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

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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