

**Written Statement of Donna Elm
Federal Public Defender for the Middle District of Florida
On Behalf of the Federal Public and Community Defenders**

**Before the United States Sentencing Commission
Public Hearing on Proposed Amendments for 2009**

March 17-18, 2009

Re: Submersible Vessels

Thank you for the opportunity to address the Commission regarding the proposed amendments to the Sentencing Guidelines regarding the Drug Trafficking Vessel Interdiction Act of 2008 (the “Act”) on behalf of the Federal Public and Community Defenders.

These written comments supplement the concerns expressed in our December 5, 2008 letter to the Commission and respond to the January 5, 2009 letter of the Department of Justice (“DOJ”) and the U.S. Coast Guard (“DOJ Letter”). A copy of our letter is attached as Appendix A.

We suggested in our December 5, 2008 letter that the Commission refer to USSG § 2J1.2 (Obstruction of Justice) the new offense created by the Act – “Operation of Submersible Vessel or Semi-Submersible Vessel [“SPSS”] without Nationality.” In light of the Commission’s ongoing work on the Court Security Improvement Act of 2007, which is reviewing, among other things, § 2J1.2, we believe that providing a new guideline at § 2X7.2 would simplify guideline application for offenses under the Act. A new guideline at § 2X7.2 also would help ensure reasonable consistency with § 2X7.1 (Border Tunnels and Subterranean Passages).

For reasons explained more fully below, we believe that the base offense level under § 2X7.2 should be set at 14. We do not agree that the proposed invited upward departures are necessary because they are adequately covered by other guidelines or criminal statutes. We suggest that the Commission omit them to avoid unnecessary confusion in application of the guidelines.

Nor do we believe it necessary to expand the scope of the specific offense characteristic at § 2D1.1 (b)(2) (Unlawful Manufacturing, Importing, Exporting, or Trafficking etc.) to provide a 2 level increase for the use of a SPSS vessel.

As to the Commission’s request for comment regarding cases sentenced under the new proposed guideline at § 2X7.2, in which § 3B1.2 applies, we urge the Commission to avoid complicated alternative base offense levels or adjustments. Instead, if the base offense level is set to account for the lower culpability of the crews typically operating a SPSS vessel, an

additional reduction will be unnecessary. In any event, the Commission should clarify the availability of the mitigating role adjustment for crew members on these vessels.

I. The Directive

Congress directed the Commission to promulgate guidelines or amend existing ones “to provide adequate penalties for persons convicted” of violating 18 U.S.C. § 2285. It further directed that the Commission “ensure that the sentencing guidelines and policy statements reflect the serious nature . . . and the need for deterrence to prevent such offenses.” Recognizing that the offense facilitates drug trafficking, and could theoretically facilitate terrorism, it also directed the Commission to account “for any aggravating or mitigating circumstances that might justify exceptions.” Congress did not direct the Commission to promulgate high guideline penalties, increase penalties, punish the offense as a drug trafficking offense, or punish it as an act of terrorism. Significantly, Congress directed the Commission, in promulgating or amending the guidelines for the offense, to:

- “ensure reasonable consistency with other relevant directives, other sentencing guidelines and policy statements, and statutory provisions”; and
- “ensure that the sentencing guidelines and policy statements adequately meet the purposes of sentencing set forth in section 3553(a)(2) of title 18, United States Code.”

Section 103 of Public Law No. 110-407, October 13, 2008, 122 Stat. 4296 (2008).

II. The Base Offense Level for this Offense Should Be Set at 14 – Not at or Near the Statutory Maximum.

The proposed guideline at § 2X7.2 inexplicably proposes a base offense level anywhere from 12 to 34. Neither the Act’s legislative history nor the available evidence support a guideline range level anywhere near the statutory maximum of 180 months, which would be the result of a level 34, criminal history I (151 - 188 months). We encourage the Commission to set the base offense level at 14, which would be consistent with the way the Commission treated an analogous offense under the Homeland Security Act – 18 U.S.C. § 555 (Border tunnels and passages). It also would be commensurate with the statutory maximum of 15 years, while also ensuring a term of imprisonment.¹

¹ Other guidelines for offenses with fifteen year statutory maximums that start at a base offense level of 14, include USSG § 2A3.3 (Criminal Sexual Abuse of a Ward; 18 U.S.C. § 2243(b); USSG § 2C1.1 (Offering, Receiving, Giving or Soliciting a Bribe; 18 U.S.C. § 201).

In 2007, the Commission created a new guideline at § 2X7.1 (Border Tunnels and Subterranean Passages) for convictions under 18 U.S.C. § 554 (now 18 U.S.C. § 555). The guideline provides for a base offense level of 16 for those convicted under 18 U.S.C. § 555(a). Section 555(a) sets a statutory maximum of *20 years* imprisonment for constructing or financing the construction of a tunnel or subterranean passage between the United States and another country.

The history of the border tunnel statute indicates that Congress was gravely concerned with sophisticated underground passages – complete with ventilation systems, electricity, and rail systems – that are costly to build. Because these passages were *directly* on U.S. soil, Congress was especially concerned that even though they were currently used to smuggle drugs, “aliens,” and other contraband, they could be used by terrorist organizations to smuggle in dangerous weapons.² Congress, wanting to prevent the use of such tunnels to smuggle contraband, directed the Commission to promulgate guidelines in response to the new statute.

The Commission responded by creating a new guideline, with a base offense level of 16 for those convicted under 18 U.S.C. § 555(a); a base offense level of 8 for those convicted under section 555(b); and a minimum offense level of 16 for those convicted under section 555(c) – a statutory provision that doubled the maximum penalty for the underlying smuggling offense. In setting the base offense level at 16 for the section 555(a) offense, the Commission noted it was “commensurate with certain other offenses with statutory maximum terms of imprisonment of 20 years and ensures a sentence of imprisonment.” USSG App. C, amend. 700 (effective Nov. 1, 2007). The Commission added no alternative offense levels, specific-offense-characteristics, or invited upward departures to account for use of the tunnel or passage to facilitate other offenses or terrorist acts, its use as part of a criminal organization or enterprise, its repeated use, or any other potentially aggravating circumstance.

Using the same reasoning, and given that 18 U.S.C. § 555(a) and 18 U.S.C. § 2285 are both aimed at smuggling activities that use new methods to avoid detection, the Commission should set the offense level for § 2X7.2 at 14. Setting it at 14 rather than 16 would account for the lower statutory maximum for 18 U.S.C. § 2285. Section 2X7.1(a)(2) sets the range at 21-27 months for an offense level 16, criminal history I. At its midpoint, that represents ten percent of

² See, e.g., *Border Vulnerabilities and Int’l Terrorism: Hearing Before the Subcomm. on Int’l Terrorism and Nonproliferation of the H. Comm. on Int’l Relations*, 108th Cong. (2006) (statement of William Kolender, Sheriff, San Diego County Sheriff’s Department), available at 2006 WL 1861258; *Terrorism, Technology, and Homeland Security: Border Security Issues: Hearing Before the Subcomm. on Terrorism, Technology, and Homeland Security of the S. Comm. on the Judiciary*, 108th Cong. (2006) (statement of Marcy Forman Dir. of Investigations, Immigr. and Customs Enforcement, Dept. of Homeland Security); see also Richard Marosi, *Suspects in Border Tunnel Charged, Mexico Officials Say*, L.A. Times, Sept. 18, 2008 (World).

the twenty year statutory maximum under section 855(a). An offense level of 14 in § 2X7.2 would set the range at 15-21 months for a criminal history I. At its midpoint, that too represents ten percent of the fifteen year statutory maximum under section 2285.

A. 18 U.S.C. § 2285 is not aimed at or based on evidence of terrorists traveling overseas armed with explosives or dangerous weapons.

The appearance in the congressional “findings and declarations” of the words “terrorism” and “threat to safety . . . and security”³ do not provide sufficient reason for the BOL to start at or near fifteen years imprisonment.

First, when Congress passed the Act, it had before it *no* evidence that SPSS vessels were used by any organization or persons other than Colombian drug-trafficking organizations (“DTOs”) to transport cocaine. *See* 154 Cong. Rec. H7237-02, *H7238 (daily ed. July 29, 2008) (statement of Rep. Cohen) (“According to the United States Coast Guard, international drug traffickers are using these vessels to transport illegal drugs to the United States.”). The only evidence before Congress concerned the seizure of SPSS vessels containing cocaine. *See* 154 Cong. Rec. H10251-01, *H1025354 (daily ed. Sept. 27, 2008) (statement of Rep. Lungren discussing seizures of cocaine from two vessels in early September 2008).

Second, Congress set the statutory maximum at 15 years because the vessels “could” theoretically carry more dangerous cargo and present a threat to the security of the United States. *Id.*⁴ While that may provide a reason for a high statutory maximum penalty, it is not a reason to set the base offense level to encompass that statutory maximum. Should it ever come to pass that a SPSS vessel is used to facilitate terrorist activity, the guidelines, as well as other provisions of the criminal code, are more than adequate to account for that conduct. USSG § 3A1.4 provides for a minimum offense level of 32 “[i]f the offense is a felony that involved, or was intended to promote, a federal crime of terrorism.” In a case that truly involves terrorism, the government should have little trouble carrying its burden under § 3A1.4. Even if § 3A1.4 did not exist, it is postposterous for the Coast Guard and DOJ to suggest that a federal judge would not impose a

³ DOJ’s letter emphasizes congressional references to “national security.” Congress’s use of that language is unsurprising given that (1) the Coast Guard drafted the legislation; and (2) the Coast Guard is the “largest component of the Department of Homeland Security.” *See* http://www.dhs.gov/xabout/structure/biography_0157.shtm.

⁴ Rear Admiral Joseph L. Nimmic, Director, Joint Interagency Taskforce South conceded in an interview that the Coast Guard has not seen these SPSS’s transport anything other than cocaine and noted only the “potential” for their use in a terrorist act. *See* <http://www.msnbc.msn.com/id/29352252>

hefty sentence on a defendant with ties to a terrorist organization regardless of where the Commission sets the base offense level for the offense.

B. *18 U.S.C. § 2285 is not meant to be a substitute for the drug statutes, but to reach a discrete harm associated with vessels that may contain contraband.*

For many years, the government has had a variety of statutes at its disposal for prosecuting individuals involved in maritime drug trafficking . *See, e.g.*, 21 U.S.C. §§ 841, 960; 46 U.S.C. § 70403. According to the Coast Guard and DOJ, those drug statutes have not been adequate to prosecute all crew members of the SPSS vessels because some of the SPSS encounters have turned into “rescue missions,” where the crews scuttled the vessel and were rescued and deported without being prosecuted. To facilitate prosecution of crews on these vessels, the Coast Guard and DOJ turned to Congress.⁵ It now has a statute to prosecute crew members on scuttled vessels.

By asking the Commission to set an extremely high base offense level for 18 U.S.C. § 2285, DOJ wants the statute to do more than what Congress intended. Instead of using the statute to punish the separate and distinct harm associated with operating an SPSS with the intent to evade detection, DOJ wants to use it as a *substitute* for the drug trafficking statutes. Prosecutors will be able to easily prove the elements of the new offense in virtually *every* case involving a SPSS vessel – regardless of whether any contraband is seized from the vessel. If the Commission adopts the government’s proposal and sets the base offense level high, prosecutors will have significantly less incentive to charge and prove the drug trafficking offense even in cases where contraband is recovered.

⁵ Representative Lungren on the House floor explained:

Why do we need this legislation? Why did the Coast Guard ask us for it? Simply put, it is this: These are made to be scuttled easily. In other words, when they are detected by the Coast Guard and the United States Navy, sometimes hundreds of miles offshore, when they are identified, when they are seen, they are scuttled, meaning that they intentionally attempt to sink their own vehicles. Why? Because then we can't have the evidence of the illicit cargo that they hold. And as they do that, the two, three, four or five people aboard, the personnel aboard these crafts jump into the water, and then we have to rescue them. *So our law enforcement and our Navy then is in the position of rescuing the very people who are attempting to bring this poison into our country, and we obviously do that, but then we can't prosecute them.*

54 Cong. Rec. H10251-01, *H1025354 (daily ed. Sept. 27, 2008) (statement of Rep. Lungren) (emphasis added).

The Commission should reject DOJ's transparent attempt to relieve prosecutors of proving, through seizure or confession, that the vessel carried even a single bale of cocaine.⁶ As discussed above, the Act was designed to facilitate prosecutions in cases where the vessel was scuttled and contraband not seized. It was never meant to replace the drug statutes in cases where contraband was, or could have been, seized. If the Commission were to base the offense level on the average or median quantity of drugs that have been seized from these, or go-fast, vessels to-date, it would switch to the defendant the burden of proving that his conduct did not relate to drug trafficking. In other words, setting a high base offense level would permit the government to make an "end-run" around the Sixth Amendment.

C. The Commission should not let the guideline become a law enforcement tool for leveraging cooperation.

Not content with the ability Congress gave them to prosecute rescued crew members of SPSS vessels where no contraband was recovered, the Coast Guard and DOJ are asking the Commission to set a high offense level "to encourage cooperation by those interdicted at sea." U.S. Coast Guard, *Dangerous Self-Propelled Semi-Submersibles (SPSS) Proliferating Rapidly* (2008) (emphasis added); *see also International Narcotics Control Strategy Report, Volume I: Drug and Chemical Control* 59 (March 2009) ("This law facilitates the establishment of new tactics to enable evidence collection and prosecution even when contraband cannot be seized."). In other words, the Coast Guard and DOJ want stiff penalties so that they can use the rescued crewmen to gather intelligence about other drug operations and increase the success of their interdiction efforts.

The typical scenario is not hard to imagine. The Coast Guard rescues the crew member and then questions him – *e.g.*, (1) who recruited him; (2) who built the vessel; (3) where was it going; (4) when are other voyages set to depart; and (5) does he know about the routes of other vessels? The Coast Guard and DOJ apparently believe that the crew member will be more cooperative if he faces a longer period of incarceration. That belief ignores the reality of the crew member.

A crew member faced with the prospect of spending *any* period of time in a foreign prison – far from his family and unable to provide them with the means of support that led him to embark on a dangerous journey in the first place – is likely to provide the government with whatever information he knows about the activities of other crews or drug trafficking operations.

⁶ Even the recovery of a single bale – that could easily contain 26 kilograms of cocaine (BOL 34) – would permit prosecutors to seek a hefty sentence for the crew members of a SPSS vessel. *See United States Coast Guard, Media Advisory: Coast Guard Releases Video, Imagery of 7 ton, \$187 Million Cocaine Bust* (September 15, 2008).

To the extent a crew member is reluctant to cooperate, it is far more likely to come from a lack of knowledge or fear for what the drug lords will do to his family back home than his fear of being locked up for a long time in a foreign prison.

In any event, whether the Coast Guard and DOJ successfully use the crew member as a pawn to gather intelligence is not the Commission's concern. It would be wholly inconsistent with the purposes of the Sentencing Reform Act to assist law enforcement in leveraging cooperation by setting a high base offense level. The only time the Commission should account for a defendant's assistance to authorities is as a *mitigating factor*. See USSG § 5K1.1, comment. (backg'd) ("defendant's assistance . . . has been recognized . . . as a mitigating sentencing factor"). The Commission thus should reject the request of DOJ and the Coast Guard to set a high BOL so they can use it to threaten rescued seamen with stiff penalties in order to obtain their cooperation.

D. High sentences for the crew members of SPSS vessels will not deter fisherman from risking their lives to support their families.

The DOJ and Coast Guard also want stiff penalties to "deter," claiming that "[o]nly a sentence that properly reflects the serious nature of this offense will deter criminals who [it claims] are making up to \$100,000 per voyage in these SPSS events because the high payments to SPSS crew members simply become a cost of doing business." DOJ Letter at 5. *But see Mina v. United States*, 2007 WL 707360 (M.D. Fla. 2007) (prosecutor represents that captains of go-fast vessels make \$10,000 for the voyage). The government's logic here is contradictory. On one hand, it recognizes that DTO's will be undeterred no matter what happens to the crew men – a point with which we agree. On the other hand, it suggests that prospective crew members will forego the opportunity to make a significant sum of money for fear of going to prison for a long period of time if caught. Given that these men are willing to risk their lives on inherently dangerous voyages to earn money to support their families, to suggest that fear of imprisonment is going to deter them is fanciful thinking. More significantly it ignores historical experience and the socio-economic factors that drive these men to become couriers on the high seas.

Historical experience shows that these crew members are completely fungible. No matter how many the government locks up, and no matter how long they remain in prison, others will take their place. For years, Colombian drug organizations have used fisherman and sailors to transport drugs in various vessels – fishing trawlers, go-fast boats, cargo ships, and most recently, semi-submersibles. When caught, these crew members have received lengthy prison sentences – usually around eleven years. For every one locked up, there is another to take his place.⁷ See

⁷ Even those who support the extradition of drug kingpins acknowledge that it does little to deter drug trafficking because "fallen drug bosses are simply replaced by their ambitious underlings." John Otis, *Colombia's Drug Extraditions: Are they Worth It?* (Feb 24, 2009), available at <http://www.time.com/time/world>.

also USSC, *Fifteen Year of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* (2004), at 134 (locking up low level drug dealers prevents little if any drug selling because someone else commits the crime as long as demand is high); Michael Tonry, *Purposes and Functions of Sentencing*, 34 *Crime and Justice: A Review of Research* 28-29 (2006) (“[F]or many crimes including drug trafficking. . . removing individual offenders does not alter the structural circumstances conducive to the crime.”).

The reason why these men line-up to take these dangerous voyages is not hard to understand. Most come from the port city of Buenaventura or nearby coastal villages, where they live with their families in crushing poverty, unceasing violence, and despair. Life in Colombia’s “deadliest city” has been well-chronicled by journalists. Just a few facts paint the grim picture.⁸

- Thousands of displaced refugees live there, having fled from fighting in the country-side.
- The poorest in the city live in shanty towns – wooden shacks built on stilts over water. “Rusted barrels collect rain from zinc roofs, the only source of fresh water.”
- Gunfire and explosions often “echo” thorough slums surrounding the port. Killings are commonplace (in 2007, 408 in a city with a population of only about 300,000).
- The unemployment rate is around 28 percent. “Residents struggle to survive on fishing, timber, and limited commerce.”
- Poverty rates reach as high as 80 percent. The poor “survive[] on less than \$3 a day.” If a man is “lucky,” he may work for \$6 one day, but then having nothing for a week.
- The drug trade provides the only “viable industry,” especially because Buenaventura’s geography connects Colombia to global shipping channels. Fast boats depart regularly from “makeshift wharves.”

⁸ The information presented here is drawn from the accounts of four journalists: Simon Romero, *Cocaine Wars Make Port Colombia’s Deadliest City*, *The NY Times* (May 22, 2007); Mike Ceaser, *Poverty, Drugs Feed Colombian City’s Violence*, *SFGate.com* (Aug. 31, 2008); Patrick Markey, *Colombian Port Town Caught Up in Narcotics Turf War*, *Reuters* (July 4, 2007); Toby Muse, *In Colombia, a Port City is a Battleground and Children Risk Becoming the Foot Soldiers*, *Chontaduro News* (Dec. 28, 2006). These accounts track those learned from defender clients.

It is from here that drug kingpins draw their crews to ferry cocaine to all parts of the globe. Men line the wharves, hoping to be the “lucky” one selected to board a vessel nicknamed a “cocaine coffin.” One city official, interviewed last August, summed up our point here: “When a man is hungry, he’s desperate and is easily recruited He is a person willing to do anything to survive.”⁹

Lengthy terms of imprisonment will not deter these men or serve any other purpose of sentencing. Setting the base offense level at 14, with few, if any, invited upward departures, is the only just way to formulate sentences for these couriers.

III. The Proposed Upward Departure Provisions Are Not Necessary. Nor is it Necessary to Add Specific Offense Characteristics or Invited Departures to Account for the Fact that Construction of the Vessels are Part of an Ongoing Criminal Enterprise.

The proposed amendment identifies four potential grounds for upward departure. Consistent with the treatment of border tunnels, we recommend that the Commission omit these invited departures. No similar departures appear in § 2X7.1. In addition, many seem unnecessary. The first one – failure to heave – encompasses an element of the offense, *i.e.*, intent to evade detection. The statute expressly identifies seven indicia of “intent to evade detection.” One of them is “[t]he failure of the vessel to stop or respond or heave to when hailed by government authority, especially where the vessel conducts evasive maneuvering when hailed.” 46 U.S.C. § 70507(b)(5) (cross-referenced in 18 U.S.C. 2285(b)). The first and second (attempting to sink or sinking the vessel) include conduct that would fall within § 3C1.2 (reckless endangerment during flight). The third (pattern of activity involving SPSS vessels to facilitate other felonies) and fourth (ongoing criminal organization) cover essentially the same harms – a pattern of organized criminal activity – that also would be covered under § 3B1.1 (aggravating role), the drug statutes, the continuing criminal enterprise statute, and criminal history rules.¹⁰ Because the crew members caught on a SPSS vessel are clearly not the individuals financing the construction of the vessel, they should not be held accountable for the fact that it was likely built by a criminal organization or enterprise

As to the Commission’s request for comment on whether the base offense level should account for the fact that use of the vessel indicates that it is part of an ongoing criminal organization or enterprise, especially in light of the costs involved in construction, we believe

⁹ Ceaser, *supra*.

¹⁰ Should the Commission choose to decide to set the base offense level higher than it is for border tunnels – 16 – then we strongly encourage it to delete these upward departures because they surely will have all been covered within the base conduct.

that setting the base offense level at 14 accomplishes that purpose. Again, we refer to § 2X7.1 and the border tunnel and subterranean passage statute, 18 U.S.C. § 855(a). A border tunnel can easily cost as much, if not more, money as a SPSS vessel. *See* Discussion I(A), *supra*. Yet, the border tunnel guideline accounts for that construction, while also keeping the offense level relatively low (16). It would create unwarranted disparity to treat a crew member on a SPSS vessel – who clearly did not have the money to build the vessel – more harshly than one who constructs or finances a border tunnel.

In any event, should the Commission promulgate amendments that include an invited departure for the vessel being using in an ongoing criminal organization or enterprise, we encourage the Commission to add a *mens rea* component, such as the following.

The offense involved use of the vessel as part of an ongoing criminal organization or enterprise, *which the defendant participated in knowingly*.

Should the Commission decide that a criminal organization is always involved in the operation of a SPSS vessel, and that the base offense level should be higher as a result, then role adjustments should be encouraged pursuant to § 3B1.2. Under those circumstances, the Commission might add commentary to § 2X2.7 to clarify the point:

The base offense level for this offense accounts for the fact that the use of the semi-submersible is part of an ongoing criminal organization or enterprise. Mitigating role adjustments under § 3B1.1 are strongly encouraged for a defendant who is convicted under 18 U.S.C. § 2285 and whose role in the offense was limited to serving as a crew member aboard the vessel. Such defendants will generally be substantially less culpable than the defendant to whom the base offense level was intended to apply.

IV. The Specific Offense Characteristic for Use of a SPSS Should not be Added to § 2D1.1.

The Commission proposes adding a two level adjustment under § 2D1.1(b)(2) for the use of a submersible vessel or semi-submersible vessel. Such an adjustment would be inconsistent with the manner in which the Commission – just two years ago – treated border tunnels and subterranean passages. With amendment 700, the Commission did not add any specific offense characteristics to § 2D1.1 or any of the smuggling offenses that might underlie the use of a

border tunnel.¹¹ We oppose the proposed specific offense characteristic in § 2D1.1 because it singles out for harsher punishment defendants involved in smuggling drugs as opposed to any other contraband.

A two level adjustment under § 2D1.1 would be especially unfair in the typical SPSS case. Defendants sentenced under § 2D1.1 for transporting cocaine on SPSS vessels receive very high base offense levels under that guideline – often level 38 – because of the amount of drugs involved. As discussed below, they rarely receive mitigating role adjustments. Unlike their domestic counterparts – where a high offense level might signal that they are higher up in the drug hierarchy – defendants on SPSS vessels have all been no more than couriers who are expendable to those higher up in the hierarchy. To saddle them with a two level increase for use of the SPSS vessel only piles onto an already high guideline that bears little, or no, relationship to the purposes of sentencing set forth in 18 U.S.C. § 3553(a) – purposes that Congress has directed the Commission to consider when fashioning this, and other, guidelines.

V. The Commission Should Clarify that the Average Participant in the Operation of a SPSS Vessel Plays a Minor Role.

We welcome the Commission’s request for comment on “whether, in a case sentenced under the proposed guideline, § 2X7.2 (Submersible and Semi-Submersible Vessels), and in which § 3B1.2 (Mitigating Role) applies, it should provide an alternative base offense level, downward adjustment, or downward departure to reflect the lesser culpability of the defendant.”

Because the crew members on these SPSS vessels are nothing more than couriers for larger drug trafficking organizations, they are plainly less culpable than those who supply the drugs, the engineers who build the vessels, or the drug lords who bankroll the operation. Because it is the crew members who will typically be sentenced under § 2X7.2, we recommend that the Commission take their lesser roles into account in setting the base offense level. If the Commission wanted to take into account the possibility that a more significant participant might be apprehended, it could invite an upward departure like that proposed.

¹¹ Instead, the Commission set the base offense level in § 2X71.1(a)(1) to account for cases prosecuted under 18 U.S.C. § 555(C) (where the government actually proved the tunnel was used for unlawful smuggling). In those cases, § 2X7.1(a)(1) adds “4 plus the offense level applicable to the underlying smuggling offense. If the resulting offense level is less than level 16, increase to level 16.” Here, Congress did not provide for a separate offense in 18 U.S.C. § 2285 that is similar to 18 U.S.C. § 555(c), so we do not believe the Commission needs to add a similar provision in § 2X7.2.

Our concern with setting the base offense level higher, but then using an alternative base offense level, downward adjustment, or downward departure to “reflect the lesser culpability of the defendant” in cases where § 3B1.2 applies, is that the judges responsible for sentencing these defendants rarely give minor role adjustments for the crewmen even though the guidelines contemplate such role adjustments.

Historically, the cases involving “go-fast” boats have been brought in the Middle District of Florida, in Tampa – not because the interdictions occur anywhere near Florida – but because the district court routinely denies crew members mitigating role adjustments. Although the guidelines contemplate that a less culpable defendant involved in importing large quantities of controlled substances may nonetheless receive a mitigating role adjustment – and in fact, caps the base offense levels for such defendants so that they may receive even greater reductions, *see* § 3B12, comment. n.3(A) and n.6; § 2D1.1 (a)(3), the judges in Tampa construe the guidelines very narrowly.

Tampa judges deny crew members mitigating role adjustments in “boat cases” for two reasons: (1) they view the quantity of drugs involved in the offense as “virtually disqualifying”; and (2) they believe a minor role reduction is appropriate “[o]nly if a defendant can establish that [he] played a relatively minor role in the conduct for which [h]e has already been held accountable-not a minor role in any larger conspiracy.” *See, e.g., United States v. Valencia-Caicedo*, 2007 WL 2330797 (M.D.Fla. 2007) (*citing United States v. De Varon*, 175 F.3d 930 (11th Cir. 1999) (en banc); *Whittaker v. United States*, 2007 WL 1296243 (M.D.Fla. 2007) (relying on *DeVaron*).

The hostility with which defense arguments for minor role adjustments are treated is best exemplified by the court’s decision in *United States v. Valencia-Aguirre*, 409 F.Supp.2d 1358 (MD. Fla. 2006):

That Valencia-Aguirre is an inconsequential, entirely fungible, unskilled, and unexceptional laborer without authority, ownership, or even longevity in this criminal enterprise fails under applicable law to justify a reduction in the assessment of his role in transporting this particular illicit cargo.

Id. at 1361. The court then cites dozens of similar cases where the Eleventh Circuit has affirmed denials of mitigating role adjustments for crew members of vessels involved in drug trafficking. *Id.* n.1.

In light of this reading of § 3B1.1, we encourage the Commission to clarify the commentary in § 3B1.2(3)(A) by adding the highlighted language:

For example, a defendant who is convicted of a drug trafficking offense whose role in the offense was limited to transporting or storing drugs – *no matter how high the quantity* – and who is accountable under § 1B1.3 only for the quantity of drugs the defendant personally transported or stored is not precluded from consideration for an adjustment under this guideline. *If other persons were criminally responsible for the commission of the offense, and if apprehended, would be considered organizers, leaders, managers or supervisors under § 3B1.1, then a role adjustment under this section is warranted for the defendant.*

VI. Conclusion

We would be happy to discuss any modifications to the guidelines that would be sufficient but not greater than necessary to satisfy the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2) and advance the goal of simplicity. Thank you for considering our comments. As always, we look forward to working with the Commission on these and other issues.

Appendix A

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December 5, 2008

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Re: Public Comment Related to Briefing on Drug Trafficking Vessel Interdiction Act of 2008

Dear Judge Hinojosa:

With this letter, we provide comments and information in response to some of the Commissioners' questions and the information presented by the Coast Guard at the briefing on November 20. Comments and information regarding the Online Pharmacy Consumer Protection Act and the directives regarding identity theft and computer crime will be provided separately.

Mr. Kieserman of the Coast Guard asked the Commission to create a guideline for the new offense at 18 U.S.C. § 2285 that begins at level 38, though the statute has a fifteen-year statutory maximum and no minimum. He testified that the average sentence for all boat cases is 131 months and that the sentence for the new offense must be higher than that in order to "disincentivize" the use of submersible vessels. According to Mr. Kieserman, the problem with these vessels is that they are sunk by the crew with their contents such that there is no evidence of drugs. The Commission is being asked to address this alleged problem by creating a guideline that assumes there is evidence of 150 or more kilograms of cocaine in the absence of any evidence.

I. Factual Information

Adam Allen, Supervising Assistant Federal Public Defender in Tampa, has provided the following information.

The Defender office in Tampa has had approximately 150-200 cases involving boats from Colombia, including fishing vessels, go fast boats and submersible vessels. While Mr. Allen is still pulling all of the cases, he believes they have had about five to eight cases involving submersible vessels, beginning in November 2006. It appears that boat cases (of all types) are prosecuted in Tampa because it is the practice of all but one of the district court judges to refuse to grant a mitigating role adjustment to the crew members.

The boats are interdicted by Coast Guard officers who are assigned/detached to large Navy warships equipped with radar, video cameras, day-time and night-time surveillance equipment, and both large and small military weapons. The Navy warships are fully staffed with Navy military personnel. Navy flyover planes and military helicopters are used in the detection and apprehension of the Colombian fishing vessels, go-fast boats and submersible vessels. The Colombian crew members are substantially outmanned by technology, manpower, speed and maneuverability. The apprehension of the Colombian crew members is conducted by the United States Navy and Coast Guard, resembling a full-scale military operation. In contrast, a submersible vessel holds approximately four people, usually a captain (or master) and three additional crew members.

In all of the prosecutions to date, regardless of the type of vessel, the interdiction turns into a rescue mission and the drugs are retrieved. It is not uncommon for the crew of a go fast boat to attempt to avoid apprehension by flight and throwing the bales of cocaine overboard into the ocean. The bales of cocaine float; they are observed by the Coast Guard and Navy personnel, and their location is marked by dye flares for later retrieval by the government. A single package or bale of cocaine typically holds approximately 300 to 500 kilograms, more than enough for a level 38 base offense level.

In the submersible cases thus far, the crew is told to stop, and they have complied. Due to the construction of the vessel and the fact that guns are trained on them, it is not possible for the crew to throw the drugs into the water, and the drugs are retrieved.

In either type of case, the crew has to be rescued. The go fast boats and submersible vessels are sunk by the Coast Guard or Navy often by launching high-powered military weaponry. On a few occasions the crew of go fast boats has attempted to scuttle the boat by pulling the drain or setting the vessel on fire and then jumping into the water, needing to be rescued by the Coast Guard. The submersibles are apparently able to be sunk by the crew by opening valves but, to date, Coast Guard personnel have successfully directed the Colombian crew members to close the valves prior to the vessel sinking.

If there are cases in which the crew sank a submersible vessel that the government has not prosecuted thus far, it is puzzling why it has not done so. There are at least three ways to prove a quantity of drugs sufficient for the most severe sentence available under § 2D1.1: cooperation, retrieval, estimation.

First, it is false that the crew in these cases do not cooperate. Upon being pulled out of the water, they immediately tell what is on the boat and where they were going. Once prosecuted in the United States, every single defendant has given a safety valve debriefing regarding their own conduct and the involvement of others, and at least 90% reveal in that debriefing who sent them from Colombia. At least 90% also attempt to provide substantial assistance. As in other cases, the first to cooperate and plead guilty receives a § 5K1.1 departure, the second one might, and so on. The government then uses the information provided in cooperation to bring the next wave of cases by indicting and extraditing the higher ups in Colombia who hired and sent the crew of the vessels.

Second, if a boat is sunk and even assuming the crew declined to cooperate, the boat and its contents can be retrieved by divers. Mr. Allen's office had a case in which a fishing boat was dragging a sub with drugs in it. The crew sank the sub and Navy divers retrieved it from the bottom of the ocean with the drugs intact. As Mr. Kieserman testified, the drugs are "very well-packed." Mr. Allen confirms that the packages are air tight, which is why they don't sink when thrown overboard from a go fast boat. If the government's position is that it should be relieved of the trouble of retrieving the vessel, it is well to remember that liberty is at stake and that it would be improper to use the guidelines to relieve the government of doing its job.

Third, if a boat is sunk and even assuming the crew declined to cooperate and the boat could not be retrieved by divers, the quantity of drugs can be estimated based on the size of the vessel and past experience with similar cases in which the cocaine was recovered. The Coast Guard will have a video tape of the vessel prior to it being sunk. Mr. Allen's office had one case in which the crew on a fishing vessel was transporting cocaine in a fuel tank. When apprehended by the Coast Guard, attempts were made to discharge the liquefied cocaine into the ocean. The defendants were sentenced based on a drug quantity estimate derived from the size of the fuel tank.

II. Congressional Directive; Defender Recommendations and Reasons

Congress directed the Commission to promulgate guidelines or amend existing guidelines to provide penalties for violations of 18 U.S.C. § 2285 that adequately meet the purposes of sentencing, take into account circumstances for which the guidelines already provide enhancements, and ensure consistency with other guidelines, policy statements and laws. *See* PL 110-407, Sec. 103(a), (b)(3), (4), (5). The Commission is to take into account the "serious nature

of the offense” and the “need for deterrence to prevent such offenses.” *Id.* at Sec. 103(b)(1). The Commission is to consider any aggravating or mitigating circumstances, including (1) the use of a submersible “to facilitate other felonies,” the “repeated use” of a submersible “to facilitate other felonies, including whether such use is part of an ongoing criminal organization or enterprise,” the use of such a vessel in a “pattern of continued and flagrant violations” of the statute, and (2) “willfully” damaging or destroying the vessel or failing to heave to when directed.

We recommend that the Commission comply with the directive by referring the offense to § 2J1.2 in Appendix A. The offense is defined as operating a submersible vessel without nationality “with the intent to evade detection.” It is essentially an obstruction of justice offense. Referring the offense to § 2J1.2 would address all aspects of the directive.

Deterrence. The offense is not deterrable. The captain and crew of these vessels live in extreme poverty, usually without indoor plumbing, electricity, or sufficient food to feed their families, and are entirely uneducated. They are paid approximately \$2500 to \$5000, more than most of them could earn in five years, as there is little to no work or any kind of economy in their small fishing villages. The Colombian crew members are as dispensable to the leaders of the cocaine trafficking organizations as are the vessels themselves. They participate in transporting drugs despite the risk of prosecution or death. Given their lack of education or financial opportunity and poverty, there exists no amount of prison time which could or would deter these low-level transporters.

Offense Seriousness. Because type and quantity of drugs is able to be proved in nearly every case, the government will likely charge both 18 U.S.C. § 2285 and drug trafficking, and the guideline range will be driven by § 2D1.1, ending up at level 38. Level 38 is a very severe sentence and a drug trafficking case involving a submersible vessel is no more serious than a drug trafficking case involving a go fast boat or a fishing vessel, as demonstrated above. The government would also have the option of charging only 18 U.S.C. § 2285, ending up at a level 30 under § 2J1.2 through the cross reference to § 2X3.1 and then to § 2D1.1. In the very rare case where the type and quantity of drugs could not be proved, the government would charge 18 U.S.C. § 2285 and the sentence would be based on § 2J1.2, likely ending up at level 17 (14 + 3 for substantial interference with the administration of justice).

While it should not matter in the sentencing of a single human being, we question Mr. Kieserman’s claim that 32% of cocaine entering the United States comes from submersible vessels. He did not offer any evidence to support that assertion and there appears to be no way of knowing. The government is not required to prove that a vessel was heading to the United States in order to obtain a conviction under Title 46. Post-arrest debriefings have revealed that the cocaine being transported is often en route to destinations other than the United States.

Facilitation of another felony; repeated facilitation; pattern; organization or enterprise.

Again, the government has various means at its disposal to prove that the vessel was being used to facilitate drug trafficking, and to obtain a sentence based on drug trafficking. If a captain is sentenced under § 2D1.1, he receives a two-level enhancement under § 2D1.1(b)(2)(B).

Repeatedly using a submersible vessel to facilitate other felonies, engaging in a pattern of doing so, or doing so as part of an ongoing criminal organization or enterprise would most likely apply to kingpins in Colombia prosecuted on the basis of cooperation provided by those on the vessels. In any event, these circumstances are more than adequately covered by mandatory minimums for prior felony drug offense, the continuing criminal enterprise statute, the criminal history rules, and the aggravating role adjustment.

Damaging or destroying; failing to heave to. Damage or destruction of the vessel by the crew rarely, if ever, occurs. Even if the crew sinks the vessel, it is retrievable from the bottom of the ocean, undamaged and not destroyed. An enhancement for failing to heave to would be inappropriate for a variety of reasons. First, failure to heave to is, by statute, evidence of the element of “intent to evade detection.” See 18 U.S.C. § 2285(b); 46 U.S.C. § 70507(b)(5). Second, a failure to heave to does not make the offense any more serious and is completely ineffective as a practical matter. These vessels are stopped by American warships manned by trained military officers with high-powered weapons; they are sitting ducks. While they can fail to heave to and attempt to flee, they cannot escape interdiction. All they can do is attempt to sink the vessel. However, given the configuration of a submersible vessel, an attempt to sink the vessel would create a likelihood of drowning much greater than an attempt to scuttle a go fast boat or fishing vessel. Third, there is no enhancement for failure to heave to for other kinds of vessels, and there is no need for such an enhancement for any kind of vessel because sentences are severe enough.

Mitigating Circumstances. The Commission should clarify through an example in § 3B1.2 that crew members are intended to receive a mitigating role adjustment.

Please do not hesitate to contact us for any additional information or input.

Very truly yours,

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