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March 27, 2009

Honorable Richard H. Hinojosa
Acting Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 2002-8002

Re: Comments on Proposed Amendments Regarding Submersible Vessels

Dear Judge Hinojosa:

With this letter, we provide comments on behalf of the Federal Public and Community Defenders regarding the proposed guideline amendments on submersible vessels. At the public hearing on March 17, 2009, we submitted written testimony on this matter, which is attached and incorporated as part of our public comment.¹ Here, we expand on that testimony and raise several additional points that we believe support setting a low base offense level for submersible vessels and handling other potentially aggravating factors through upward departures.

First, we continue to believe that setting the *base offense level (BOL) at 14*, and providing for *upward departures*, is a sound way to comply with the congressional directive “to provide *adequate* penalties for persons convicted of” violating 18 U.S.C. § 2285 and “account for any aggravating or mitigating circumstances that *might* justify exceptions.” 28 U.S.C. § 994, note. *See* 28 U.S.C. § 991(b) (1) (A) (sentencing policies and practices must meet purposes of setting set forth in 18 U.S.C. § 3553(a) (2)).

Setting the BOL at 14 would:

- (1) Place the new offense at 18 U.S.C. § 2285(Operation of Submersible Vessel or Semi-Submersible Vessel without Nationality) in line with two comparable offenses – constructing or financing a border tunnel and destroying evidence with the intent to impair its availability for use in an official proceeding.² The former has a BOL of 16 under USSG § 2X2.7 and the latter a BOL of 14 under § 2J1.2(a);

¹ That written testimony includes an appendix with our December 2008 submission on this issue.

² *See* 18 U.S.C. § 555(b) (Border Tunnels and Passages) and 18 U.S.C. § 1512(c) (1) (Tampering). The analogy to border tunnels accounts for the use of the SPSS as a potential method of smuggling contraband and avoiding detection; the analogy to tampering with evidence accounts for the use of the

- (2) Account for the fact that section 2285 prosecutions will generally involve scuttling of the vessel and a failure to heave because such evidence furnishes proof of a required element – “intent to evade detection”;
- (3) Recognize the lower culpability of SPSS crew members.³ To date, the defendants in SPSS cases are poverty-stricken peasants and fisherman desperate to earn some money and then return to their families in Colombia. They hold no ownership interest in the vessel or anything on board it. They earn no commissions and often do not know the final destination of any contraband that may be on board the vessel;⁴
- (4) Account for the mitigating factor that the vessels are typically seized outside the territorial waters of the United States and not destined for the United States, but Central American countries like Honduras or Guatemala,⁵ or West Africa.

Providing for upward departures would ensure appropriate sentences for those rare cases⁶ where section 2285 is the primary charge and the government offers reliable evidence, not mere inference or speculation, that the vessel was

- (1) used “to facilitate other felonies,” – whether related to the smuggling of cocaine, poppy, heroin, marijuana, undocumented persons, contraband goods or any other criminal act over which the United States exercises extraterritorial jurisdiction;
- (2) used as “part of an ongoing criminal organization or enterprise”;

vessel to avoid detection—an element of the offense – and the potential of the vessel being scuttled and any contraband that may be on board destroyed.

³ One paradox of the 2009 guidelines amendment cycle is that SPSS crew members are motivated by the same survival instincts, and are just as vulnerable and exploited, as some sex workers in alien prostitution rings. Yet, the Commission is contemplating treating one as a serious offender deserving of a lengthy term of imprisonment and the other as a victim. See United States Sentencing Commission, March 18, 2009 *Public Hearing, Re: William Wilberforce Trafficking Victims Protection Reauthorization Act*.

⁴ Even if the vessels were used to transport contraband other than cocaine from Colombia, the likelihood of the defendants being anything but couriers in such voyages is extraordinarily small.

⁵ See Spiegel Online International, *The Cartels are Refining their Semi-submersibles* (interview of Coast Guard Rear Admiral Joseph L. Nimmich), available at <http://www.spiegel.de/international/world>

⁶ Cases where the government must use section 2285 as the lead charge should be rare because in most cases the government will be able to prove the underlying violation under 46 U.S.C. § 70503 or related smuggling statutes through the seizure of contraband, admissions of crew members, or circumstantial evidence.

(3) “[i]nvolve[d] a pattern of continued and flagrant violations” of section 2285.

Second, the BOL *should not*, as the government has suggested, *be based on sentences imposed in current cocaine smuggling cases* in the United States District Court for the Middle District of Tampa or set anywhere near the statutory maximum of 180 months.

- In setting the base offense levels, the Commission should focus primarily on the core conduct involved in the offense. The elements of a section 2285 offense do not require smuggling, much less the smuggling of cocaine. *Id.* If the Commission were to use the sentencing practices in maritime cocaine cases as the reason to set a high BOL for a section 2285 offense, it would relieve the government of the burden of producing any evidence that the vessel was involved in smuggling cocaine and without affording the defendant a hearing or opportunity to be heard.
- If the Commission were to use sentences imposed in maritime drug cases as a measure of the severity of a section 2285 offense, it would need to assume without any fact-finding by judge or jury, that (1) the vessel carried contraband at the time of the interdiction; (2) the contraband was cocaine; and (3) all crew members knew of the nature of the contraband. If the Commission were to make such assumptions, it would ignore other potential scenarios where the vessel contained no contraband, including, among others, that (a) the crew was taking the vessel on a test-voyage and did not deliberately scuttle it;⁷ (b) the vessel was empty because its contraband had already been delivered to a drop-off point; (c) the crews had been switched after offloading.⁸ The Commission also would be short-sighted in not acknowledging that a SPSS could be used to smuggle other contraband items, including precursor chemicals or opium that are trafficked by Colombian drug cartels,⁹ or diamonds that may be coming into Latin America on a return trip.¹⁰ To account for all these possibilities, the Commission should set the BOL

⁷ BBC News, *Spanish Police Find “Drugs” Sub* (Aug. 2006) (reporting discovery of SPSS believed to have been involved in testing when it experienced a technical problem), *available at* <http://www.news.bbc.co.uk/2/hi/europe/4792075.stm>

⁸ Such scenarios are distinct possibilities given Rear Admiral Nimmich’s observation that the Coast Guard expects to see the semi-submersibles travelling from “eastern Brazil to West Africa.” Cordula Meyer, *Colombia’s Cocaine Cartels Learn a New Trick*, *available at* <http://www.spiegel.de/international/world>

⁹ See United States Department of State, *International Narcotics Control Strategy Report: Vol I, Drug and Chemical Control* (March 2009), at 247 and 9.

¹⁰ Jennifer Lee, *High Value, Low Weight. Perfect for Laundering Money*, NY Times (March 20, 2009) (reporting on how Colombian drug traffickers smuggle gold and diamonds to launder money); *see also Sierra Leone Targeted by Latin American Drug Cartels* (discussing link between Sierra Leone – the source of untold “blood” diamonds – and Colombian drug traffickers), *available at* <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/sierraleone>

Honorable Richard H. Hinojosa
United States Sentencing Commission
March 27, 2009

low to account for the core conduct of operating the SPSS with the intent to evade detection and leave to the government the burden of proving what illicit cargo, if any, the crew was smuggling aboard the vessel.

- If the Commission were to rely on the sentences imposed in maritime drug cases as even a rough measure of offense severity for section 2285 offenses, it would perpetuate the fundamental flaws underlying the drug guideline at USSG §2D1.1. As the Commission is well aware, the offense levels and quantities in §2D1.1 are tied to mandatory minimum statutes. For example, an offense level 32 is set for offenses involving at least 5 kg but less than 15kg of cocaine not because the Commission independently decided that a sentence of 121-151 months for a first time offender met the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2), but because of the mandatory minimum in 21 U.S.C. § 841(b)(1)(A); 46 U.S.C. § 70503(a) (cross-referencing penalties to 21 U.S.C. § 960, which cross-references 21 U.S.C. § 841). Nothing in the congressional directive regarding 18 U.S.C. § 2285, or the Sentencing Reform Act requires that the Commission use § 2D1.1 as the benchmark for operating a semi-submersible with the intent to evade detection, particularly when section 2285 is not a title 21 offense, makes no reference to title 21 penalties, and contains no mandatory minimum.
- The Commission itself has acknowledged that the drug quantity table is a poor measure of an offender's culpability or role in drug trafficking. In 2007, the Commission categorized drug offenses according to offender function within the distribution network, independent of drug quantity. *See* United States Sentencing Commission, *Report to Congress: Federal Cocaine Sentencing Policy* (May 2007), at 95. Under that analysis, a crew member on an SPSS would be nothing more than a courier, far removed from the most culpable offenders – high-level suppliers, importers or leaders/organizers/financiers. Yet, if the Commission were to set a high base offense level for the section 2285 offense, the courier would be subject to a prison term as long, or longer, than the average sentence imposed for high-level suppliers and importers. *See id.* at 18 (average sentence for cocaine powder importers was 122 months). This would undermine “respect for the law” rather than promote any of the purposes of sentencing set forth in 18 U.S.C. § 3553(a) (2).

As always, please do not hesitate to contact us for additional information, observations, and comments.

Sincerely,

JON M. SANDS
Federal Public Defender, District of Arizona
Chair, Federal Defender Sentencing Guidelines Committee

cc: Hon. Ruben Castillo, Vice Chair

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United States Sentencing Commission
March 27, 2009

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