until backup arrived.

See ROBBERS, A7

Herald

COCONINO COUNTY ARCHAEOLOGIST Peter Pilles displays a photograi and John Price, who were convicted of raiding archaeological sites at A

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Magical performance

Anthrax kills four victim in New Ya

Arizona Daily Sun

ROBBERS

from the Front Page

"Every once in a while, they'd say nature was calling, and they'd go off to relieve themselves behind bushes. They were also relieving themselves of artifacts they found at the site," Pilles said.

Investigators used pot shards from the piles behind the bushes and fitted them to artifacts they combed from pieces that were still at the archaeology sites. About three of 1,000 pieces they tested gave them the needed matches, said Phil Berendsen, one of the Forest Service investigators on the case.

The Forest Service also called in a Pennsylvania soil expert to precisely match soil found at the suspects' campsite with soil from the burial grounds, he said.

When all was said and done, the investigators dropped an airtight case on the Phoenix U.S. Attorney's Office, said assistant U.S. attorney Paul Rood.

About a dozen Forest Service law enforcement officers and investigators, along with Rood, were presented with special plaques bearing the likenesses of pots and pot shards as a tribute to their cooperative efforts.

DESTRUCTIVE KNOWLEDGE

Forest Service officials described Mascher and Price as two grisly characters who dressed in camouflage and toted semi-automatic weapons on their forest forays. An enlarged photograph of the pair leaned against a back wall. In it, the men lounge in portable chairs underneath a swastika they'd gouged in a tree.

Rood helped to prosecute the case earlier this year. He described the perpetrators as "Rambos."

But these were no ordinary rednecks, investigators said. Mascher had a keen interest in archaeology that began in his high school days, when he documented archaeology sites in the Tonto National Forest for a 50-page research paper. Rood said he suspects Mascher has been actively exploiting historic sites in Yavapai County since 1992.

"Lots of people in Yavapai County knew what these two were doing, but nobody came forward," he said. One goal of publicizing the conviction is to encourage public awareness about the severity of robbing archaeology sites, he said.

"They are no longer sheriff's deputies. They are no longer allowed to carry weapons," he said.

That may be the strongest penalty incurred by Mascher and Price.

Others at the conference Wednesday — including Leigh Kuwanwisiwma, director of the Hopi Cultural Preservation and the Forest Service's Pilles — lamented a prison sentence they thought was too short. Mascher will spend three months in federal prison and Price will spend two. Each will be fined $6,213 in damage costs to the forest.

The total damage estimated to the site was $22,000.

Nevertheless, forest officials say the conviction is a victory for cultural preservation.

It's among only a handful of cases throughout the state in which the court has gotten a conviction from the 1979 Archaeological Resource Protection Act.

In a happy coincidence, Coconino Forest Supervisor Jim Golden pointed out, that Wednesday marked the 22nd anniversary of the act.

IMMEASURABLE VALUE

Kuwanwisiwma said there's no way to measure damages to the people who consider the sites sacred to their cultural heritage.

"Anderson Mesa and other sites around Flagstaff are very real to the Hopis. These were villages that actually interacted. This was a convergence place for many clans in the region. There are traditions and ceremonies that are out of these areas," he said. "Besides science, there's also the intangibles, the emotional ties, the spiritual feelings and emotions."

The Forest Service's Pilles agreed.

He said the Anderson Mesa sites numbered among just six known pueblo dwelling relics built by the latest stage of Sinagua inhabitation. The sites are estimated to have been occupied about 1300 or 1400 AD. Stealing material artifacts from those days is just part of the crime, he said.

"People still think it's the artifacts. 'Oh, you found the artifacts. That's great.' It's like saying a Beethoven symphony is the paper and ink. When you take from archaeology sites, it's like having pages, chapters, words torn out."

Golden said there are about 8,000 archaeological sites on the forest's 1.8 million acres.

Mascher and Price reportedly tore through grave and cultural sites on Anderson Mesa without mercy.

"The thing that was especially disgusting is the way these things were just ripped out of the ground," Pilles said. "The ends of the bones were broken. You can see hack marks, footprints on the bones. There was no respect at all."

Reporter Anne Minard can be reached at aminard@azdailysun.com or 556-2253.

Bush ad Clinton-drinking

WASHINGTON (AP) – versing course, the Bush a istration will accept a tougher arsenic standar drinking water that was i in the last days of the C. presidency.

Environmental Prote Agency Administrator Ch Whitman said the decisior reduce the maximum of ar allowed in drinking water 50 parts per billion — a first set in 1942 — to 10 p per billion by 2006.

Former President Clinton adopted the tougher standar 10 ppb three days before lea office. The Bush administra suspended that action and s back to 50 ppb, citing at l $200 million in new costs local communities and quest ing the scientific basis bel the new standard.

"A standard of 10 ppb p tects public health based on best available science and sures that the cost of the st dard is achievable," Whitn said in a letter to the House A propriations Committee cha man, Rep. Bill Young, R-Fla., Wednesday.

One part per billion is t equivalent of one drop of wat in a 10,000 gallon swimmi pool.

The new rule had been su pended until next Februar leaving in place the old sta dard. In July, EPA began gat ering public comment ar Wednesday was the deadlir for submissions.

Last month, the Nationa Academy of Sciences issued report to Whitman saying th

BUS

from the Front Page

ANTHRAX

from the Front Page

Rudolph Giuliani said.

THE NAVAJO NATION

HISTORIC PRESERVATION DEPARTMENT

January 14, 2002

United States Sentencing Commission
One Columbia Circle, N.E., Suite 2-500
Washington, DC 20002-8002

Re: *Proposed Sentencing Guidelines for Cultural Resource Crimes*

Honorable Commission Members:

On behalf of the Navajo Nation I write to applaud the Commission's initiative and effort in developing new proposed sentencing guidelines for cultural resource crimes. The proposed sentencing guidelines published in the Federal Register on November 27 will, when implemented, significantly enhance the United States' efforts to deter this serious class of crimes.

While the guidance as proposed is clear and will encourage Federal Courts to fully implement Congress' intent in enacting such laws as the Archaeological Resources Protection Act and the Native American Graves Protection and Repatriation Act (NAGPRA), we believe these guidelines would be much improved if they incorporated Congress' recognition of the importance of Native American Archaeological and Sacred sites (as in the 1992 amendments to the National Historic Preservation Act) as well as the extreme importance of Native American Sacred Objects (as in the 1990 passage of NAGPRA).

Specifically, we believe the Commission should review **Section 2B1.5 Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources** and revise part (2) of this section adding "(H) an Historic Property of religious or cultural importance to a Federally recognized Indian Tribe or Tribes."

Similarly, in section (3) we note the startling absence of "Items of Cultural Patrimony of a Federally recognized Indian Tribe." These sacred and communally owned items are among the most important heritage resources for many American Indian tribes, and their loss to illegal private collectors is among the most serious of cultural resource crimes. We believe that Items of Cultural Patrimony certainly merit specific mention in this guidance and that their mention is completely consistent with the objectives of your efforts. The definition of an item of Cultural Patrimony is provided in NAGPRA at 25 U.S.C. 3001(3).

We thank you for your consideration of these comments and ardently hope you will incorporate them into the final guideline. Should you wish to discuss these comments or more fully understand our perspective on these two issues please call me or Peter T. Noyes at (928) 871-6437.

Sincerely,
/s/

Alan S. Downer, Director
Historic Preservation Department
P.O. Box 4950
Window Rock, Navajo Nation, AZ 86515-4950

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THE NAVAJO NATION
OFFICE OF THE CHIEF PROSECUTOR • P.O. Box 3779 • Window Rock, Arizona 86515 • (520) 871-7658 • FAX (520) 871-6688

KELSEY A. BEGAYE
PRESIDENT

TAYLOR McKENZIE, M.D.
VICE PRESIDENT

February 1, 2002

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

Re: *proposed sentencing guidelines for cultural resource crimes*

Honorable Commission Members:

As the enforcement agency for cultural resource crimes on the Navajo Nation, the Office of the Chief Prosecutor fully agrees with the January 14 comments of the Navajo Historic Preservation Department (attached).

We are particularly gratified by the Commission's effort in developing guidelines that will enhance awareness of the serious nature of this class of crimes. The changes recommended by HPD Director Downer suggest the enormous impact of such crimes on Navajo culture. I would add only that items of cultural patrimony represent the heart and soul of our People. They are revered as symbols of a living history, much as our Constitution and the material culture of the fathers who created it. Imagine the outrage if someone stole or damaged our Constitution.

Please review Section 2B1.5 and incorporate a subsection (H) which reads: "an Historic Property of religious or cultural importance to a Federally recognized Indian Tribe or Tribes." This language we can work with, and language that will serve our unique interests.

Thank you for your consideration. If I can answer any questions about this or any other related matter, please do not hesitate to contact me at (928)871-6622.

Sincerely,

John A. Kern, OCP Staff Attorney
Office of the Chief Prosecutor
Navajo Nation
P.O. Box 3779
Window Rock, AZ 86515

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Pawnee Nation of Oklahoma

Repatriation Office, Post Office Box 470, Pawnee, Oklahoma 74058
(918) 762-3621 (918) 762-6446 Fax No.

January 18,2002

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

Dear Sir:

In answer to your letter dated December 19,2001 concerning the "Proposed Sentencing Guidelines for Cultural Resources Crimes."

My name is Francis Morris. I am the NAGPRA coordinator, and the Historical Preservation officer for the Pawnee Nation of Oklahoma.

As such, I am speaking for the Pawnee Nation. We are in total agreement with the Sentencing Commission, and agree with the proposed amendments to sentencing guidelines as printed in the Federal Register dated November 27, 2001.

If you need any further assistance, please let us know. We would be glad to help you in any way. Thank you

Sincerely,

Francis Morris, NAGPRA Coordinator
Tribal Historical Preservation Office

CC Bob Chapman, President
Pawnee Nation Business Council

REPATRIATION FILE

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

January 31, 2002

Dear Commission;

The Prairie Island Indian Community, a Federally Recognized Tribe that is bordered by the States of Minnesota and Wisconsin exercises it option to comment on the proposed sentencing guidelines on crimes committed against cultural resources.

The Federal Register notices dated November 27,2001/Vol 66, No. 228. does not designate "**Indian Reservations**" as a protected area, it does however include ***National Parks***. Our land (Reservations) is our cultural heritage resource, and it is essential that they be protected. History has provided us with lessons as to why we need protection for our land. Our reservation was only 500 acres in the 1950's, the U.S. Army Corp of Engineers built Lock & Dam # 3, a mile upstream from us on the Mississippi. This had a devastating effect on our Tribe, our land base was flooded and of the 200 acres left above ground 180 acres is now in a flood plain, which we are continuously dealing with. Further, the land area that was flooded eradicated plants that we harvested for food and medicine, and deposited burial mounds into the Mississippi.

Non-Indians are continuously exploiting Tribal Lands "Reservations" throughout the United States for logging, minerals, fishing and settlement. We appeal to the Federal Government to include ***all Reservations*** as protected areas under the cultural heritage sentencing guidelines.

Respectfully Submitted on behalf of the Prairie Island Indian Community,

Audrey Kohnen **Mason Pacini** **Darelynn Lehto**

Alan Childs Sr. (absent) **Darrell Campbell**

Cc, Paul Wellstone
James Oberstar
Byron White Sr.

5636 Sturgeon Lake Road • Welch, MN 55089
(651) 385-2554 • 800-554-5473 • Fax (651) 388-1576 • TTY 800-627-3529 Deaf or Hearing Impaired

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Pyramid Lake Paiute Tribe
Post Office Box 256
Nixon, Nevada 89424
Telephone: (775) 574-1000 / 574-1001 / 574-1002
FAX (775) 574-1008

04 February 2002

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

ATT: Public Information

RE: Proposed Sentencing Guidelines

Dear Commissioners:

On behalf of the Pyramid Lake Paiute Tribe, I express my appreciation for the opportunity to comment on the proposed "Sentencing Guidelines." The Commission is commended for its effort to increase the accountability upon individuals who choose to cause harm and damage cultural resources. The proposed amendments appear to improve the enforcement and punishment provisions, which would impose the seriousness of illegal activities in the realm of cultural resources management and protection. Our comments will be general in nature sharing our feelings, beliefs and concepts in effort to assist you in realizing the importance of protecting cultural heritage resources.

In Nevada, there exists a vast wide open space which invite persons with intentional tendencies to seek cultural resources for pecuniary purpose. Although the permitting process is in place, the enforcement lacks adequate law enforcement to prevent unlawful excavations. When violators are apprehended, the prosecution becomes complicated in determining the most suitable charge. This situation is not an isolated case. The proposed sentencing guidelines will reduce and possibly eliminate any uncertainty in prosecution.

A black market compels individuals to seek cultural resources and use necessary means to obtain such valued resources at any expense. It proves to be a dangerous undertaking to apprehend such persons with criminal intent. This black market is widely known in the criminal underworld of archeology. In one case, it was revealed that Native Indian skulls are used in the Orient and Far East and that this resource was being exported. Most looted sites involving human remains discover that only skulls are missing. It is suggested that cases be investigated to determine black market implications and impose appropriate punishment accordingly.

The term "cultural heritage resource" as it would be applied under the Archeological Resources Protection Act (ARPA) and the Native American Graves Protection and Repatriation Act (NAGPRA) is amenable and implies consistency. Any such resource that qualifies as a

cultural heritage resource should not be ruled out by misunderstanding definitions. Furthermore, the level for understanding cultural resources cannot be taken for granted. The resource as determined by investigation, must have automatic recourse for action and not debated as to whether or not it would qualify for prosecution.

The sentencing enhancement based on value as proposed should be reduced to $500 rather than $2,000. The intrinsic value of our past is reflected through a means of undue respect for life that gives life. By allowing disturbances and damage to any degree would imply that we are not taking responsibility for proper protection. The sentencing regulations are a form of written laws and rules placing violations into an understandable format for modern society. Our traditions do not involve a capital gain such that it incites disregard for cultural knowledge and violation of the sanctity of known sacred sites. By reducing the threshold value, it supports and secures the fact that persons will be properly held accountable by the damage inflicted by their crime.

Our traditional customs and cultural identity is rooted in belief systems since time immemorial. All that is known, is past from generation to generation. Each resource that is dated to a time period prior to Western Civilization "discovery," must qualify for protection. Factual scientific information is useful, but it can not be used to prove theoretical ideas of our past. These sentencing guidelines should hold true the facts of cultural knowledge, law, and science. An equal application of these concepts will present the importance and seriousness of protecting cultural heritage resources of Native Indian People.

Again, I would like to thank you for this opportunity to comment on these proposed sentencing guidelines. If you have any questions, please feel free to contact myself at the address listed above or Mervin Wright, Jr. at 574-1050. Thank you for your time and consideration.

Sincerely,

Alan Mandell

Alan Mandell
Tribal Chairman

AM/mw

cc: Tribal Council Members
File

The SHOSHONE-BANNOCK TRIBES

FORT HALL INDIAN RESERVATION
PHONE (208) 478-3700
FAX # (208) 237-0797

FORT HALL BUSINESS COUNCIL
P.O. BOX 306
FORT HALL, IDAHO 83203

January 28, 2002

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

Dear Commission members:

The Shoshone-Bannock Tribes are a federally recognized tribes of Indians located on the Fort Hall Indian Reservation, Fort Hall, Idaho. Our Tribes are established by the1868 Fort Bridger Treaty and thereafter by the 1934 Shoshone-Bannock Constitution and By-Laws.

Our Tribes appreciate the opportunity to comment on the sentencing guidelines for cultural resource crimes that are being considered by the U.S. Sentencing Commission. We take this opportunity to respond to the issues presented in the Federal Register Notice, November 27, 2002 (Vol. 66, No 228) very seriously as the proposed guidelines are efforts to provide for further protection of our tribal resources, also referred to as cultural resources.

After, and during, the Euro-American migration into the western section of the United States the United States Government placed our tribal people on Indian Reservations thereby forcing us to leave the tangible and spiritual parts of our culture on lands from which we were removed. The U.S. Government assured tribal nations they would be good stewards to those cultural places and things. We also identify with the cultural resources that affect us after contact with Euro-Americans and the historic properties established throughout tribal history to present. The post-contact resources we speak of are those properties that are under the stewardship of the federal, state, and local governments, including those historic resources of each government mentioned above.

Since the passage of the 1906 Antiquities Act and continuing to the Native American Graves Protection and Repatriation Act of 1990—inclusive of all Congressional and Presidential mandates—American antiquities have been considered non-renewable resources. These important and non-renewable resources need reinforced and supporting legal sanctions for their protection. Enforcement of these penalties are important critical measures to assure that the U.S. Government, its states and local governments are "being good stewards" of tribal history, U.S. Government history, and Euro-American history.

The U.S. Government's ability to enforce cultural resource laws is limited. Strengthening the penalties against persons vandalizing, looting, stealing, and destroying cultural resources may provide assistance toward protecting tribal, government, and historical resources. Additionally, these sentencing guidelines should not supercede or relinquish penalties described in other federal, tribal, and state statutes.

In review of the proposed guidelines described in the Federal Register November notice, we agree the proposed amendments should be implemented. These guidelines should support and reinforce the existing penalties identified in the 1906 Antiquities Act, the Archaeological Resources Protection Act of 1979, the Native American Graves Protection and Repatriation Act of 1990, and all other Federal Historic Preservation Laws enacted by Congress and to those enacted by state legislatures. Additionally a

[1207]

Presidential Executive Order directing federal agencies to institutionalize these guidelines in their internal organizations and protect the resources so valuable to the United States of America should strengthen the guidelines.

In response to Section 7, issue 1 "pattern of similar violations" the guidelines could be better understood because the Courts may interpret violations differently depending on the context of the action. Patterns of similar violations should be understood that when a violator commits a crime against a cultural resource, regardless of that resource's importance, the violation is a cultural resource crime and such crime is cumulative to the first violation. The pattern of committing a cultural resource crime is set and should be determined as such—a criminal act.

In response to Section 7, issue 2 "upward departure" the damage to cultural and non-cultural heritage resources is important. Archaeological damage cost estimations is generally focused on the "archaeological/research value". Cost analyses should involve other damages based upon the importance of the cultural resource. This analysis could include the damage ascertained by the cultural group associated to the resource. A non-cultural heritage resource is often overlooked because of the boundaries set to protect a cultural heritage item/place. A non-cultural heritage resource is equally important to a cultural group even if it doesn't have archaeological importance. Penalties should be seriously given to these types of resources as well.

In response to Section 7, issue 3 "use of explosives" is a serious crime against the non-renewable resource. Use of an explosive is much more destructive because it can totally eliminate the resource from all existence. The use of explosives, or any weapon, to eliminate a cultural resource is similar to a murderous act and should be seriously considered a major criminal act. An annihilation of a cultural resource, especially intentional, is a vicious attack on Federal Historic Preservation Law and the cultural resources, especially if the destruction is used at places of human burials. The use of explosive weapons to destroy a cultural resource in efforts to avoid compliance to Federal Historic Preservation Law should be considered another violent attack against a cultural resource. The penalties for intentional destruction to avoid compliance should have severe penalties.

It's not clear if *Section 2B1.5. Theft of, Damage to, or Destruction of, Cultural Heritage Resources: Unlawful Sale, Purchase Exchange, Transportation, or Receipt of Cultural Heritage Resources*, applies to interstate, intrastate, or transportation across national borders. Section (2) mentions level increase if the resource is part, or identified, on (G) the World Heritage List. Does this imply the U.S. has jurisdiction to penalize if item(s) from another country are found in the U.S. or if America's item(s) are transported out of the U.S.?

We are supportive of the guidelines to provide for sanctions against violators who selectively diminish our country of America's cultural resources. The implementation to institutionalize these guidelines will be the next challenge. Again, we appreciate the opportunity to provide comments to the important considerations of the U.S. Sentencing Commission.

Sincerely,

Blaine Edmo, Chairman
Fort Hall Business Council
Shoshone-Bannock Tribes

c.c.: Heritage Tribal Office (HeTO), D. Yupe
chrony/file

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Spokane Tribe of Indians

P.O. Box 100 • Wellpinit, WA 99040 • (509) 258-4581 • Fax 258-9243

CENTURY OF SURVIVAL
1881 - 1981

February 1, 2002

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

Attn: Public Information

Ms. Diana E. Murphy, Chair

I wish to express my views as the Tribal Historic Preservation Officer for the Spokane Tribe of Indians regarding the proposed sentencing guidelines published in the Federal Register on November 27, 2002.

First I wish to commend the commission on the attempt to differentiate between general property destruction and human remains. Because of the vast number of victims of the crime of disturbance of human remains, I believe the sentencing difference of the two crimes must show the seriousness of harm done not only to the descendant of the deceased but to the community. To rebury exposed human remains causes a very difficult task to be undertaken only by the Tribe, at great expense to the emotions of that Tribe.

You requested comment in three areas; 1) "pattern of similar violations" any violation by an individual must be taken into consideration at time of sentencing, I don't believe that the *"casual"* offender would establish a "pattern". All violations, whether it be a violation to a permit to administrative notices must be included in the "pattern". 2) the upward departure issue when human remains or funerary objects are involved must be to the maximum extent allowable. A separation must be made between the disturbance of an archeological site and grave goods or human/funerary objects.3) explosives, when used to unearth human remains/funerary objects will cause extensive damage to the point that it may be impossible to retrieve all items. In some Tribal beliefs, it is extremely offensive if the individual can not be buried whole, further offense to the Tribe and descendants.

Reference article 2B1.5(b)(3), the wording should be amended by addressing only A and B of that item and adding and additional part for items C and D. also, make the level of increase for A and B at a minimum 4 levels or maximize sentence. As written the article seems to indicate human remains are equal to an architectural sculpture, I don't believe this is what the commission had in mind.

Thank you for this opportunity to comment on these sentencing guidelines and had I been aware that this process was available, would have much earlier attempted to address this matter, or asked your commission to address this area. Again I commend your commission for this task and feel this will assist in our attempts to protect that heritage that is shared by all.

Sincerely,

Louie J. Wynne,
Tribal Historic Preservation Officer

THE TULALIP TRIBES

Cultural Resources Department
x̌alal?tx^{w}
6410 - 23rd Avenue N.E.
Marysville, WA 98271
(360) 651-3300
FAX (360) 651-3312

The Tulalip Tribes are the successors in interest to the Snohomish, Snoqualmie, and Skykomish tribes and other tribes and band signatory to the Treaty of Point Elliott.

January 14, 2002

Ms. Mary Anne Kenworthy
ATTENTION: Public Information
Sentencing Commission at
United States Sentencing Commission
One Columbia Circle NE, Suite 2-500
Washington, D.C. 20002-8002

Dear Ms. Kenworthy:

This is in response to your letter dated December 19,2001 from the Assistant Secretary - Indian Affairs. My comments and concerns are as follows.

For the past ten years or more tribes throughout the Unites States have always sought ways and means to put some teeth and meaning into prosecuting those who pillage and plunder historical sites for profit. It is a million dollar black-market business that lacks respect for the historical cultural life ways of our people.

Therefore, any effort to upgrade the laws for those who steal from the dead for profit, and/or with the general disrespect for our cultural life ways. Should receive the maximum punishment achievable and allowable.

Another area of concern that may or may not be addressed in your proposed upgrading process. Is that when a site has ben discovered, and is obviously damaged. The cost of repair, retrieval and reburial in some cases is accrued at the expense of the Tribe.

Also, in regards to your proposed upgrade. I would hope that it would be binding enough in its design to hold the state, county, city and individual landowners accountable as well.

Thank you for allowing me to comment on the proposed, "Sentencing Guidelines for Cultural Resources Crimes." If I can be of further assistance, I can be reached at the above address.

Sincerely yours,

Hank Gobin
Cultural Resources Manager

White Mountain Apache Tribe
EXECUTIVE OFFICE OF THE CHAIRMAN
Dallas Massey Sr., Tribal Chairman

January 08, 2001

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

Attention: Public Information

Dear Commissioners:

Thank you for the opportunity to review the proposed amendments to sentencing guidelines for theft, damage, destruction, or trafficking in cultural heritage resources. As the Chairman of the White Mountain Apache Tribe, I strongly support the establishment of sentencing guidelines that take into account the community-based values of the objects and places left behind by previous generations, as well as the fragile, unique, and irreplaceable qualities of cultural heritage resources.

Embedded within and inseparable from the 1.67 million acres of White Mountain Apache Tribal Trust Lands are approximately 10,000 cultural heritage localities protected by the Archaeological Resources Protection Act, the Native American Graves Protection and Repatriation Act, and related federal and White Mountain Apache statutes. Although a small percentage of these localities have been subjected to greedy and sacrilegious vandalism and theft, all of these sites retain invaluable cultural importance. The removal and alteration of cultural heritage resources has caused significant and ongoing harm to White Mountain Apaches, and the United States Sentencing Commission mus address the adverse effects of such crimes on communal and individual spirituality, including a sense of place, in sentencing considerations.

Please direct any questions relating to this issue to Mr. Ramon Riley, Tribal Cultural Resources Director, at (928) 338-4625, or Dr. John R. Welch, Historic Preservation Officer, at (928) 338-3033.

Sincerely,

Dallas Massey, Sr.
Tribal Chairman

cc: Ramon Riley, Tribal Cultural Resources Director
John Welch, Tribal Historic Preservation Officer

DMS/bh

P.O. Box 1150, Whiteriver, Arizona 85941
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[126]

YAVAPAI
PRESCOTT ◆ INDIAN ◆ TRIBE

Tuesday, January 08, 2002

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

RE: Proposed Sentencing Guidelines for Cultural Resources Crimes

We have reviewed 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 which will be used as guidelines for the federal district courts for judges to use in sentencing violators.

It is our concurrence that crimes committed against cultural resources are serious attacks on tribal culture and agree that by establishing a higher base offense level for cultural resources crimes than the base offense level for generic property damage would reflect the seriousness of these crimes.

In the matter of "§ 2B1.5, Theft of, Damage to, or Destruction of, Cultural Heritage Resources: Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources," one concern we have is the valuation of cultural heritage resources. In your *Application Notes,* Item 2 (A), it is proposed to use "the value of a cultural heritage resource is its commercial value, and the cost of restoration and repair." except as provided in subdivision (B), the value of an archaeological resource is (i) the greater of its commercial value or its archaeological value..."

This does not address the value that a Native American tribe would place on a cultural resource. The value system may differ in this case. Perhaps this issue could be addressed in a further stipulation that would include consultation by affected Native American Tribes.

Thank you for your consideration of this matter.

Sincerely,

Ernest Jones Sr.

Ernest Jones, Sr.
President

[1277]

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YUROK TRIBE

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February 1, 2002

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

Re: Yurok Tribe Comment on Proposed Amendments to Sentencing Guidelines, Policy Statements, and Commentary – Amendment to Add §2B1.5.

Honorable Commission Members:

The Yurok Tribe commends the Commission's efforts to bolster sentencing guidelines resulting in enhanced upward departures for those perpetrators engaged in the despicable and illegal acts of looting, vandalizing or destroying Cultural Heritage Resources. The Yurok Tribe Heritage Preservation Office has witnessed, documented and pursued the convictions of such criminals who have engaged in these activities on Yurok Tribal lands and within Yurok Ancestral Territory. In addition to the support for increased enhancement as proposed, The Yurok Tribe wishes to take this opportunity to suggest additional areas of the Sentencing Guidelines needing amendment.

§2B1.5 (b) 2 should include additional heritage resource locations and types such as:

- Tribal Lands
- determined eligible or listed on a Tribal Heritage Resources Register
- determined eligible to the National Register of Historic Places

§2B1.5 (b) 3 should include the class of NAGPRA defined items:

- Items of Cultural Patrimony

It is also suggested that the provision be added that should the victims of the heritage resources crime be more than 10, but less than 50, for example in the case of a stolen or damaged item or place belonging to an affiliated Native American family or religious society, then increase the level by 2. Should the offense involve more than 50 victims then increase the level by 4.

I have witnessed the long-term emotional suffering that these reprehensible acts cause in Native American Communities. Strengthening the Sentencing Guidelines will provide the "wake-up call" needed to bring attention to the serious wrong committed when people loot, sell, damage, deface, alter, and destroy this Nation's heritage and identity. Please do not hesitate to call me at 707 482-1822 if I can be of further assistance.

Sincerely,

Thomas Gates

Dr. Thomas Gates
Yurok Tribe Heritage Preservation Officer

[128]

National
Congress of
American Indians

February 4, 2002

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

Attention: Public Information

To whom it may concern:

On behalf of the National Congress of American Indians (NCAI), the oldest, largest and most representative American Indian and Alaska Native advocacy organization in the United States, I am writing to express strong support for the November 27, 2001 cultural heritage proposed amendment to the sentencing guidelines. NCAI and the NCAI Culture Committee is committed to the protection of cultural heritage resources that are integral to the practices of Indian religions and the well being of tribal cultures.

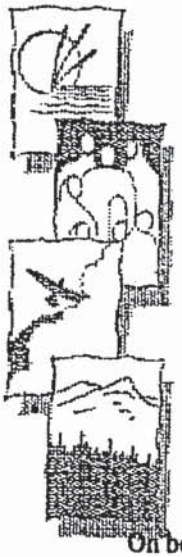
Across Indian Country, Native Americans are struggling to protect both their land and cultural heritage resources located on Indian land. To strengthen the protection of cultural heritage resources and reflect the increased non-pecuniary value of cultural heritage resources located on Indian land, NCAI is encouraging the United States Sentencing Commission to include an upward departure provision for offenses involving the theft, damage to, destruction of, or illicit trafficking in cultural heritage resources that are located on federal lands held in trust for the benefit of Indian tribes or members of Indian tribes.

If you have any questions are concerns, please feel free to contact Lillian Sparks at (202) 466-7767 or Lillian_sparks@ncai.org <mailto:Lillian_sparks@ncai.org>. Thank you for your dedication to protecting important and invaluable cultural heritage resources.

Sincerely,

Tex G. Hall
NCAI President

[129]



NATIONAL ASSOCIATION OF TRIBAL HISTORIC PRESERVATION OFFICERS

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February 1, 2002

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

Honorable Commissioners:

On behalf of the National Association of Tribal Historic Preservation Officers, I thank you for your efforts in developing sentencing guidance for cultural resource crimes. As you are likely aware, pot hunting, grave robbing, and illegal trade in sacred and religious objects is particularly offensive to and disproportionately harms American Indian Tribes, traditions and heritages. We hope that in considering the comments resulting from your November Federal Register notice you will pay particular attention to and appropriately weigh the points raised by any and all Indian Tribes.

The desecration of Native American graves and burials is deeply harmful and offensive to Native American Tribes, the descendants of the interred. The distress and outrage expressed by so many Tribes and Tribal members about the desecration of grave sites is both heartfelt and earnest. The resulting harm is real. Pot hunters have long understood that ceremonial grave goods are among the most valuable objects on the black market and have callously targeted graves for their looting, violations involving disturbance to human remains should be punished especially severely. Please consider specific mention of the offensiveness of grave desecration in your guidance as well as recommending 3 level increases or maximum sentencing for such crimes.

In addition, desecration of Native American sacred sites is similarly offensive and harmful to Indian Tribes. In 1992 Congress amended the National Historic Preservation Act specifically recognizing tribal "properties of traditional religious or cultural importance." Your guidance should support this recognition by including these kinds of properties along with the recognition you have already included for especially important or sensitive heritage resources.

Furthermore, the illegal trade in Native American ceremonial and religious items is among the most offensive and culturally insensitive of cultural resource crimes. The treatment of sacred objects as mere "things" or as "Art" is particularly insulting to people who understand them differently. We encourage you to specifically reference "Items of Cultural Patrimony" in your guidance and to call for 2 or more levels of increase for crimes involving these items.

We thank you for your efforts to date in developing this guidance and hope that you will seriously consider and faithfully incorporate these comments into the final sentencing guidelines.

Sincerely

/s/ Alan S. Downer
General Chairman

[130]

CONFEDERATED TRIBES OF
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February 4, 2002

United States Sentencing Commission
Attention: Public Affairs/Public Comment/Public Information
One Columbus Circle, NE, Suite 2-55
Washington DC 20002

RE: Section 2B1.5

Dear Commissioners:

This letter represents the comments of the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians on the proposed new sentencing guidelines for "cultural heritage resources." The staff feels that the proposed guideline makes a significant step in protecting our valued cultural resources.

The Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians wish to go on record supporting the proposed guidelines as written.

I would like to express my appreciation to the commission for considering these proposed guidelines.

Very truly yours,

Carolyn Slyter

Carolyn Slyter
Vice Chair, Tribal Council
Confederated Tribes of Coos, Lower Umpqua and Siuslaw

CS:ch

cc

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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

[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.

reduction to defendants who confess at the time of 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

[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).

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 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

[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).

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.

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

[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.

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.

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.

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

[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

importantly for purposes of this amendment, requires the sentence to be consecutive to any other sentences.[7]

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

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

> 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)....

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 would more properly trigger designation as a career offender. So that the primary effect of this proposal is to dramatically increase 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

[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

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.

Many §924(c) offenses would in fact 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 – the definition already in use for career offenders. 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

[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.

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:

> 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

[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.

years but is not one for purposes of the 3-Strikes enhancement because it is not subject to the 10-year mandatory minimum penalty.

Significantly, of course, 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.