

---

# UNITED STATES SENTENCING COMMISSION

---



**WRITTEN TESTIMONY**

---

**PUBLIC HEARING  
MARCH 11, 1996**

---

---

WRITTEN TESTIMONY

---

PUBLIC HEARING  
*March 11, 1996*



UNITED STATES SENTENCING COMMISSION

---

---

**United States Sentencing Commission**  
**Public Hearing on Proposed Guideline Amendments**  
**March 11, 1996**

1. 1:00 p.m. Mary Lou Soller  
*American Bar Association*
2. 1:15 p.m. David Wikstrom  
*New York Council of Defense Lawyers*
3. 1:30 p.m. Julie Stewart  
*Families Against Mandatory Minimums*
4. 1:45 p.m. Alan Chaset  
*National Association of Criminal Defense Lawyers*
5. 2:00 p.m. Judith Hall
6. 2:15 p.m. Atlee W. Wampler III  
*Wampler Buchanan & Breen*
7. 2:30 p.m. Lisa Campanella



# AMERICAN BAR ASSOCIATION

GOVERNMENTAL AFFAIRS OFFICE • 740 FIFTEENTH STREET, NW • WASHINGTON, DC 20005-1009 • (202) 662-1760

**STATEMENT OF**  
**MARY LOU SOLLER, CHAIRPERSON**  
**COMMITTEE ON THE U.S. SENTENCING GUIDELINES**  
**SECTION OF CRIMINAL JUSTICE**

**ON BEHALF OF**  
**THE AMERICAN BAR ASSOCIATION**

**BEFORE THE**  
**UNITED STATES SENTENCING COMMISSION**  
**CONCERNING**  
**SENTENCING GUIDELINE AMENDMENTS**

**MARCH 11, 1996**



My name is Mary Lou Soller, and I am the Chairperson of the ABA Criminal Justice Section's Committee on the United States' Sentencing Guidelines. The members of this committee include numerous professionals involved in a wide variety of roles in the criminal justice system, including judges, prosecutors, public and private defense practitioners, academics, and criminal justice planning professionals.

I appear before you today at the request of ABA President Roberta Cooper Ramo, to convey the ABA's views on the proposed amendments to the Sentencing Guidelines. Our comments are made in the context of the Third Edition of the ABA Standards for Sentencing Alternatives and Procedures, as well as other policy statements adopted by the ABA's House of Delegates.

### Specific Amendments

The ABA appreciates the opportunity to provide comments on the proposed amendments and have set forth our positions below.

1. Cocaine Offenses

The Commission seeks comment on a wide range of factors that could be considered in sentences imposed for cocaine offenses.

The list of factors is long, but does not contain factors not already considered or covered by current guidelines. In general, we believe substantial changes in the treatment of these factors should not be made at this time, particularly if there is no change in the statutory and guideline emphasis on drug quantity.

The ABA has long believed that the current Guidelines overemphasize the quantity of drugs in determining an offender's culpability. In August 1995, the ABA House of Delegates resolved that it

endorses in principle the U.S. Sentencing Commission proposal transmitted to Congress on May 1, 1995, to amend the federal sentencing guidelines and manual to a) eliminate current differences in sentences based upon drug quantity for offenses involving crack versus powder cocaine, and b) assign greater weight in drug offense sentencing to other factors that may be involved in the offense, such as weapons use, violence, or injury to another person.

We believe that changes in the law governing the treatment of other factors should not be made in a vacuum. Such changes should be paired with a reconsideration of the role of quantity.

In addition, consistent with ABA policy, we oppose the mandatory minimum provisions themselves. To the extent the Guidelines can ameliorate the distortion caused by these ill-considered statutes. We adhere to the principle, stated in both our Standards and in 18 U.S.C. § 3553, that punishment should be sufficient -- but not greater than necessary -- to fulfill the statutory purposes of sentencing. The shocking extent to which federal prisons are populated with low-level, non-violent drug offenders is well-documented. According to the Department of Justice, 21% of all prisoners are low-level, non-violent drug offenders and one-third of all drug offenders in federal prison are low-level. These results are caused largely by mandatory sentencing statutes and their interaction with Guideline §2D1.1.

The Commission has also requested comment on the ratio of "crack" cocaine to powder cocaine. The ABA continues to support the Commission's efforts to purge the guidelines of the unwarranted disparity that currently exists between people sentenced for offenses involving crack cocaine and those for powder cocaine. In August 1995, the ABA House of Delegates considered

the Commission's report to Congress and endorsed the your May 1, 1995, proposal to Congress to "eliminate current differences in sentences based upon drug quantity for offenses involving crack versus powder cocaine." The ABA agrees that the current differences in applicable punishments cannot be justified.

We urge the Commission to continue seeking ways to correct the current crisis that faces defendants charged with offenses involving crack cocaine.

2. Money Laundering

The ABA continues to support the proposal made by the Commission during the prior amendment cycle. These proposed amendments should assist in achieving some proportionality in sentencing for all money laundering offenses.

The basis of our position is that we agree with the Commission's Money Laundering Working Group that where "the defendant committed the underlying offense, and the conduct comprising the underlying offense is essentially the same as that comprising the money laundering offense[,] the sentence for the money laundering conduct should be the same for the underlying offense."

As we have stated in the past, and as the Commission heard in testimony last year, many lawyers have reported to us their experience that the current Guidelines encourage prosecutors to seek money laundering convictions in cases not narcotics-related or fraud-related money laundering, because the resulting sentences are significantly higher than for the underlying offenses. We have also become aware of instances in which the government can influence plea bargaining negotiations merely by threatening to include a "money laundering" count in the

indictment -- with its exceptionally high base offense level of 20 or 23 -- to improperly influence plea negotiations.<sup>1</sup>

We have considered the Department of Justice proposal as an alternative to the Commission's proposed amendments. Contrasted with the Commission's proposal, which was based on the extensive study by the Money Laundering Working Group, the government's proposal is not based on empirical evidence. The Department of Justice study is due to be released six weeks from now, on May 1, 1996, so it cannot be fully considered at all in this amendment cycle. The fact that the Department of Justice has proposed a position that is more in line with the Commission's direction than that which it endorsed in the past is encouraging. However, the ABA continues to support the Commission's proposal as the more equitable alternative.

3. Food and Drug Offenses

Although we have specific comments on each of the proposals, we urge the Commission to defer any action on these proposal, since you are now engaged in a comprehensive review of the guidelines to (i) reduce the complexity of guideline application; and (ii) to improve the guidelines by refinement. Each of these proposed amendment "simplifies" the guidelines in a piecemeal fashion, but in ways that may have consequences for conduct involving other than food

---

<sup>1</sup> We note that Department of Justice policy is that money laundering is not to be charged in "pure" deposit cases.



and drug offenses. Before the Working Group on Guideline Simplification has completed its comprehensive review, we believe these proposed changes are premature.<sup>2</sup>

a. Proposed Amendment A

This proposed amendment would delete the current guideline for §2N2.1 and treat all offenses previously governed by this guideline under the fraud guideline. The proposal is seriously flawed for the reasons we address below.

First, the proposed amendment would result in sentencing persons whose conduct does not involve fraud under the fraud guideline. This would create disparity in sentencing, not eliminate it.

According the Commission data, most criminal conduct sentenced under §2N2.1 has been violations of statutes relating to adulterated or misbranded meat (21 U.S.C. § 610) and violations relating to misbranded or adulterated food, drugs, cosmetics, or devices under the Food, Drug and Cosmetic Act (21 U.S.C. § 331, et seq.). See Food and Drug Working Group Final Report (Feb. 1995) at 3. The violations of these statutes, as well as many other statutes currently covered by §2N2.1, may be either misdemeanors or felonies. Under both 21 U.S.C. § 610 and 21 U.S.C. § 331, felonies are those offense that involve an intent to defraud or an intent to mislead. If a person violates these statutes without acting with intent to defraud, the violation is punishable as a Class A misdemeanor, which carries a maximum statutory sentence of one year.

Section 2F1.1 of the Guidelines is designed to handle cases involving an intent to defraud or mislead, such as mail fraud, wire fraud, false statement offenses, and the like. It is not designed

---

<sup>2</sup> This is particularly significant for Amendment C. We understand that consideration of "loss" is an important part of the simplification review. Deferral of this critical issue until it can be fully considered is preferable to a fragmented approach as proposed her.



to cover offenses without such an intent. It is particularly inappropriate for food and drug prosecutions, since most sentences under §2N2.1 have been for misdemeanor violations -- i.e., those not involving an intent to defraud or mislead. See Food and Drug Working Group Final Report, at 11. The amendment would result in sentencing a number of persons convicted of non-intent crimes under a guideline designed to cover more serious forms of criminal conduct.

This anomaly is significant -- and particularly unfair -- because the misdemeanor provisions of statutes such as 21 U.S.C. § 331 are strict liability criminal statutes. Under United States v. Park, 421 U.S. 658 (1975), and Dotterweich v. United States, 320 U.S. 277 (1943), persons with absolutely no knowledge of the adulteration or misbranding can be convicted of misdemeanor violations of these statutes. Thus, the amendment would result in punishing persons convicted of a strict liability crime on the same terms governing a person who has engaged in criminal with specific intent to defraud or deceive. Unfortunately, the Sentencing Commission Working Group appears not to have considered this aspect of the offenses involved when it designed its proposals.

Second, why "fix" a sentencing guideline when it "isn't broken?" The current version of §2N2.1 already contains a specific cross-reference that "if the offense involved fraud," §2F1.1 is to be used.

The Working Group noted instances when the cross-reference was not used in situations the Working Group felt it should have been used, but the available data is insufficient to draw a conclusion that this cross-reference is an inadequate device to assure that the cases involving intent to defraud are sentenced under the more appropriate guideline. Indeed, we note the Working Group considered data only from 1991, 1992, and 1993 cases. Since the cross-reference

was not effective until November, 1992, very few cases studied by the Working Group involved situations in which the cross-reference would be applicable. If the cross-reference is not properly being applied (as the Working Group Final Report suggests at page 20), the "fix" is to provide further guidance in the commentary, not to eliminate §2N2.1.

b. Proposed Amendment B

This proposed amendment would specify that a departure may be warranted in fraud cases where the offense creates risk of serious bodily harm to a large number of persons. This Application Note is unnecessary.

Section 2F1.1 provides that an upward departure may be warranted where the fraud "caused or risked reasonably foreseeable, substantial non-monetary harm" or where the offense "caused reasonably foreseeable, physical or psychological harm . . . ." Application Notes 10(a) and (c). The proposed additional application note would add little to the existing commentary.

Further, as the proposed amendment notes, the current guideline provides for an enhancement of two levels whenever the offense involves the conscious or reckless risk of serious bodily injury. This specific offense characteristic already insures that sentences are increased in fraud offenses involving risk of serious bodily harm to a large number of persons.

c. Proposed Amendment C

The Commission seeks comment on whether an offender's "gain" should be used instead of "loss," where fraud is against a regulatory agency, but does not cause any economic loss. We believe the Commission should not make such a significant change in the guideline structure.

An offender's "gain" may always be taken into consideration by the sentencing court in two ways, even where there is no economic loss. The gain may be used by the court to determine

what sentence within the applicable guideline range should be imposed and whether to depart from that range. Indeed, in United States v. Chatterji, 46 F.3d 1336 (4th Cir. 1995), a case to which the Commission makes reference in this Issue for Comment, Judge Wilkins holds that courts may consider departures for offenses against a regulatory agency not involving economic loss.

4. Child Sex Offenses

The Commission has sought comment on its proposals to implement the Congressional directive to increase by at least two levels the base offense level for certain offenses contained in 18 U.S.C. §§ 2251 and 2252.

The Commission's proposals to raise the base offense levels involve a choice of three bracketed alternatives. Because ABA policy does not address such precise distinctions, we are constrained from commenting on the specific offense level chosen by the Commission, but we do offer the following general comments.

The Commission reached its decision as to the appropriate base offense levels for these criminal activities after careful study and deliberation. Congress has not found that the Commission's decisions were in error; it has merely changed some of the statutory provisions. As noted above, the ABA believes in the principle that punishment should be sufficient -- but not greater than necessary -- to fulfill the statutory purposes of sentencing. The Commission's prior decision as to the appropriate level of punishment should not be drastically altered. We urge the Commission to adopt the alternative which least changes the current base offense levels, while still complying with the Congressional directive.



## Administrative Procedures

In addition to our comments about specific proposed amendments, we would like to take this opportunity to provide comment on the procedures employed by the Commission in conducting its business.

In previous years we have recommended that the Commission adopt rules of procedure and work toward a more accountable process. We renew those recommendations. We believe the Commission's effort to systematize its process is an important part of any effort to improve federal sentencing. Indeed, in August 1995, the ABA House of Delegates approved a resolution that

recommends that the United States Sentencing Commission adopt and publish internal rules of practice and procedure, including procedures commonly used by other rulemaking agencies to invite and structure public participation, disclose information, and justify promulgated rules.

We applaud the steps already taken by the Commission. However, even with the changes that have been made, the Commission remains significantly less accountable to the public than other federal rulemaking agencies. This difference contributes unnecessarily to the controversial nature of Commission decisions. While many of the Commission's policy decisions will of necessity be unpopular with some, Commission policy decisions become even harder to accept when the decision makers have not provided adequate access to information, sufficient opportunity to comment, or an adequate explanation of the decisions reached.

We believe that, as a general matter, the Commission should adopt procedures followed by other administrative agencies that issue substantive rules as a model for procedural regularity. While these procedures are by no means perfect, they do represent an accommodation that has

been reached over time between the need for agency efficiency and the need for public accountability.

We are aware that the Commission staff is actively reviewing the ABA proposal and is preparing a recommendation for the Commission. We urge you to publish this draft and to seek comment on it.

What follows are recommendations contained in the ABA report supporting its resolution last August that could be implemented without any changes in the Commission's statutory mandate. In making these suggestions, we do not intend that these procedures would alter or expand any rights of review that may currently exist.

1. The Commission Should Promulgate Rules of Procedure.

We note that 28 U.S.C. § 994(a) envisions that the Commission will promulgate and amend its Guidelines pursuant to "its rules and regulations." However, the Commission has not, as yet, brought together those procedures it now follows into a unified and published set of standards. We urge the Commission to publish a set of the rules and procedures to govern all aspects of its rulemaking process and to make those procedures available to the interested public.

2. The Commission Should Provide a More Detailed Statement of Basis and Purpose When Adopting Rules.

Section 553(c) of the Administrative Procedures Act ("APA") requires that an agency incorporate "a concise statement of basis and purpose" in the rules adopted. For most agencies, that requirement poses a more elaborate burden than the term "concise statement" implies. As the Supreme Court has explained, "an agency must examine the relevant data and articulate a



satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"<sup>3</sup>

In the past, the Commission's explanations have not met this standard. For example, the Commission has often failed to account for factors Congress required to be considered, such as the impact of Guideline changes on prison overcrowding. It has also rarely responded to public requests to explain why a comment was being accepted or rejected. For some issues, such as the decision to make Commission changes retroactive, the Commission has supplied no explanation at all.

We urge the Commission to provide a more thorough explanation of its amendments to the Guidelines and policy statements, to explain why it chooses one option over others considered, and to explain why it rejects public comment opposed to its suggestion. If the requirement of producing this statement of basis and purpose is difficult to accomplish under the Commission's current timetable, we believe the Commission should seriously consider moving to a two-year amendment cycle.

3. The Commission Should Publish a More Detailed Regulatory Agenda.

The Commission now publishes a notice in the Federal Register identifying the issues on which it seeks comment and those on which it may adopt amendments, and we commend you for doing so. However, that notice is generally far less detailed than the notice published in the United Agenda of Federal Regulations and required of other agencies. We recommend that, to the extent feasible, the Commission should model its agenda on the United Agenda. The more information the Commission can provide to the public, the better the feedback it can expect.

---

<sup>3</sup> Bowen v. American Hospital Ass'n, 476 U.S. 610, 626 (1986).

4. The Commission Should Adopt Procedures for Petitions.

At present, the Commission has no written procedures concerning the solicitation and disposition of petitions. It also does not maintain a public petition file. The Commission should consider adopting procedures regarding petitions.

5. The Commission Should Comply Voluntarily With FACA and FOIA.

Conventional rulemaking agencies are subject to the requirements of the Federal Advisory Committee Act ("FACA") and the Freedom of Information Act ("FOIA"). The Commission's failure to operate under these open-government provisions, or to construct acceptable analogies, frustrates legitimate public efforts to influence and learn from the Commission.

FACA requires open advisory committees. Most other, more traditional, agencies have learned to operate with open meetings. An open meeting rule would permit the public better access to the Commission's committee action and would improve the quality of its deliberations by permitting public input. Compliance with FOIA, or a Commission analogue, would permit the public easier access to Commission documents with relevance to sentencing questions.

6. The Commission Should Comply With the Sunshine Act.

Although the Commission's meetings are open to the public, the lack of notice and lack of formality concerning the meetings limits the usefulness of any open meeting policy. The Commission's current policy does not require a week's prior notice of the meeting or publication of the notice in the Federal Register, nor does the policy define what meetings are to open or limit the circumstances under which a meeting may be closed. In addition, the Commission does not make tape recordings of prior meetings available to the public. We urge the Commission to

amend its meetings policy to provide greater notice of the time of its meetings, access to a record, and standards for those rare circumstances when decisions will not be made in public.

**COMMENTS OF  
THE NEW YORK COUNCIL OF DEFENSE LAWYERS  
REGARDING PROPOSED 1996 AMENDMENTS TO  
THE SENTENCING GUIDELINES**

**Respectfully submitted,**

**NEW YORK COUNCIL OF  
DEFENSE LAWYERS**

**220 East 42nd Street  
New York, New York 10017  
(212) 687-8850**

**Andrew M. Lawler, President  
Marjorie J. Peerce and John J. Tigue, Jr.  
Co-Chair, Sentencing Guidelines Committee**

**March 5, 1996**

NEW YORK COUNCIL OF DEFENSE LAWYERS

COMMENTS OF THE NEW YORK COUNCIL  
OF DEFENSE LAWYERS REGARDING PROPOSED  
1996 AMENDMENTS TO THE SENTENCING GUIDELINES

Introduction

Once again, we would like to thank the Sentencing Commission for the opportunity to present our views on the Proposed Amendments. The New York Council of Defense Lawyers ("NYCDL") is an organization comprised of more than one hundred and fifty attorneys whose principal area of practice is the defense of criminal cases in federal court. Many of our members are former Assistant United States Attorneys, including ten previous Chiefs of the Criminal Divisions in the Southern and Eastern Districts of New York. Our membership also includes attorneys from the Federal Defender offices in the Eastern and Southern Districts of New York.

Our members thus have gained familiarity with the Sentencing Guidelines both as prosecutors and as defense attorneys. In the pages that follow, we address the Proposed Amendments and Issues for Comment of interest to our organization.

The contributors to these comments, members of the NYCDL's Sentencing Guidelines Committee, are Marjorie J. Peerce and John J. Tigue, Jr., Co-Chair, and Robert J. Anello, Paul Corcoran, Michael S. Feldberg, Linda Imes, Peter Kirchheimer, William J. Schwartz, Vivian Shevitz, Audrey Straus, Paul Vizcarrando and David Wikstrom.



PROPOSED AMENDMENT 2: CHAPTER 2, PART 5  
(MONEY LAUNDERING AND MONETARY TRANSACTIONS)

Commission's Proposal

The NYCDL reiterates its support in principle with the Commission's proposed amendments to the money laundering guidelines, U.S.S.G. §2S1.1. We wish to make the following comments concerning the Commission's proposal, as well as the alternative proposal submitted by the Department of Justice.

The Commission's proposed amendment (which was disapproved by Congress, see Pub.L. 104-38, 109 Stat. 334, Oct. 10, 1995) consolidated §§2S1.1 and 2S1.2, and provided additional modifications with the aim of better assuring that the offense levels prescribed by these guidelines comport with the relative seriousness of the offense conduct, chiefly by tying base offense levels more closely to the underlying conduct that was the source of the illegal proceeds.

Under the amended §2S1.1, violators of either 18 U.S.C. §1956 or §1957 would be sentenced to the greater of (1) 8 plus the number of levels which would be added for a fraud or theft of the same amount as the laundered funds; (2) 12 plus the number of levels that would be added for a fraud or theft of the same amount, if the defendant knew or believed that the funds were derived from narcotics trafficking, a crime of violence, or an offense related to national security or terrorism; or (3) the offense level of the underlying offense, if the defendant committed the offense or was "accountable" for its commission under §1B1.3. The NYCDL

reiterates its agreement with the efforts on the Commission's part both to simplify the money laundering guidelines and to tie them more closely to the underlying activity.

We wish to note our view, however, that the Specific Offense Characteristics set forth in subdivision (b) are problematic. Subdivision (b)(1) provides for a two-level upward adjustment if the defendant believed that the money laundering transactions were "designed . . . to conceal or disguise the proceeds of criminal conduct," or believed that the funds were to be used to promote further criminal conduct. These two "specific offense characteristics" are already elements of the 18 U.S.C. §1956 violation itself. (See §§1956(a)(1)(A)(i), (a)(1)(B)(i), (a)(2)(A), (a)(2)(B)(i), (a)(3)(A), (a)(3)(B).) We thus anticipate that this two-level enhancement will apply virtually across the board in all §1956 prosecutions.

This is so because section 1956 imposes money laundering liability on anyone conducting the requisite financial transactions, when committed with the intent either (1) to evade taxes (e.g., §1956(a)(1)(A)(ii)), or (2) to avoid a reporting requirement (e.g., §1956(a)(1)(B)(ii)). One of the two "specific offense characteristics" is thus already a component of the crime. It will be the rare defendant, if indeed one can be hypothesized, who conducts a financial transaction to avoid either a reporting requirement or to avoid paying taxes on it who does not also, a fortiori, conduct the transaction with the intent "in whole or in

part to conceal or disguise the proceeds of criminal conduct," thus meriting the two-level upward adjustment under subdivision (b).

A second problem worthy of consideration is the appropriateness of treating violators of 18 U.S.C. §1957 the same as violators of 18 U.S.C. §1956 at sentencing. Section 1957 is essentially a lesser-included offense of §1956, imposing liability for conducting financial transactions with the proceeds of specified unlawful activity. The statute does not require proof of intent either to promote the underlying activity or conceal its proceeds; neither does it require that the defendant know that the funds involved in the transaction were derived from specified unlawful activity. Under the previous guideline, defendants convicted of §1957 violations were sentenced under a base offense level of 17 (rather than 23, for §1956 violations). Under the Commission's proposed guideline, violators of §1957 will generally receive the same sentence as violators of §1956. We question the advisability of increasing the penalties for §1957 violations simply to streamline the guideline. Furthermore, under the proposed guideline, the government could, in close cases, or in cases where portions of the proof are troublesome or lacking, simply indict a person for the §1957 violation, and then seek to establish -- by a mere preponderance of the evidence -- the elements of "actual" money laundering as offense-level enhancements. As we wrote in our comments to the proposed 1995 amendment, we question the advisability of trading the government burden of proof for the advantage of fewer guidelines.



We continue to support strongly the Commission's proposal to lower the offense level for money laundering by bringing it into line with the level applicable to the underlying conduct. Under the Proposed Guideline, base offense levels start at 8, 12 or the offense level for the underlying offense, whereas currently violators are sentenced at levels of 17, 20 or 23. Level 8, the bottom of the proposed base offense levels, is premised upon the base offense level of 6 from §2F1.1, plus the two-level enhancement for "more than minimal planning," which is a specific offense characteristic under 2F1.1 and which is built into the proposed structure of §2S1.1. The Synopsis states that the Commission has made the assumption that heartland money laundering cases will all involve more than minimal planning. We believe that this approach is incorrect. The "more than minimal planning" enhancement under §2F1.1 presents too low a standard for increasing the offense level in most cases and too high a likelihood that the enhancement will apply across the board. Virtually every financial crime will involve "planning" that meets the "more than minimal" standard; the average level of planning in financial crimes has thus already been taken into account in formulating the base offense level of 6 under §2F1.1.

We therefore believe that since "more than minimal planning" is not a meaningful barometer in terms of punishing conduct which represents a greater danger to the public, or a greater obstacle to detection by law enforcement, it should not

form a part of the theoretical underpinning of the base offense level of 8 under Proposed §2S1.1.

We recognize that there will be money laundering cases, or other financial crime cases, in which the defendant's meticulous or complex planning, i.e., "sophistication," merits an upward enhancement. A better approach, we believe, would be to fix the base offense level for money laundering at 6 -- the level prescribed for most financial crimes -- and abandon altogether the virtually universally-applicable enhancement in money laundering cases for "more than minimal planning." In cases in which a defendant's planning is more extensive than is typical in money laundering cases, and has posed a greater threat to the public or greater difficulty in detection, then an upward adjustment for "sophisticated" money laundering under subdivision (b)(2) would be warranted. Given the vagueness of the term "sophisticated," however, we believe that either a better definition, or specific examples, or both, should be provided. Proposed application note 5, which states in circular fashion that the "sophisticated" enhancement will apply where ". . . sophisticated steps were taken to conceal the origin of the money" is not as helpful as one would wish since "sophisticated" is not defined, and because "steps to conceal the origin of the money" will likely have been taken in every case.

Finally, while we strongly support the effort to bring money laundering levels down from levels 20, or 23, to levels which are generally commensurate with the level 6 or level 8 conduct



which produced the money in the first place, in cases where the underlying conduct is punished by a comparatively high base offense level, the proposed guideline imposes much more punishment than is currently imposed under the guidelines. This may be warranted in cases where the money launderer actually committed the underlying conduct too, but Proposed §2S1.1 goes much further, setting the base offense level for money laundering at the level for the underlying conduct if the defendant "would be accountable for the commission of the underlying offense under §1B1.3 (Relevant Conduct). . . ." In light of the broad ambit of §1B1.3, particularly the breadth of the "common scheme or plan" language in §1B1.3(a)(2), the proposal threatens to punish money launderers for the conduct which produced the money in the first place, even if they did not commit it. We question whether this is what the Commission intended, and respectfully suggest a reexamination of the application of this section to those defendants whose "accountability" is accessorial.<sup>1</sup>

---

<sup>1</sup> For example, Defendant A travels to the far East and returns carrying two kilograms of heroin. Defendant B, a friend of Defendant A who works at a bank and who knows all about A's venture, agrees to transfer the \$300,000 proceeds to A's pseudonymous Caribbean account, then back to A's brokerage account. At sentence, A is sentenced at level 32 for the narcotics. Defendant B, on the other hand, pleads guilty to money laundering. Under Proposed §2S1.1, B's base offense level is 32 because he is "otherwise accountable" for the acts committed as part of the common scheme or plan with Defendant A under §1B1.3. B also receives a two-level upward adjustment for disguising proceeds, under subdivision (b)(1), and an additional two-level upward adjustment for moving funds out of the country under subdivision (b)(2), for an adjusted base offense level of 36.

Furthermore, any guideline like the proposed money laundering guideline, which keys a defendant's base offense level to any criminal activity for which he or she is "otherwise accountable" under §1B1.3, raises the specter that a defendant will be sentenced for conduct not only that was uncharged, but for conduct as to which the defendant was acquitted. We reiterate the objection of the NYCDL to a sentencing court's consideration of acquitted conduct in determining the offense level under the relevant conduct section of the guidelines.

Department Of Justice Proposal

The Department of Justice proposal sensibly eliminates the language in the Commission's proposal tying the base offense level to relevant conduct for which a defendant "otherwise would be accountable under §1B1.3." As noted in the hypothetical set out in the footnote above, given the broad ambit of relevant conduct for which a criminal defendant is "otherwise accountable" under §1B1.3, the Commission's proposal would expose money launderers to punishment for the offenses which generated the funds in the first place, even if they did not commit it. We noted that as a practical matter, such a system is destined to punish too severely those whose "accountability" is merely accessorial. The DOJ proposal omits the "otherwise accountable" language in §2S1.1(a)(1) and, we believe, is preferable.

The other provisions in the DOJ proposal are, we believe, unwarranted; the suggested base offense level adjustments are

greater than those the Commission proposed, and appear designed to eliminate sentencing disparity in money laundering sentencing by simply sentencing everyone more severely. For instance, where the Commission set the bottom of the proposed base offense levels at level 8, premised upon the base offense level of 6 from §2F1.1, plus the two-level enhancement for "more than minimal planning," which is a specific offense characteristic under 2F1.1, the DOJ proposal suggests a base of 12. We believe this to be an unwarranted and arbitrary suggestion. The Commission's proposal, tied to the base offense level of §2F1.1, (although we took issue with the automatic inclusion of the two-level enhancement for more than minimal planning), at least has in its favor the consistency of treatment a variety of offenders would receive. The DOJ proposal, on the other hand, inconsistently elevates the exposure of the money launderer. For example, a mail fraud defendant sentenced on the basis of a loss of \$150,000 would be at level 15, assuming a base offense level of 6, a two-level enhancement for more than minimal planning, and a 7-level increase under §2F1.1(b)(1)(H). Under the DOJ proposal, the same mail fraud defendant who launders his own proceeds would be at level 17. (DOJ proposed §2S1.1(a)(1)). The highest sentence of all, however, would be the §1956 or §1957 defendant who, even if he had no involvement in the mail fraud, would be sentenced at level 19. (DOJ proposed §2S1.1(a)(3)). We believe such a result to be contrary to the intent of the commission.



When the Commission promulgated §2S1.1, it intended to provide for punishment that was significant, but somewhat less significant, than that for the underlying criminal conduct which generated the proceeds eventually laundered. As presently designed, §2S1.1 effectuates that policy; however, the section makes sense only where the underlying criminal activity - narcotics trafficking, for instance - carries an offense level greater than 20, the base offense level for money laundering. Thus, §2S1.1(a)(1) specifies an increase of 3 levels where the defendant intended to promote the specified unlawful activity, and §2S1.1(b)(1) specifies a further 3 level increase where the funds were derived from drugs.

To move the offense level upward by 3 levels for defendants who seek to promote (as opposed to conceal) the specified unlawful activity is only logical where that activity has a higher offense level. In other words, it does not make sense that a launderer of the proceeds of level 6 "specified unlawful activity," with an initial offense level of 20 under §2S1.1, should be raised an additional three levels to 23 for trying to promote the level 6 activity itself.

We believe that the problems with the money laundering guideline have emanated from cases in which it has been applied to specified unlawful activity carrying a much less serious offense level than the money laundering base offense level itself, a situation not contemplated at the time the money laundering guidelines were initially promulgated. This was made explicit by



the language accompanying the proposed amendments to §2S1.1. There, the Commission stated:

When the Commission promulgated §§2S1.1 and 2S1.2 to govern sentencing for the money laundering and monetary transaction offenses found at 18 U.S.C. §§1956 and 1957, these statutes were relatively new and, therefore, the Commission had little case experience upon which to base the guidelines. Additionally, court decisions have since construed the elements of these offenses broadly. This amendment consolidates §§2S1.1 and 2S1.2 for ease of application, and provides additional modifications with the aim of better assuring that the offense levels prescribed by these guidelines comport with the relative seriousness of the offense conduct.

The amendment accomplishes the latter goal chiefly by tying base offense levels to the underlying conduct that was the source of the illegal proceeds.

The DOJ proposal, which increases the money laundering sentence in most cases, exacerbates this problem. The NYCDL opposes its adoption.

**PROPOSED AMENDMENT 3 (B): FOOD AND DRUG OFFENSES:  
-- UPWARD DEPARTURES FOR OFFENSES INVOLVING  
RISK TO A LARGE NUMBER OF PERSONS**

The Commission seeks comment on a proposal to add an additional note to the Application Notes to § 2F1.1, which would provide that subsection (b)(4) [adding two levels] applies when the offense caused a conscious or reckless risk of serious bodily injury. The NYCDL supports this application note only to the extent noted below, and opposes providing for a possibility of an upward departure.

§ 2F1.1(b)(4) reads: "If the offense involved (A) the conscious or reckless risk of serious bodily injury . . . increase by 2 levels." Unexplained, this could be interpreted to mean that the level should be increased whenever there is risk involved in the offense. The problem with this is that in the food and drug area, virtually every regulated medical device and every drug carries risk of serious bodily injury. The question the Food and Drug Administration asks is whether the potential benefits outweigh the potential risks. The proposed additional notes would clarify that the increase should apply only when the offense caused the risk. This represents an improvement, and would help eliminate the possibility that a two-level increase would be imposed when the device or drug involved in the offense was inherently risky, but whose risks the FDA had concluded were outweighed by its potential benefits or where the risk was not caused by the offense itself.

We believe that the risk to a great number of people is already adequately dealt with in the existing guidelines. For

example, § 2F1.1(b)(4) already provides for a minimum of a level 13 if there was a risk of bodily injury. We thus oppose that portion of the proposed amendment.

ISSUE FOR COMMENT: 3 (C)

The Commission seeks comment on whether gain should be substituted for loss for a regulatory offense with no economic loss. The NYCDL believes that the reasonings of the Fourth and Seventh Circuits in United States v. Chatterji, 46 F.3d 1336 (4th Circuit, 1995) and United States v. Anderson, 45 F.3d 217 (Seventh Cir. 1995) are correct and urges that the proposed change not be made. In particular, in those circumstances when there is no economic loss, it is possible that utilizing the gain may unfairly overstate the seriousness of the offense. Regulatory offenses are particularly susceptible to this result because the conduct may by itself violate the law, but there may not have been any actual or intended economic harm as a result of the conduct. This would occur, when for example, a defendant failed to comply with particular regulatory approval mechanisms in violation of the law, but the product approved was viable and effective, the wrongful conduct was not intended to harm anyone economically and there was no economic loss. In those circumstances, where there is no economic loss, we believe that it would be unfair to increase someone's sentence by the amount of the gain.

Finally, we note that in those cases in which the court feels that the guidelines range does not fully capture the seriousness and harmfulness of the offense, the court can depart upwardly. We believe that that option is preferable to automatically including gain in every "no loss" case, without regard to the potentially unique circumstances presented.





Families Against Mandatory Minimums

F O U N D A T I O N

Julie Stewart  
Families Against Mandatory Minimums

U.S. Sentencing Commission  
Written Testimony  
March 1996

### Money Laundering

Last year the Sentencing Commission responded to the need for reform of the money laundering guidelines by recommending that §§ 2S1.1 and 2S1.2 be consolidated, enabling the sentence to more accurately reflect the seriousness of the offense. FAMM strongly supports the Commission's recommendation from last year and urges that the Commission go forward with the same recommendation this year.

A primary block to the money laundering amendment last year in Congress, was its inclusion with the crack cocaine amendment. Even so, near the end, the money laundering amendment gained support because many members of Congress began to recognize the need for reform of the money laundering guidelines.

The issue has been analyzed closely by the Sentencing Commission, the Department of Justice, and those who enforce the law. The enforcement community thinks the Commission's guideline reform is about right. It provides increased sentences for those defendants who are major players and lesser sentences to those whose conduct is more minimal. This adjustment reflects the Commission's principles of just punishment.

FAMM receives an increasing number of letters each year from money laundering defendants. These letters convince us that small-time players are regularly charged with money laundering guidelines. Attached are two recent letters we received from defendants serving sentences under the money laundering guidelines. I hope these will help you in understanding that prosecutors do charge low-level defendants with money-laundering offenses.

1001 Pennsylvania Avenue, N.W. • Suite 200 South • Washington, D.C. 20004 • (202) 457-5790 • Fax (202) 457-8564

---

San Francisco, CA	Seattle, WA	Miami, FL	Atlanta, GA	Cedar Rapids, IA	Los Angeles, CA	
Indianapolis, IN	Detroit, MI	Austin, TX	Portland, OR	Greeley, CO	Tucson, AZ	Honolulu, HI

February 13, 1996

Elizabeth Joseph  
4624 North 101 Street  
Wauwatosa, WI 53225  
Phone: (414) 527-2735

For: Joseph Koller 02216-089  
P.O. Box 1000  
Oxford, WI 53952

FAMM - Suite 200 South  
1001 Pennsylvania Avenue NW  
Washington, DC 20004

Attn: Monica Pratt

REGARDING MONEY LAUNDERING AMENDMENT: I am under the impression the Money Laundering Statue was enacted by congress to be used against large scale operations. I would like you to review what happened to my brother. I feel there was an injustice to him. The guidelines were misused.

BACKGROUND INFORMATION: My brother, Joseph Koller went to bail his friend, Jane out of jail. A receptionist asked his name and he gave Joseph Koller. The amount needed was \$2100. He left to try and raise that amount, by getting loans from friends.

The next day, my brother returned with \$2100. He was then informed the amount was \$2300 (plus change). He left to try and come up with the rest of the money.

Back that same day, with the amount require, He was told cash was not acceptable. He would have to provide a money order.

My brother secured the money order and returned. The receptionist asked how to spell Gerald and my brother told her. Never was he asked what his name was, outside the first visit, and never did he try to disguise or sign anything with his name.

IN COURT: It was entered into the record Joseph Koller used a fictitious name of Gerald Kohler, when putting up bail for Jane. (My brother gave his name only one time, as Joseph Koller and that was to the receptionist. It was not the receptionist who testified in court. It was her boss.)

Unknown to Joe, Jane was an informer, who's testimony put other people in prison. She was fearful of her life, if she was sent to prison. To get into the witness protection program she testified the money used for her bail was drug money. Her testimony was entered into the record, regardless the fact, the prosecutor admitted Jane was a drug addict and of poor character.

My brother had 7 witness of good character who stated they loaned money to him for Jane's bail (of which one was Jane's father).

RESULT: 20 year sentence for money laundering.

I do not believe the result of what happened in this case is what the money laundering guidelines were created for.

Consideration should be given to correct the money laundering guidelines.

Respectfully,

*Elizabeth Joseph*



February 8, 1996

Chris Lamprecht  
#61153-08C  
FCI Bastrop  
PO Box 1010  
Bastrop, TX 78602-1010

FAMM  
1001 Pennsylvania  
Suite 200 - South  
Washington, DC 20004

Re: Money Laundering case info. supporting proposed guidelines  
amendment

Dear Sir or Ma'am:

My name is Chris Lamprecht, and I am 23 years old. I am in FCI Bastrop, Texas, serving a 70-month sentence for laundering \$153,000. I am writing in response to your July - December 1995 FAMM-gram, specifically, the proposed Money Laundering amendment which would change the sentencing scale.

I believe I qualify as a "small-time" case, as money laundering was a side effect of the actual crime of interstate transport of stolen property (Section 2Fl.5 I believe). I believe my case may be useful to you as an example of a prosecutor charging someone with money laundering to get a higher sentence when the real crime would have brought on a lesser sentence. If I had been charged with interstate commerce, I would have received a sentence of 36-45 months or less.

My case history is as follows (very brief). I stole electronic and computer equipment from several buildings, and sold the equipment across state lines. The companies who bought the equipment paid me with a company check, which I deposited into a bank account, later to be withdrawn. This money was withdrawn partly by making normal withdraws, and partly by taking out \$400 per day from ATM machines. This is hardly a sophisticated money laundering enterprise.

My offense level points were as follows: 20 points base offense level for Money Laundering (Sec. 2Sl.1), plus 1 point for \$100,000 - \$200,000 range. I received no points for acceptance of responsibility, and 2 points for obstruction of justice, bringing my total points to 23. This is my first time in prison but because of my prior probations, my criminal history category was III (3). My guideline range was 57-71 months and I received 70 months.

I hope this case may help in your effort towards passing this money laundering amendment. I believe I would have somewhere from 17 to 21 points with the new amendment, bringing my sentencing range significantly lower. If it would help for me to write to anyone else, including my Senator or Representative, please let me know and I will do so. Your FAMM-gram states that the deadline for letters going to the Sentencing Commission is early March, so time is of the essence. Also, if you need additional information, including my PSI, I will gladly send it. I thank you for what you have been doing for us and I hope I can help to reduce my own sentence and many others' as well.

Sincerely,

Chris Lamprecht

*Chris Lamprecht*



**OFFICERS**

**PRESIDENT**  
Robert Fogelnest  
New York, NY

**PRESIDENT ELECT**  
Judy Clarke  
Spokane, WA

**FIRST VICE PRESIDENT**  
Gerald B. Lefcourt  
New York, NY

**SECOND VICE PRESIDENT**  
Larry S. Pozner  
Denver, CO

**TREASURER**  
William B. Moffitt  
Alexandria, VA

**SECRETARY**  
Edward A. Mallett  
Houston, TX

**PARLIAMENTARIAN**  
Kent A. Schaffer  
Houston, TX

**IMMEDIATE PAST PRESIDENT**  
Gerald H. Goldstein  
San Antonio, TX

**DIRECTORS**

Julie B. Aimen  
Chicago, IL

Charles E. Atwell  
Kansas City, MO

James A. H. Bell  
Knoxville, TN

Michael V. Black  
Phoenix, AZ

Juanita R. Brooks  
San Diego, CA

Raymond M. Brown  
Newark, NJ

Peter A. Chang, Jr.  
Santa Cruz, CA

Mary E. Conn  
Houston, TX

Richard K. Corley  
Providence, RI

Charles W. Daniels  
Albuquerque, NM

Tim Evans  
Ft. Worth, TX

Drew Findling  
Atlanta, GA

John P. Flannery, II  
Leesburg, VA

Lawrence S. Goldman  
New York, NY

Stanley I. Greenberg  
Los Angeles, CA

Gary G. Guichard  
Atlanta, GA

M. Cristina Gutierrez  
Baltimore, MD

Tova Indritz  
Albuquerque, NM

Frank Jackson  
Dallas, TX

Joseph D. Johnson  
Topeka, KS

Helen Leiner  
Fairfax, VA

Jack T. Litman  
New York, NY

Shaun McCrea  
Eugene, OR

Jeralyn E. Merritt  
Denver, CO

G. Fred Metos  
Salt Lake City, UT

Marvin D. Miller  
Alexandria, VA

George H. Newman  
Philadelphia, PA

Martin S. Pinales  
Cincinnati, OH

Leah J. Prewitt  
Knoxville, TN

Dennis Roberts  
Oakland, CA

David S. Rudolf  
Chapel Hill, NC

Natman Schaye  
Tucson, AZ

Barry C. Scheck  
New York, NY

Laurie Shanks  
Albany, NY

Burton H. Shostak  
St. Louis, MO

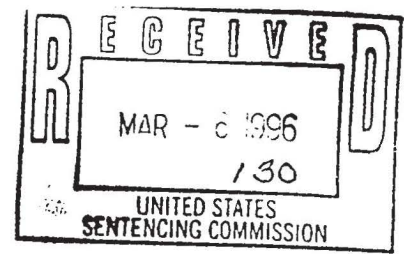
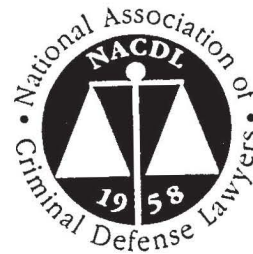
Theodore Simon  
Philadelphia, PA

Michael L. Stout  
Roswell, NM

Richard J. Troberman  
Seattle, WA

Martin G. Weinberg  
Boston, MA

.....  
**EXECUTIVE DIRECTOR**  
Stuart M. Stalter



March 4, 1996

Honorable Richard P. Conaboy, Chairman  
United States Sentencing Commission  
One Columbus Circle, N.E., Suite 2-500  
Washington, D.C. 20002-8002

**Attn: Public Information**

Dear Judge Conaboy:

In my capacity as Chairman of the Post-Conviction and Sentencing Committee of the National Association of Criminal Defense Lawyers (NACDL), I am writing to provide NACDL's comments regarding the proposed amendments and related matters that the Commission has indicated it is considering for submission to the Congress by May 1, 1996.

As you know, NACDL is a national organization of over 8,000 criminal defense attorneys who practice in the federal and state courts. Its members come from every state in the United States, as well as from Puerto Rico, the Virgin Islands, Guam and several foreign countries. The NACDL is affiliated with 68 state and local criminal defense organizations with which it works cooperatively on issues related to the area of criminal defense and thus it speaks for more than 28,000 criminal defense lawyers world and nationwide. A non-profit association formed in 1958, the NACDL seeks to promote the study of and research in the field of criminal defense and constitutional law and procedure, to advance the knowledge of the law as it relates to the practice of criminal defense, to promote the proper and fair administration of criminal justice, to preserve, protect and defend the adversary system of justice and the Constitution, and to ensure justice and due process for persons accused of committing crimes.

First, as regards the continuing debate concerning the appropriate guideline sanctions for the various forms of cocaine, the NACDL steadfastly maintains that the proposal promulgated by the Commission and forwarded to the Congress during the last amendment cycle remains the correct and fair response to this issue. We felt then and we feel now that combining the various proposed new enhancements with the adjusted quantity ratio addressed both the perceived rationale for punishing certain offenders/offenses more severely while recognizing and attempting to eliminate the gross disparity and racial discrimination that had resulted from the existing quantity ratio.

While obviously cognizant of the fact that that proposal was rejected and while mindful that the Congress directed the Commission to "try again" to develop both a new set of enhancements and a different quantity ratio, NACDL believes that no new factors and/or arguments emerged during the Congressional debate that can provide an appropriate basis for anything different from what the Commission has previously proposed.<sup>1</sup> We maintain that provisions already within the guidelines can be used to address each of the "new" matters that Congress has asked the Commission to consider.

NACDL is similarly supportive of the Commission's prior effort in the money laundering arena and we urge the Commission to repromulgate and resubmit the same amendment.<sup>2</sup>

In that regard, it is important to remember that the Congress convened no hearings whatsoever on this particular issue and that, if they had, any "concerns that serious money laundering offenses continue to receive severe punishment" could have easily been addressed. If anything, the existing proposal clearly insures that the serious money laundering offender will receive a more severe sanction than is available under the present guidelines. Additionally, and aside from its being unnecessarily harsh, the alternative proposal authored by the Department of Justice appears significantly complex and complicated. As such, it would be an immediate candidate for the simplification effort that the Commission is currently undertaking.

As regards the proposed changes to the Food and Drug guidelines, the NACDL feels that it has insufficient information with which to evaluate the proposed amendments. Furthermore, while cognizant that the existing organizational guidelines do not as yet address these offenses and the Commission might feel the need to now remedy that situation, we believe that changes like these cannot be fully appreciated/understood until the simplification process reaches its logical conclusion. Anticipating that the fraud guidelines in general will be the subject of much review and recrafting during that process, the NACDL recommends waiting until the next cycle before introducing any proposals that reference and/or are based upon §2F1.1.<sup>3</sup>

---

<sup>1</sup>NACDL remains supportive of changes to the drug guidelines that would decrease the emphasis on drug quantity. We trust that proposals in this regard will be explored during the current review/simplification process.

<sup>2</sup>As we have stated in the past, we continue to agree with the Commission's own Money Laundering Working Group that where the defendant committed the underlying offense and the conduct comprising that offense is essentially the same as contained in the money laundering charges, "the sentence for the money laundering conduct should be the same for the underlying offense."

<sup>3</sup>Permit me to note, however, our concern that many Food and Drug offenses often do not include any intent to defraud and/or other fraudulent activity. Lumping all such matters into a single guideline may well present disparity problems.



Similarly, the NACDL offers no comment as of yet as to whether "gain" should be a substitute for "loss" when the essence of the offense is fraud against regulatory authorities with no economic loss. While we are supportive of the holdings in Chatterji and Anderson, we anticipate that the many issues related to the definition and description of loss will be the subject of scrutiny and debate during the simplification process. Rather than taking a position now, we would prefer to wait until the Commission proposes all the related amendments in this area.

Finally, as regards the proposals addressing the directives included in the Sexual Crimes Against Children Act of 1995, the NACDL believes that any guideline changes must await the completion of the research contemplated by the legislation even if that means delaying those changes to the next amendment cycle.<sup>4</sup>

On behalf of NACDL, I thank the Commission for this opportunity to offer these brief comments. Should the Commission decide to convene a hearing on these items, we would be pleased to appear at such an event to both further detail these matters and to respond to any questions that the Commissioners might have in their regard.

Before ending this correspondence, however, please permit me to remind the Commission of the NACDL's continuing interest in assisting the agency with its simplification process. As part of that process, we urge the Commission to convene a series of public hearings to gather input and suggestions from all the actors in the federal criminal justice and sentencing continuum. Furthermore, as one of the products of that effort, we urge the Commission to develop a set of rules and regulations to structure Commission activity, particularly when it comes to the guideline amendment procedures.<sup>5</sup> And, as one of the proposals that we would like to see supported by the Commission, we urge the passage of a statutory amendment to require the appointment of a representative of the criminal defense bar as an ex officio member of the Commission.

Sincerely,

  
\_\_\_\_\_  
ALAN J. CHASET

---

<sup>4</sup>If the Commission does decide to move ahead in this amendment cycle, the NACDL would merely remind the agency of the provisions of 18 U.S.C. §3553(a) and would ask that any changes made to the existing guidelines be limited to what is sufficient, but not greater than necessary, to comply with both the purposes of sentencing and any Congressional mandate.

<sup>5</sup>NACDL is aware that the American Bar Association has been an active proponent here. We are supportive of those continuing efforts and adopt the position of the ABA in this regard.

February 6, 1996

Judith Hall  
1878 Bristol Ct.  
Maitland, FL 32751

The Honorable Richard P. Conaboy, Chairman  
U.S. Sentencing Commission  
One Columbus Circle, NE #2-500  
Washington, DC 20002

RE: Money Laundering Sentencing Guidelines

Dear Sir:

Money laundering statutes were originally intended to be used to combat the ability of organized crime (primarily the drug trade) to convert "dirty" money into clean money. Somewhere along the line this intent has been ignored, and now the statutes are being used to convict ordinary business people. I know this from personal experience because this is what has happened to two of my family members.

After a long and complicated trial last summer, my brother and sister were convicted of mail fraud and money laundering. My brother was sentenced to 12 years and my sister to 6 years. They are both currently serving in Federal prison.

My brother's name is Glenn Martin. He is 53 years old. For the past 30 years he has been a highly successful insurance executive. My sister's name is Candy Cooper. She is 43 years old and has worked for my brother for 25 years. They are both educated, hardworking, caring people whose only real crime was to challenge the North Carolina Department of Insurance. They are not racketeers, drug lords, or criminals. They both were well respected in their careers and have given their time and money to support their community over the years, particularly to the American Cancer Society. Many people wrote letters of support that were sent to the judge prior to the sentencing attesting to their excellent character and exemplary lifestyle. Prior to this tragedy, neither Glenn nor Candy had a single blemish of any kind on their names, lives or careers.

What is most disturbing about this case is how the mail fraud and money laundering statutes were used to criminalize normal business activities and how severe the sentencing was in relation to the charges.

In 1985, my brother purchased a life insurance company, Twentieth Century Life, that was domiciled in North Carolina. From the onset, Glenn had problems meeting the demands of state regulators, and this dispute finally resulted in a regulatory agreement that called for both parties to perform certain tasks. The agreement clearly stated that if either party breached the



contract, it was to be considered null and void. Both parties did in fact breach the contract and Glenn, considering the agreement to be void, continued to run the company as he had always done. It is this breach of agreement that motivated the North Carolina Department of Insurance to place the company in liquidation and subsequently, convince the Federal prosecutors that Glenn and Candy had committed a crime.

The crime needed a conspiratorial meeting to devise a scheme. Federal investigators intimidated two people with threats of imprisonment to testify that such a meeting took place. They needed to create an illegal activity so they chose mail fraud. The mail fraud counts consisted of receiving legitimate life and annuity applications with premiums, mailing out bonafide life and annuity policies, and mailing normal business correspondence. They needed money laundering to cause a loss so they determined that depositing those premiums into Twentieth Century Bank Accounts and using it as company revenue just like Glenn had always done should be labeled money laundering. Finally, they needed victims. So the government made the stockholders, the policyholders and two state guarantee funds the victims, even though none of these entities ever filed a complaint.

In fact, the only policyholder who testified at the trial told the court that he still has his money in Twentieth Century Life because he saw no reason not to. My husband and I are also still Twentieth Century policyholders. We were also stockholders and like all the others, we read the prospectus with the normal warnings of risk of loss. Like every other insurance company, Twentieth Century Life paid assessments to the guarantee funds to protect consumers against failing companies. There was never a criminal intent by Glenn or Candy to defraud these entities!! My brother had used all his capital and our mother's retirement fund plus years of toil and labor to get his piece of the American dream, and Candy was committed to his vision. Now the system has criminalized the activities of a failed business and locked up two bright and productive citizens.

During the alleged scheme, \$9.5 million in premium was collected and policies equaling that value were issued. This is the amount that they were both held responsible for and the amount that was used to determine their long sentences. It is not "Dirty money." It is legitimate premium collected in the ordinary course of business. This is particularly unfair as it relates to my sister, Candy. She had no control over the money and was acquitted by the jury of all money laundering charges! Candy was not involved in any of the financial transactions of the company and never received one red cent of the alleged diverted premium. Yet her sentence is abnormally harsh because she was also credited with the loss.

Candy is in prison with people who set out to commit a crime, planned it, and executed it. Yet, they are serving 6 months or

less. Candy was convicted for performing the routine functions of her job. Comparing what Candy allegedly did with what others have done and then comparing the sentences clearly shows that something is wrong with the guidelines.

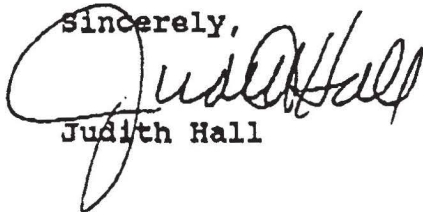
I want the sentencing commission to know that the laws are not just getting the bad guys, but they are getting the good guys too. The courts are too anxious to take severe steps to punish people for nonviolent white collar crimes. Society gets absolutely no benefit from putting people like Candy and Glenn in jail. The judge was presented an alternate sentencing proposal that would have required Candy to serve for five years without pay as principal of a school for throw-away teen girls. Glenn would have been in the custody of an internationally successful entrepreneur, Jeno Palucci, who during his career has worked with the courts experiencing great success with taking on the responsibility for rehabilitating over 100 criminals. Neither of these alternate proposals were given any consideration.

Please understand that this has happened to model citizens and loving family people. The ripple effect of destruction goes way beyond the tragedy of my brother and sister wasting away in jail. My brother's sixty year old wife is left penniless and my sister's two wonderful teenage boys have to finish growing up without a Mother. Our own Mother has to live the daily horror of having two children in jail, knowing that she may not live to see them both free.

For over 25 years my brother was an outstanding leader in our community, giving freely of himself and his money. My sister was always diligently in the background juggling her time between long hours on the job and the rigorous demands of being a wife and mother; Really no different than thousands of other hardworking women across the country. The outcome for her is, however, much different. She has lost everything, owes more money than anyone ever makes in a lifetime, and cries every day as she suffers the torment of separation from her children and her aging mother.

I urge you to try again this year to convince Congress that the money laundering statutes need to be amended so that the punishment will better fit the crime, and so that it is applied only to cases where the money was derived from illegal activities, not legitimate business activities.

Sincerely,

A handwritten signature in cursive script, appearing to read "Judith Hall". The signature is written in dark ink and is positioned above the printed name.

Judith Hall



*Wampler Buchanan & Breen*

*A Professional Association  
Attorneys and Counselors at Law  
900 Sun Trust Building  
777 Brickell Avenue  
Miami, Florida 33131*

(305) 577-0044

FAX (305) 577-8545

March 6, 1996

**VIA FAX AND FEDERAL EXPRESS**

Honorable Members of the  
United States Sentencing Commission  
Public Comments  
1 Columbus Circle, N.E., Suite 2-500  
Washington, D.C. 20002-8002

Dear Commission Members:

This letter is a request for you to propose an amendment similar to the disapproved Amendment 18 to the U.S. Sentencing Guidelines, policy statements and official commentary relating to Money Laundering.

I represent a client who would benefit from the money laundering amendment. He was convicted of money laundering with a specified unlawful activity of mail fraud where the Government agreed and the Judge found there was no (\$0.00) monetary loss to the victim. He did consulting work for a company that was the bonded low bidder on construction contracts that were performed satisfactorily. His base sentencing level was 20.

However, I have an objective view of the body of federal criminal law from my twelve years service at the U.S. Justice Department. In my later service, from 1975-1980, I was the Chief of the United States Justice Department's Miami Organized Crime Strike Force and from 1980-1982, I was the United States Attorney for the Southern District of Florida.

**Executive Summary**

The U.S. Department of Justice ("DOJ") proposed disapproval of Amendment 18 (and Congress voted disapproval and the President signed the legislation) principally based on the DOJ's misleading argument that the sentences of drug traffickers who launder money will be reduced and, therefore, a vote for approval of Amendment 18 was

Honorable Members of the  
United States Sentencing Commission  
March 6, 1996  
Page 2

to be soft on crime. In fact, Amendment 18 imposed greater sentences on drug traffickers who launder money than the current guideline because Amendment 18 required the sentencing judge to hold the offender accountable for the underlying offense, drug trafficking. Therefore, a vote for Amendment 18 should have been a vote for being tough on money launderers who are drug traffickers.

Also, DOJ argued that sentences would be reduced for financial offenses. The existing money laundering sentence is based on the sentence for drug traffickers, having been enacted as a part of the Anti-Drug Abuse Act of 1986. Amendment 18 proposed a sentence for white collar offenders fair and proportional to the nature of the underlying offense charged. Offenders laundering proceeds of a false statement on an income tax return or of a violation of the Resource Conservation and Recovery Act should not be sentenced to the same time as a drug trafficker, as is the case under the current guideline. Therefore, an amendment similar to Amendment 18 is a proposal for fair sentences for white collar offenders who are not drug traffickers.

Amendment 18 Imposed Greater  
Sentences On Drug Trafficking  
Conspirators Who Launder Money  
Than the Existing Guidelines.

Sentences of money launderers who are in drug trafficking conspiracies would have been greater, not less under Amendment 18 than under the existing guideline. In the example given by the Acting Assistant Attorney General Markus in his May 12, 1995 letter to Congress (a scenario where the drug trafficking conspiracy's laundered illegal proceeds only involved \$110,000.00 in drugs, for example, greater than 500 grams but less than 2 kilograms of cocaine at \$60,000.00 a kilogram, or more than 100 grams but less than 400 grams of heroine or methamphetamine), the drug trafficking conspirator convicted of laundering \$110,000.00 in illegal drug proceeds would receive a current guideline sentence of only 51-63 months imprisonment. Under guideline Amendment 18, the sentence would be 78 to 97 months of imprisonment. If the drug trafficking conspiracy dealt in 60 kilograms of cocaine over a period of years (more than 50 kilograms of cocaine but less than 150 kilograms of cocaine at \$60,000.00 a kilogram, or more than 10 kilograms of heroine or methamphetamine), the drug trafficking conspirator convicted of money laundering \$3,600,000.00 in illegal drug proceeds would receive a current guideline sentence of 97-121 months imprisonment. Under guidelines Amendment 18, no matter how much or how little illegal funds were proven to be laundered, the sentence would be 235-293 months of imprisonment. In fact, in his May 12 letter to Congress, Mr. Markus mislead Congress by

*Wampler Buchanan & Breen*



Honorable Members of the  
United States Sentencing Commission  
March 6, 1996  
Page 3

using the middle of the 3 proposed base offense levels to compute the time to be served by a drug trafficker who launders money, but Amendment 18 required the judge to apply the greatest base offense level. Therefore, the proposed amended guideline would have been more harsh on money launderers who are drug trafficking co-conspirators because the proposed amended guideline would have held them accountable for the underlying offense.

Amendment 18 made the Punishment Fit the Crime; It Differentiated Between: (1) Money Launderers Who Are Drug Trafficking Conspirators and; (2) Money Launderers Who Make False Statements On Their Tax Returns or Who Violate The Resource Conservation and Recovery Act.

Money laundering is a compound statute based upon: (1) concealing the ownership of and transferring the proceeds [money laundering] of (2) a specified unlawful activity [the predicate crime]. The specified unlawful activity is chosen from a voluminous list of other criminal statutes that range on a scale of public obloquy from narcotics trafficking, 21 U.S.C. § 841(b) [a twenty year to life in prison maximum imprisonment penalty], kidnapping and hostage taking, 18 U.S.C. §1201, § 1203 [a life imprisonment maximum incarceration unless death results and then the death penalty] on one end of the scale, to making false statements on income tax returns, 26 U.S.C. § 7206 [a three year maximum imprisonment offense], violations of the Water Pollution Control Act 33 U.S.C. § 1319 [maximum three year imprisonment for first offense] and violation of the Resource Conservation and Recovery Act, 42 U.S.C. § 6992(d)(e) [maximum penalty of two years for violation of the medical waste tracking program], on the other end of the scale.

The key provision in Amendment 18 tied the money laundering sentence base offense level to the nature of the underlying crime committed. The current money laundering sentencing provision sets the money laundering sentence base offense level at a level established by one of the most opprobrious of the list of specified criminal activities, narcotics trafficking because the money laundering statute was enacted as a part of the Anti-Drug Abuse Act of 1986, see U.S.S.G., § 2S1.1, Background. A major vice at

*Wampler Buchanan & Breen*

Honorable Members of the  
United States Sentencing Commission  
March 6, 1996  
Page 4

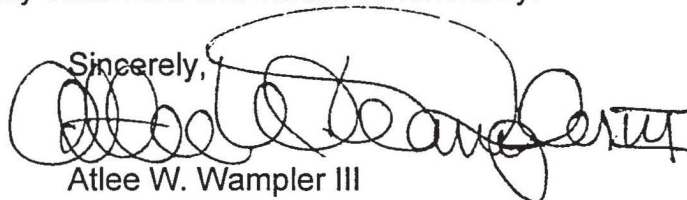
the time of the enactment of the money laundering statute (and still is today) and the specific target of the money laundering statute was the "laundering" of the proceeds of narcotics sales through bank accounts to give the false appearance to criminal investigators and to financial institutions that the money was generated from legitimate sources. The other less heinous specified offenses were simply not addressed by the original guideline and, therefore, all money laundering sentences began with the narcotics trafficking money laundering base level of 20 or 23. Therefore, under the current guideline, the money laundering sentence base level would be the same (20 or 23) for a defendant who was a narcotics trafficker as for a defendant who made a false statement on his income tax return or who failed to keep appropriate medical waste records.

You proposed Amendment 18 in light of the past 8 years' experience in using the existing Guideline §§ 2S1.1 and .2 which remains in its initial form without case experience from the courts. Based on the first 8 years of case sentencing experience, you determined that the guidelines must be amended to reflect the relative seriousness of the underlying specified unlawful activity in order to achieve proportionality in sentencing.

Amendment 18 reasonably and fairly tied the money laundering base sentencing level to the nature of the underlying offense. In cases of fraud, Amendment 18 tied the sentencing level to the amount of loss to the victim and not to the dollars transferred. In plain words, Amendment 18 made the punishment fit the crime.

Therefore, I urge you to approve a new proposed amendment similar to Amendment 18 to the sentencing guidelines, policy statement and official commentary.

Sincerely,



Atlee W. Wampler III  
For the Firm

F:\CLIENTS\2524\LET-SENT

*Wampler Buchanan & Breen*

Michael Courlander  
United States Sentencing Commission  
1 Columbus Circle NE  
Washington DC 20002

Lisa Campanella  
101 Maple Lane  
Morgantown WV 26505

March 6, 1996

I am appearing at this hearing today as a wife and mother. My husband, the father of our four young children, is incarcerated and has been sentenced to 71 months for the crime of money laundering. He is a non - violent first time offender who was convicted of a crime that is extremely complex in what it entails and frequently misunderstood. He was a successful businessman who worked long hours, sometimes 16 hour a day, to provide for and build a future for his family. He has never bought, sold or used illegal drugs, and had never contemplated breaking the law with his financial transactions. So how did he end up in a Federal Correctional Institute for laundering drug money?

I believe Money Laundering is a ubiquitous term used to cover many kinds of possibly illegal transactions, and it is this ambiguity that is confusing to many legitimate business persons. It becomes very easy for government agents to target high profile affluent people ( people with many assets to forfeit) , catch them at a vulnerable point and



-2-

then maneuver them over a period of time so that they end up breaking a law that they might not have known even existed!

In my husband's case he was approached by government agents who expressed interest in investing in a restaurant he was planning to open. They subsequently offered a loan instead. After much manipulation and deception on their part, a loan in cash was accepted. These men had presented themselves as legitimate business men and my husband thought the transactions through carefully and did not see any cause for concern. Cash is legal tender after all. After many months the agents let slip little by little that maybe the money had been "stored" near drugs or had some residue on it. My husband not being from that world or "underworld" as it were, was again not overly concerned. He realizes now that this was a mistake.

We also now know that he had been under investigation for the previous two years, but since there were no offenses being committed, the government had to justify the time and money that had been spent, so they created a crime.

It was conceived, manufactured and implemented by a government agent to convict a person who, if left to his own devices never would have been afoul of the law. There was no victim. No money laundering ring was eradicated because there was none to begin with. No narcotics trafficking ceased because there was none to begin with. Are these the



-3-

type of money launderers the government needs to apprehend and punish so severely?

Is ours an isolated case? I doubt it. I do not deny that money laundering is a serious crime that essentially goes hand in hand with narcotics trafficking. But I think there has to be a very clear distinction made between the penalties for criminals who are actually buying and selling drugs and then need to launder their own profits (these people obviously know they are committing a crime) and the actions of a legitimate business person who could become entrapped and misconstrue his actions.

The base level for money laundering is too high. Revision is needed to make the penalties correlate with profits. And please, vote in favor of retroactivity, so that we might add some right to the wrong, a little hope to the despair.

Money launderers often serve more time than rapists, some murderers and many people who sexually assault children. My husband, who has never even spanked his children still has another two years away from his family. He will not see his baby, who was 9 weeks old at the time of his arrest, go off to kindergarten for the first time. Unless of course the baselevel points for money laundering are reduced.

-4-

We are still together as a family and will make it through this tragedy and continue on with our lives. We have many things we must teach our children as they grow. Now my husband and I will be able to teach them what money laundering is. We didn't know before. Now we do.

Lisa Campanella  
3/6/96