

Sentencing Guidelines for Cultural Heritage Crimes

AIA COMMENTS ON THE 2002 PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES ON CULTURAL HERITAGE RESOURCE CRIMES (PROPOSED USSG § 2B1.5)

The United States Sentencing Guidelines establish offense levels based on the seriousness of a crime committed that, in turn, determine the extent of punishment (incarceration and/or fine) to which one who is convicted may be subject. In the case of crimes involving property damage or destruction, the offense level is generally determined by the commercial value of the property involved. However, in the case of cultural heritage resource crimes, such as the looting of an archaeological site, the commercial value of the property destroyed or damaged may be relatively low, resulting in an equally light sentence. The Sentencing Commission recently proposed new guidelines that would set higher offense levels for cultural heritage resource crimes. In response to a call for public comment, the AIA submitted comments endorsing these new sentencing guidelines and suggesting some additional wording that would strengthen the proposed changes.

COMMENTS AND RECOMMENDATIONS SUBMITTED TO THE U.S. SENTENCING COMMISSION ON JANUARY 31, 2002

The Archaeological Institute of America [AIA] is a professional and academic association with approximately 10,000 members throughout the United States, of which 2500 are professional archaeologists. Founded in 1879 by Harvard Professor Charles Eliot Norton and chartered by an Act of Congress in 1906, for over a century the AIA has cultivated the interests of and educated the American public about the past. Of particular concern to both the professional and avocational members of the AIA is the preservation of archaeological sites, historic monuments and museum collections, which form the basis for our understanding and knowledge of the past. The AIA today leads the debate concerning the trade in illicit antiquities. It was one of the first organizations in the United States to call for adherence to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property and to incorporate UNESCO principles into its Code of Ethics. The AIA has been instrumental in the enactment of United States cultural heritage legislation from the Antiquities Act of 1906 to the Convention on Cultural Property Implementation Act of 1983.

The AIA strongly endorses the 2002 Proposed Amendments to the Sentencing Guidelines (Proposed USSG § 2B1.5), which would provide enhancements and valuation rules for offenses involving the theft of, damage to, destruction of, or illicit trafficking in cultural heritage resources. While the AIA strongly supports these proposed Guidelines, we also suggest some changes that would have the effect of clarifying and carrying out more completely the intent of the proposal to provide offense levels that are commensurate with the full harm caused by cultural heritage resource crimes.

When objects are looted from archaeological sites, the damage that is caused often far exceeds the monetary value of the objects themselves. Much of the historic and scientific information of archaeological sites is contained in the context and relationship of individual objects to other objects, as well as to architectural remains, living floors, and floral and faunal

remains. The ability to discern these relationships enables archaeologists, often working collaboratively with different types of scientists, to reconstruct past societies and to deduce a wealth of information concerning past life. Thus, the theft of objects of relatively low commercial or market value can cause destruction and harm of considerable magnitude to the historical and cultural record.

The currently existing Sentencing Guidelines are not able to take this full harm into account because they do not provide adequate levels of punishment for offenders. The initial two-level enhancement of the proposed Guidelines for cultural heritage resource crimes is a starting point for a calculation that takes this increased harm into account. The calculation of the monetary value of the damage caused can be based on either commercial value or archaeological value. The use of archaeological value is particularly appropriate in cases where the object is of low commercial value but the harm caused to an archaeological site is high. Thus, archaeological value takes into consideration the cost of retrieving the information that could have been obtained if the offense had not been committed. This provision is discussed in greater detail below.

A third enhancement is provided if the offense involved commercial advantage or private financial gain. The AIA particularly supports this enhancement. While it is difficult to discern the exact workings of the international market in stolen and looted antiquities, the illegal market includes individuals who deal in large quantities of looted objects with considerable potential for financial gain. At least at the international level, these individuals facilitate the market between local looters, who receive relatively small payments for objects, and ultimate purchasers who pay considerable sums. The profit motive is high, while the chance of successful prosecution is relatively low, because of the complex interaction of laws of different nations and the perception of cultural heritage crimes as “victimless.” Thus, an enhancement based on commercial gain motivation is one way to provide sufficient punishment that is a meaningful deterrent to the commission of cultural heritage resource crimes. It also provides a legitimate distinction between those who traffic in cultural objects for pecuniary gain and those who take objects to satisfy their own interest but who are not motivating others to do likewise.

Another enhancement is proposed for offenses involving specially protected resources or resources from specially protected places. In the latter, seven locations are specified. One of these locations is museums, and we will offer specific comment below. In the former category is included four types of cultural heritage resources that have merited special treatment in federal law. Again, we will comment on this provision further. The AIA supports both of these types of enhancements because the places and types of objects included have all been recognized by federal law, international agencies, or international conventions as having particular value to the cultural history of humankind.

Following are responses to the issues on which comment was requested, as well as specific recommendations to improve the proposed Sentencing Guidelines and thereby carry out more fully the intended purpose of these amendments.

Issues for Comment

1. Enhancement for “Pattern of Similar Violations”: Section 2B1.5(b)(4)(B), Application Note 5

For numerous reasons, including difficulty of policing archaeological sites and historic monuments, the apprehension and successful prosecution of those who commit cultural heritage resource crimes are difficult to attain and not as frequent as are warranted. The AIA thus supports the proposed enhancement for a “pattern of similar violations” when the defendant is shown through prior adjudications to have previously engaged in similar misconduct.

2. Upward Departure Provision: Application Note 7

The AIA supports a provision allowing an upward departure in situations in which the offense level understates the seriousness of the offense. The example given in Application Note 7, in which a non-cultural heritage resource is damaged, destroyed or stolen, would warrant an upward departure. However, there are additional circumstances in which the offense level, to the extent it is based on the commercial value of the cultural heritage resource that has been stolen, damaged or destroyed, may well still be inadequate. This situation is addressed further in Recommendation 4, below.

3. Enhancement for Use of Explosives

The AIA supports an enhancement for use of explosives, both because it poses an additional danger to human life and because it can cause an extreme amount of damage to archaeological sites and historic monuments.

Recommendations

1. Definition of Museum: Section 2B1.5(b)(2)(F) and Application Note 3(A)

As previously mentioned, one of the locations specified under Section 2B1.5(b)(2)(F) is museums. However, the definition of museum used in Application Note 3(A) is the definition provided in 18 U.S.C. § 668(1), which requires a “museum” to be located within the United States. The AIA suggests expanding the definition to include museums located outside of the United States. Theft from a museum collection is equally egregious, wherever the theft occurs. With an expanded definition, this provision would apply to thefts from a museum when the stolen object is later brought to the United States. Museums, both in the United States and abroad, serve a valuable public function in collecting and preserving archaeological and cultural objects and making them available to the public for education and to scholars for research.

Theft from a museum imposes a special range of burdens—risk of injury to the object; deprivation to the public, which is denied the opportunity to view the object; deprivation to the scientific community, which is denied the opportunity to study the object and thereby add to our knowledge of the past; dismemberment of a collection so that the other objects in a particular group may also lose some of their meaning and historical or scientific value. Museums in some foreign countries may be the only repository of the few cultural objects in the country that are available for the public to view and study, and the citizens of these countries may not be able to visit collections in other countries. Thus, the loss of the commercial value of the object may be considerably smaller than the cultural and historical loss caused by the theft of an object from a museum collection. The recent case of nearly three hundred antiquities that were stolen from a museum in Corinth (Greece) and that surfaced in Miami is an illustration of the type of theft that inclusion of foreign museums in this section of the proposed guidelines would assist in deterring.

2. Particular Protected Categories of Cultural Heritage Resources: Section 2B1.5(b)(3) and Application Note 4

Section 2B1.5(b)(3) lists particular types of cultural heritage resources that have been designated by United States law as meriting special protection. A cultural heritage resource crime involving one of these particular types of objects receives an enhancement of two levels. The types of cultural heritage resources in this section are: (A) human remains; (B) a funerary object; (C) designated archaeological or ethnological material; and (D) a pre-Columbian monumental or architectural sculpture or mural. Human remains and funerary objects both receive special protection under the Native American Graves Protection and Repatriation Act, while the import of Pre-Columbian monumental or architectural sculptures and murals is specifically regulated under the Pre-Columbian Monumental or Architectural Sculpture and Murals Act of 1972, 19 USC. §§ 2091-95.

Subsection (C) of Section 2B1.5(b)(3) includes archaeological and ethnological material that has been designated for import restrictions under the Convention on Cultural Property Implementation Act of 1983, 19 U.S.C. §2601 *et seq* [CPIA]. The CPIA is the United States’ implementing legislation for the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. The UNESCO Convention, among other things, calls on States Parties to the Convention to provide means of respecting each others’ export regulations for archaeological and ethnological materials that are subject to theft and looting, which injures archaeological sites and indigenous communities. Pursuant to the CPIA, 19 U.S.C. §§2602-03, the United States may impose import restrictions on designated archaeological and ethnological materials that are illegally exported from the country of origin. In order to clarify the definition of “designated archaeological and ethnological material,” we suggest that the citation to the CPIA in Application Note 4(A) be changed to read: “19 U.S.C. §§2601(7) and 2604”, thereby referring to the more specific sections of the CPIA

In addition, the CPIA recognizes a second category of cultural objects, that is “stolen cultural property.” The CPIA prohibits the import into the United States of “any article of cultural property documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution in any State Party that is stolen from such institution . . .”, 19 U.S.C. §2607. In what seems to have been an inadvertent oversight, the proposed Sentencing Guidelines do not recognize this category of cultural heritage resources for an enhancement, although it is also specifically recognized by federal law as deserving special legal treatment. In fact, this section of the CPIA provides the most specific protection for archaeological sites, historic monuments, churches and other religious institutions located in foreign countries. It is also objects stolen from these types of institutions and locations that are most likely to involve a crime in the United States.

The AIA therefore suggests that a category be added to this section of the proposed Sentencing Guidelines to include “stolen cultural property.” Furthermore, Application Note 4(A) would require an additional reference to “19 U.S.C. §§2601(6), 2607” in order to incorporate this category of “stolen cultural property” into the Sentencing Guidelines. The addition of this category of stolen cultural property would be the only means of providing enhanced protection to some categories of cultural heritage resources stolen from foreign countries as these may not otherwise be included in the specific categories listed in Section 2B1.5(3) of the proposed Sentencing Guidelines. This also seems an appropriate and logical complement to the inclusion of “designated archaeological and ethnological 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.