UNITED STATES SENTENCING COMMISSION

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Testimony of

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Concerning

CULTURAL HERITAGE GUIDELINE
USSG § 2B1.5 (Proposed)

Honorable Judge Murphy and Distinguished Commissioners:

Thank you for giving me the opportunity and privilege of appearing before the Commission today to testify concerning the proposed Cultural Heritage Guideline. I respectfully request that my full written statement be incorporated as part of the record of this hearing. My testimony today is taken from the full statement. I would like to say at the outset that the adoption of this Guideline is not only necessary and appropriate, but indeed is also long overdue. The Cultural Heritage Guideline will, in my opinion, prove to be one of the most important of all the sentencing guidelines for the long-term benefit of our nation. Consequently, I commend the Commission for considering this urgently-needed Cultural Heritage Guideline. Before addressing the specifics of the proposed Guideline, and recommending several revisions to improve its effectiveness, some background would be helpful.

The United States Attorney's Office for the District of Utah is uniquely qualified to address the proposed Cultural Heritage Guideline. During the past decade, the District of Utah has led the nation in the enforcement of the Archaeological Resources Protection Act (ARPA), whose noble purpose " is to secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands."

16 U.S.C. § 470aa(b). During this period, 38 defendants in Utah were convicted of ARPA offenses, which included 32 ARPA felony convictions. My office has successfully prosecuted the largest case under the ARPA statute (10 defendants convicted of 18 felonies). In another case, we obtained the longest ARPA prison sentence (63 months) for a notorious looter of archaeological resources. Last year the Society for American Archaeology presented its Public Service Award to Assistant U. S. Attorney Wayne Dance, District of Utah, for his exemplary ARPA prosecution record and his nation-wide training efforts.

Based on our experience in prosecuting ARPA cases, and particularly in dealing with the sentencing issues, we and our colleagues in the Justice Department throughout the nation became convinced that the current Sentencing Guidelines are wholly inadequate for ARPA and other cultural heritage resource offenses. These crimes cause devastating and irreparable harm to the nation's cultural heritage, yet there is no specific treatment of them in the Sentencing Guidelines. Consequently, in December of 2000 I wrote a letter to the Commission, through then Commissioner (ex officio) Laird Kirkpatrick, pointing out this serious problem and strongly urging the Commission to adopt a specific guideline for archaeological resources and other cultural heritage resources. We are gratified that our letter was

the genesis of the Cultural Heritage Guideline now under consideration by the Commission.

I commend the staff of the Commission for their dedicated and sustained efforts in drafting and revising the proposed guideline to bring it to its present excellent form. In particular I would like to extend our praise and gratitude to Deputy General Counsel Paula Desio for her outstanding efforts for more than a year in furthering this worthy endeavor.

The proposed Cultural Heritage Guideline, as published for comment in the Federal Register last November, effectively addresses the multitude of deficiencies in the current Sentencing Guidelines concerning cultural heritage resources. As a result of extensive public comment and suggested revisions, including those from my office and the Department of Justice, it is my understanding that the staff has prepared a revised draft of the Guideline for the Commission's consideration. We appreciate the staff's responsiveness to the public comment. The proposed Guideline, with its latest revisions, greatly strengthens the Sentencing Guidelines for cultural heritage crimes. I offer the following comments to inform the Commission of revisions which will add to the Guideline's effectiveness.

First, I want to emphasize that the value determination provision in

subsection (b)(1) and Application Note 2 is the heart of this Guideline because it measures the degree of harm associated with the cultural heritage offense. In United States v. Shumway, 112 F.3d 1413, 1425 (l0th Cir. 1997), an ARPA case prosecuted by AUSA Dance, the Tenth Circuit upheld the use of archaeological value, plus cost of restoration and repair, as the appropriate method "to gauge the severity of a particular (ARPA) offense." It is essential to an effective Cultural Heritage Guideline that the Shumway value methodology be explicitly required for archaeological resource offenses.

The latest draft Guideline before the Commission, a revision of the published draft, accomplishes this important requirement by what is termed the "Special Rule for Archaeological Resources." The published draft also met this essential requirement by equating the value of an archaeological resource with its archaeological value or its commercial value, whichever is greater. I strongly encourage the Commission, in deciding upon the language of the value determination provision, to maintain the requirement that archaeological value be utilized in determining the value of archaeological resources.

Second, the value determination provision of the Guideline (both the published draft and the latest version submitted by staff) has a serious flaw

concerning the valuing of cultural heritage resources which are not "archaeological resources" by statutory and guideline definition. For these resources, the draft Guideline provides for value determination based only on commercial value (plus cost of restoration and repair, where applicable). For some types of cultural heritage resources which are not archaeological resources, commercial value may well be an adequate means of "gaug(ing) the severity of the offense." Shumway, 112 F.3d at 1425. An example would be "an object of cultural heritage" which by statutory and guideline definition, must have a threshold commercial value.

However, there are various types of cultural heritage resources covered by this Guideline for which commercial value is simply not applicable, or difficult to ascertain, or wholly inadequate to fully assess the harm caused by the offense. Although troubling to contemplate, we must recognize that offenses may occur involving our national monuments and memorials, historic properties and resources, Native American cultural items, and other resources covered by this Guideline, which will not be fully and appropriately valued for sentencing purposes by simply using commercial value (plus cost of restoration and repair, where applicable). How could a meaningful commercial value be placed on a national monument, for example, which is covered by this Guideline yet not an

archaeological resource and valued as such, simply because it is less than 100 years of age? If the U.S.S. Arizona Memorial were vandalized, who would dare say that the mere cost of restoration and repair for removing the graffiti would fully "gauge the severity of the offense?"

This serious problem can be addressed in one of two ways. One corrective measure would be to revise the value determination provision to reflect that the archaeological value method of value determination be applied not only to archaeological resources, but also to any other cultural heritage resource for which commercial value is (a) not applicable, (b) difficult to ascertain, or (c) inadequate to fully assess the harm caused by the offense. Distinguished archaeologists, including the President of the Society for American Archaeology and the Departmental Consulting Archeologist for the U. S. Department of the Interior, have submitted public comment to the Commission expressing their expert opinion that many cultural heritage resources which are not archaeological resources under the Guideline, since they are less than 100 years old, nevertheless can be appropriately valued by the archaeological value method in the same manner as archaeological resources.

The second alternative is to specifically address this Guideline deficiency in

the Upward Departure commentary (Application Note 7) by strongly urging an upward departure to correct the inadequacy of assessing value solely on commercial value (plus cost of restoration and repair, where applicable) for any cultural heritage resource which does not meet the definition of an archaeological resource, where the commercial value of that resource is (a) not applicable, (b) difficult to ascertain, or (c) inadequate to fully assess the harm caused by the offense.

The Upward Departure provision (Application Note 7) also deserves mention for another important reason. The commentary appropriately recommends upward departures in "cases in which the offense level determined under this guideline substantially understates the seriousness of the offense." This provision is essential to the overall effectiveness of the Cultural Heritage Guideline. That said, the Upward Departure provision nevertheless needs revision.

Because this Cultural Heritage Guideline may on occasion apply to cultural heritage resources which have profound uniqueness and significance to our nation's history and culture, the Upward Departure provision should emphasize this important point by specific reference, rather than the less important example used in the comment draft. Consequently, we recommend adding the following after the

second sentence of proposed Application Note 7:

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

The proposed Cultural Heritage Guideline provides sentence enhancements for two aggravating factors: where the offense involved commercial advantage or private financial gain, and where the defendant has engaged in a pattern of misconduct involving cultural heritage resources (subsection (d)(4)(A) and (B)). Unfortunately, the proposed Guideline sets forth these two valid and appropriate enhancements as alternative enhancements in the same subdivision. Consequently, although each enhancement appropriately addresses an aggravating factor deserving separate sentencing consideration, and both could factually apply to an individual defendant, the Guideline as currently drafted limits the sentencing court to applying only one of the two appropriate enhancements. For example, a commercial looter with a history of such misconduct should be subject to both enhancements on the basis of these distinct aggravating factors. Such an offender should not get a "pass" on one of the enhancements simply because the Guideline joins the two

enhancements under one Specific Offense Characteristic subsection. We recommend that these two enhancements be made independent of one another by making each a Specific Offense Characteristic.

Finally, we have several recommendations concerning technical revisions which we will provide to the Commission's staff. We will continue to assist the staff in every way we can with the Cultural Heritage Guideline.

In conclusion, I repeat what I stated in my December 7, 2000 letter to the Commission:

> Amending the Sentencing Guidelines to fully address the irreparable harm caused by ARPA offenses and other heritage resources crimes will truly manifest to "the present and future benefit of the American people" as Congress intended. 16 U.S.C. § 470aa(b). Few undertakings by the Sentencing Commission could be of greater significance to the nation.

Thank you very much for this opportunity to address the Commission on so vital a matter as the proposed Cultural Heritage Guideline.