UNITED STATES SENTENCING COMMISSION

WRITTEN TESTIMONY

PUBLIC HEARING
OCTOBER 15, 1997

UNITED STATES SENTENCING COMMISSION
ONE COLUMBUS CIRCLE, NE
SUITE 2-500, SOUTH LOBBY
WASHINGTON, DC 20002-8002
(202) 273-4500
FAX (202) 273-4529

WRITTEN TESTIMONY
for the
OCTOBER 15, 1997

PUBLIC HEARING
on the
DEFINITION OF *LOSS*

Statement of
United States District Judge J. Phil Gilbert[1]
Representative of the Committee on Criminal Law
To the United States Sentencing Commission
October 15, 1997

On behalf of the Criminal Law Committee, I want to thank Judge Conaboy and the Sentencing Commission for the invitation to participate in this public hearing.

Introduction

This submission by the Committee on Criminal Law is in response to the issues to be discussed at the public hearing on October 15, 1997. The Committee on Criminal law would like to emphasize first the adoption of modified and augmented loss tables for Sections 2F1.1 and 2B1.1. The Commission should complete its adoption of new loss tables prior to considering how to clarify and improve the definition of loss. It would be much more difficult for the Commission to attempt reform of the loss tables at the same time as it attempts to reform the loss definition and rules. In fact, simultaneous analysis of the tables and loss may well result in the Commission not being able to accomplish either.

On the other hand, sequential analysis is more logical, practical, and takes advantage of the considerable work already done by the respondants and the Commission. Introduction of the loss issues, which will require significant study, analysis and effort, would complicate and delay accomplishing the reform of the tables, which is nearly complete and which accomplishes the goal of increased punishment for more serious offenses and eliminates the specific offense characteristic for more than minimal planning. This Commission should follow through with its reform of the tables in the 1998 amendment cycle, which would be a significant contribution by the current Commission. It would then be providing the new-formed Commission, later in 1998, the gift of a stationary backdrop against which the new Commission can begin the analysis of the loss issues.

Although some argue that the loss tables and loss definition have to be done simultaneously, the two are in fact separable. They would only be tied if anticipated changes to the loss determination represented an enormous ideological shift, either expanding or contracting the concept of "loss" in white collar offenses. No such shift is proposed nor seriously anticipated. Rather, the discussed potential changes are systemic, policy-neutral clarifications and improvements that would not result in wholesale changes in the computation of loss. Metaphorically, anticipated changes do not divert the loss road, but merely smooth out the rough spots, fill in the holes, and add a few meaningful road signs.

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[1] Hon. Gerald E. Rosen, U.S. District Court for the Eastern District of Michigan, will appear for Judge Gilbert, Chief Judge, Southern District of Illinois, who is unable to attend.

To do both the table and definitional issues together would be the most difficult way to proceed, and may end up being a recipe for failure on both counts, because simultaneous consideration would be attempting to focus two moving targets. While the tables and loss are not integrally intertwined, there will be numerous arguments to the Commission that they are, resulting in confusion, needless complication, and delay - making any clear focus on either the tables or the issues next to impossible. If, on the other hand, the Commission were to do the tables first, it would then provide a stationary backdrop against which the loss definitional analysis can take place.

1. Why should the Commission consider tackling the definition of loss?

Once the tables are reformed, the Commission definitely should consider reforming the definition and rules used in the determination of loss. The current definition for loss is larceny-based, which makes it difficult to apply to fraud cases. The results are ambiguity, disparate application, and cumbersome litigation. The definition, "property taken, damaged, or destroyed," is at once insufficient, ambiguous, and overbroad, especially in application to a complex fraud case. It is incomplete because it does not state what the causation standard should be - how broad to cast the net - without which, identification of victims and determination of loss are much more difficult and open to disparate results.

The problems with the current definition and rules cannot be gleaned from analysis of appellate data only - although there are numerous hair-splitting appellate cases on the determination of loss, along with what are estimated to e at least eleven conflicts among the circuits. However, the many contested and lengthy sentencing hearings are not visible in the appellate data. Moreover, the natural result of incomplete, inconsistent and ambiguous rules is, inevitably, disparate results - of which we are all aware, sometimes even within the same courthouse. These results are not readily apparent, either, from numerical sentencing or appellate data.

There needs to be not only an improved "core" definition of loss, but also improved application rules, to assist courts with some of the more commonly encountered situations and problems in determining loss. The current rules, like the core definition, are incomplete, inconsistent, confusing, and a patchwork of concepts. They do not provide a unified theme, perhaps because the "core" definition lacks one. There are omissions of key clarifications regarding, for example, the point in time that loss and the value of collateral should be measured. None of these changes would drastically change the loss landscape, but would instead even out the uneven applications and the rough road that results from the current rules.

2. Would all or some of the problems with loss be best addressed through a more comprehensive, simplified definition of loss coupled with elimination of all or some of the current commentary?

A simplified and improved definition for loss would address some of the problems in determining loss. The "core" definition for loss in both fraud and theft cases is currently inadequate. A simple, but improved, definition should be developed that would fit both. Currently, one must conduct a side-by-side comparison to determine the subtle, and sometimes inexplicable, ways in which the two definitions differ. Differences, where necessary (such as perhaps the differing rules for crediting returned property for theft than for fraud) should be made clear. As much as possible, however, the definition and rules should be the same, to avoid disparate results from alternative charging decisions.

The consolidated and improved definition should include a causation standard, which would, in itself, be a significant improvement. Such a standard, modified by the familiar concept of foreseeability, would assist courts by telling them how wide to cast the net for loss. Courts are accustomed to determining foreseeability. It is a basic concept in torts, contracts, and determining liability among co-defendants under the current relevant conduct rules. It is only fair that it be applied to a defendant's loss liability, and no doubt much of the anguishing done by the courts amounts to an attempt to find a rule of fairness, that foreseeability would provide. In some cases it may result in a wider net being cast than currently available, and in others it would result in a somewhat narrower net. It is policy-neutral, but, most importantly, it is fair. It also brings loss determination back into the fold of otherwise familiar legal concepts, to which courts are accustomed. By clarifying loss determination with familiar concepts, the Commission would, in effect, be simplifying the process.

However, even given such an improved definition, courts would also need an improved set of rules to provide guidance to them on the many commonly occurring situations and problems that arise in the determination of loss. For example, the current rules do not have a consistent rule for measurements (such as at what point in time to determine loss and how and at what point in time to value collateral or other credits against loss). Indeed, if courts were not given such guidance, it is inevitable that circuit courts would gradually develop such rules and applications for the courts, resulting in considerable confusion, continued disparity, and additional circuit conflicts.

Because courts need clarified and consistent rules to assist them in applying an improved core definition of loss, it would not be helpful to relegate significant, recurring areas of loss determination to departure. For example, issues involving intended loss and gain can make a significant difference in loss determination and conceivably arise too frequently to be considered outside the heartland. In many cases, for example, one party or the other can credibly argue that there is a difference between the actual, net loss and the intended loss. Such commonly recurring issues should be the subject of guidance for the courts.

3. **In addition to the possible statement or clarification of generalized principles for defining and determining loss, are there specific loss issues that need to be separately addressed?**

Actual Loss

As noted above, it would be helpful to courts if there were a causation standard specified. This should be modified to incorporate the concept of foreseeability to reflect the relevant conduct provisions in Chapter 1. This clearer standard would not only provide guidance and a central theme, but it would also eliminate the current inconsistency of including foreseeable consequential damages only in certain kinds of cases.

Interest

The current rule is ambiguous and implies the exclusion of all interest. It needs, at a minimum, to be clarified. What form(s) of interest does the Commission intend to exclude? Some courts have found that the Commission did not intend to exclude as "interest" appreciation of a victim's money or investment that the victim relied-upon, and bargained-for. The Commission should make clear the intention of commentary note 7 under Section 2F1.1 as it relates to interest.

Value Received - Credits Against Loss

The rules are incomplete and inconsistent on when loss or collateral is measured or how the loss or credit should be valued. This quandary comes up frequently, and courts should be given guidance. Any such rule should include specific guidance on how to value money given to early investors in "Ponzi" schemes. In this area, as in several others involving loss, there is no rule, currently, so courts are trying to develop their own rules, some of which their circuit courts like, and some of which their circuit courts do not like.

Diversion of Government Benefits

As with the other issues, the Commission should clarify the issue so that courts are not required to guess what the Commission's intent was.

Alternatives to Actual Loss

The issues of intended loss, risk of loss, and gain are frequently occurring considerations which merit guidance from the Commission. The Commission should give careful analysis to these issues, with a mind toward clarification rather than relegation to departure, as some have suggested. These concepts are integral to many loss cases and should be part of the loss calculation, as specified by the Commission. Any such rules should include guidance on how to handle factual impossibility and reverse sting cases.

TESTIMONY OF JAMES E. FELMAN
GIVEN BEFORE THE UNITED STATES SENTENCING COMMISSION
ON BEHALF OF THE PRACTITIONERS ADVISORY GROUP
10/15/97

I. Introductory comments.

On behalf of the Practitioner's Advisory Group to the Commission, I would like to express our appreciation for this opportunity, particularly at this pre-publication stage of the amendment process. The guidelines governing economic crimes are perhaps the single the most important work of this Commission. They apply to a very large number of cases. Together with drug cases, economic crimes are typically the most important cases committed to federal criminal jurisdiction. Unlike the guidelines governing drug cases, however, the Commission's work in the area of economic crimes is unfettered by Congressionally mandated minimum sentences. It is with the guidelines for economic crimes, therefore, that this Commission faces its greatest challenges and can reap the greatest rewards offered by the promise of determinant sentencing.

The cornerstone of the current guidelines for economic crimes is the concept of "loss" as a means of determining offense severity and the defendant's level of culpability. The PAG agrees with this general approach. Although there are a myriad of factors bearing on offense severity in the variety of factual scenarios governed by these guidelines, the avoidance of undue complexity demands a fixed starting point in the analysis. The loss inflicted serves as the best overall measure of the severity of the offense and, although with far less precision, the culpability of the offender.

Looking at the current versions of the fraud and theft guidelines reflects a collage of ten years worth of tinkering, perhaps not always with a unified theme or approach. Moreover, litigation and uncertainty regarding a fairly small number of fairly significant issues remains. Once these issues

are identified, which we believe the staff has done a good job of doing, they really are not insurmountable. The Commission can and should address these issues. With a small number of carefully drafted amendments — we have submitted a few suggestions — and follow-up study to measure their impact, the Commission can make greats strides toward the elimination of unwarranted disparity and the administration of just punishments for those who commit economic crimes.

The PAG's approach to these issues is driven by two guiding principles. The first is that we must not to lose sight of the fact that loss, and its role as the driving force in guideline calculations, should not be thought of as an end in itself, but rather to serve as a rough and approximate proxy for culpability and offense severity. The point behind the definition and calculation of loss should not be to seek mathematical certainty regarding the precise quantity of funds lost by the victim(s). The objective is instead a far more limited one — to measure in approximate terms the relative severity of the offense conduct and culpability of the offender. Accordingly, the general approach should be to look only at the loss proximately caused by the defendant's criminal conduct, and then to make every effort to simplify the calculation of that loss in a rough and approximate way. Side issues which require detailed and complex fact finding, particularly where the impact on the total loss figure is small in most cases, should be relegated to departures in unusual cases.

This is not a political issue; it is one of rationality and efficiency of approach. The ultimate punishment is determined by the offense levels plugged into the loss table. To the extent that changes in the calculation of loss which err for the sake of simplicity on the side of exclusion result in loss figures which are lower than they are under the current guidelines, the offense levels in the

table may be adjusted accordingly. This potential, as an aside, is a compelling reason to consider changes to the definition of loss and the offense level tables at the same time, rather than piecemeal.

The second guiding principle behind our views is that the use of "loss" as a surrogate for culpability must be coupled with encouraged departures where gain differs significantly from loss. Unlike theft cases, in which gain is likely to match loss, fraud cases often present scenarios in which the defendant's gain bears no relation to the loss. We cannot prove it with any documented study, but we find that almost every case in which there is dissatisfaction with the result obtained by looking only at loss, the root cause of the dissatisfaction can be traced to a large variance between loss and gain or intended gain. This is a door which swings both ways. Where the loss is minimal or zero but the defendant obtains a significant gain from criminal activity, an upward departure may be necessary and should be encouraged. By the same token, where the loss is extremely large but the defendant's gain is minimal or zero, a downward departure may be necessary and should be encouraged. Unless these departures are encouraged by the guidelines, undue uniformity will result.

II. The Commission should modify the guidelines' definition of loss.

The PAG believes it is important for the Commission to address a small number of extremely important issues concerning the definition of "loss," and suggests that should be done in tandem with its consideration of revised loss tables. Unless it is clearly understood how loss will be calculated, any discussion of revisions to the tables utilizing the resulting loss calculations occurs in a vacuum.

We are much more interested in the qualitative question posed by the Commission than we are in the quantitative question. The goal here is to reduce disparity and achieve just sentences. The issues of causation and gain, for example, should be addressed because they are essential to achieve fairness, although we also believe they are unclear and the subject of frequent litigation.

III. Very few of the problems with defining loss can be addressed solely through a general statement of principles.

It would certainly be helpful to have a general statement of principles regarding the definition of loss. This statement could explain that loss is used only as a rough surrogate for culpability, and thus need not be determined with precision or complicated by extraneous issues. The statement could also explain the basis for using a "net" loss approach coupled with a requirement of proximate causation as the best way to measure the harm caused by the defendant's criminal conduct.

But a statement of principles alone will not adequately address the current areas of uncertainty. Specific rules regarding what is included within and excluded from the loss calculation, including much of the current commentary, must accompany the statement of principles in order for the courts to apply the guidelines with the greatest ease to a variety of factual scenarios. Elimination of the current commentary would only return uncertainty to issues which are now relatively settled.

IV. Specific loss-related issues.

A. Actual loss

1. *Causation.* Only those losses proximately caused by the defendant's criminal conduct should ordinarily be included within the definition of loss for guideline application purposes. The current guidelines do not provide guidance as to the appropriate standard for determining whether a defendant's conduct "caused" the loss in a particular case. As a result, courts have applied different causation standards leading to disparate results.

The PAG believes that application note 7 should be revised to state explicitly that the defendant is only responsible for losses which are proximately caused by his or her conduct, i.e., those losses which were reasonably foreseeable. Such a result is appropriate because a defendant's

culpability is more appropriately tied to those losses which the defendant could reasonably anticipate as opposed to those which completely beyond the defendant's control. Loss that a defendant either did not cause or that was not reasonably foreseeable has little (if any) bearing upon culpability. In unusual cases in which a defendant causes extraordinary unforeseen loss as a result of criminal conduct, an upward departure may be appropriate.

In addition to a requirement of proximate causation, the PAG also believes that some provision should be made for "multiple causation" situations. In a "multiple causation" case, the defendant's criminal conduct may both actually and proximately cause a loss, but it does so in combination with other factors — for example, a sharp downturn in the economy or unrelated criminal conduct by another person. To hold the defendant responsible for the entire loss in such a case could overstate his culpability. There are two different ways to deal with the issue of multiple causation -- either through incorporation in the loss calculation, or by downward departure in unusual cases.

2. *Consequential damages.* The inclusion of consequential damages within the definition of loss would, we respectfully submit, frequently cause protracted litigation, uncertainty and disparity in application, and, at the end of the entire process, sheer speculation. In the interests of simplicity and ease of application, the PAG strongly opposes the use of consequential damages to calculate loss under the guidelines.

As a practical matter, evidence regarding consequential damages will almost never be within the possession of either the government or the defendant. Development of these factual issues will require large amounts of investigation, research, and discovery from third parties. Determination of consequential damages, by the very "what if" nature of the inquiry, involves litigation of

frequently complex issues which may have almost no factual connection to the conduct underlying the charged offense. This type of issue is a perfect candidate for treatment as a departure issue where consequential damages are out of proportion to the direct loss caused by the defendant's conduct.

3. *Interest.* The PAG does not believe interest or any other lost profits should be included within the definition of "loss." Why should a defendant who fraudulently borrows money he promises (and may actually intend) to repay be punished more severely than a defendant who outright steals the same amount of money? Unpaid interest, whether "bargained for" or not, simply has nothing to do with the concept of loss. Moreover, even if there were any connection between the amount of unpaid interest and a defendant's culpability, the added complexity of including such matters — which is likely to be a rather small component of the total loss figure in most cases — is not justified by any measurably increased accuracy in determining culpability or offense severity.

4. *Value received/credits against loss.*

a. Amounts credited. The PAG believes that the actual loss figure should be reduced by all amounts received or readily recoverable from the defendant at the time law enforcement authorities discover the offense. This would include, for example, (1) any services, goods, or money furnished by the defendant before authorities discover the offense; (2) any security pledged by the defendant before authorities discover the offense; and (3) any other thing of value belonging to the defendant that the victim is in a position to recover through reasonable effort before authorities discover the offense, provided that the defendant does not interfere with the victim's recovery. Category (3) would include, for example, the defendant's money in an account with a victim bank at the time authorities discover the offense and the defendant's goods in the possession of a victim bailee at the time authorities discover the offense.

Reducing actual loss by these amounts will help ensure that the loss figure provides a rough measure of the defendant's culpability. Value that the defendant has already furnished to the victim at the time authorities discover the offense (category (1) above) plainly reduces his culpability: by the act of furnishing the value, the defendant has, to that extent, diminished the harm to the victim and provided tangible evidence of his own good faith. Similarly, value that the defendant has placed at the victim's disposal before authorities discover the offense (categories (2) and (3) above) reduces culpability, since the defendant presumably expects the victim to recover that amount.

The PAG believes that discovery of the offense by law enforcement authorities should represent the cut-off point for credits against loss. Discovery of the offense by the victim or another non-law enforcement person should not be used as the cut-off for two reasons. First, usually it will be easier to prove when law enforcement authorities discovered an offense than when some other person or entity did so, since law enforcement authorities generally keep records of information received and no resort to third-party witnesses will be necessary. Second, value given after law enforcement authorities have discovered the offense often will be viewed as an attempt by the defendant to buy his way out of trouble. Although such a post-detection payment may merit a downward adjustment or departure for acceptance of responsibility, it does not otherwise diminish the defendant's culpability. By contrast, value given before law enforcement authorities have discovered the offense (whether or not the victim has discovered it) is more likely to reflect the defendant's genuine desire to make the victim whole and thus to reduce the defendant's culpability.

b. <u>When credits are valued</u>. The PAG suggests that goods and services furnished to the victim before law enforcement authorities discover the offense (category (1) above) should be valued as of the time they are provided. Goods that are pledged as security or that are otherwise

readily recoverable at the time authorities discover the offense (categories (2) and (3) above) should be valued as of the time pledged or otherwise put at the victim's disposal. Valuing such goods in this manner will ensure that the defendant does not receive an undeserved windfall or suffer an unjustified penalty from increases or decreases in value after he has made the goods available to the victim.

B. Alternatives to actual loss.

1. *Gain.* Actual or intended gain must be included as a recognized ground for departure in certain cases in which gain differs substantially from loss. The first sentence of the current background commentary regarding the definition of loss (found within the theft guideline and incorporated by reference in the fraud guideline) explains that loss is used to determine culpability in theft cases because loss is generally a measure of the two key aspects of culpability in such cases -- harm to the victim and actual or intended gain to the defendant. By using the same tables and offense levels in fraud cases, there appears to be a built-in assumption that loss also generally equals actual or intended gain in fraud cases. Indeed, the current fraud guideline considers gain only where the amount of the loss is difficult to determine with precision. The PAG respectfully submits that this is a serious defect in fairness and rationality which contributes greatly to dissatisfaction with the guidelines in many so-called white collar cases.

Simply stated, there is a significant and palpable difference in culpability between defendants who purposely and intentionally derive gain in an amount similar to the loss caused by their conduct on the one hand, and defendants who actually or hope to gain little or no personal benefit on the other hand. For example, a defendant who swindles a victim out of $500,000 and uses the funds to live a lifestyle beyond his means would appropriately be sentenced using a guidelines application

reflecting a $500,000 loss. Such a case is essentially akin to a $500,000 theft. By ignoring the concept of gain, however, the guidelines treat in an identical fashion a corporate employee who submits a claim for payment to the government which overstates the amount owed to his employer by $500,000.

By the same token, in other types of cases the actual or intended loss caused by the defendant may be minimal or even zero, while the actual or intended gain from the offense may be significantly greater. In such cases, consideration only of the harm to the victim will potentially understate the severity of the offense.

In sum, although harm to the victim and gain to the defendant will be the same in typical theft cases, there often will be little correlation between the two in fraud cases. The question then arises as to how to address this issue while simultaneously simplifying the guidelines. If it were possible to draft a guideline which factored actual or potential gain into the initial determination of the base offense level, this would certainly be preferable. After some consideration of the issue, however, the PAG believes that it would unduly complicate the sentencing process to attempt to merge within the base offense level determination concepts of both gain and loss. Accordingly, the only remaining alternative appears to be the use of loss in the first instance to determine the applicable guideline range, followed by an encouraged departure in cases in which gain significantly differs from loss.

2. *Intended loss*. The concept of intended loss as currently set forth in application note 7 is too broad. It invites speculation about every defendant's subjective intent in engaging in fraud, and where that subjective intent is greater than the actual loss, the note requires that the intended loss be used for purposes of determining the defendant's offense level. This approach can result in serious disparities between defendants. For example, one who engages in a scheme which could never

successfully defraud anyone, but who intends to swindle someone out of $100,000, is punished more harshly than a defendant who successfully defrauds individuals of $70,000, even though in the latter case victims have actually lost money. The guideline should be amended to reflect that where the defendant is incapable of causing the loss intended, the defendant's offense level should be based on the loss which would have been caused had the defendant's fraud been successful.

3. *Impossibility*. The "impossibility" (or "economic reality") doctrine limits intended loss. The doctrine has significance only to the extent that the guidelines base the loss figure on intended loss when intended loss is greater than actual loss (for example, setting the loss figure at $100,000 when the defendant intends to cause a $100,000 loss but causes no actual loss). As set forth above, the PAG believes the guidelines should not continue using intended loss as an alternative to actual loss for determination of the base offense level. Instead, intended loss should only be used as an encouraged departure ground where it differs significantly from actual loss. If the PAG's position were adopted, the impossibility issue would largely be eliminated except in determining the appropriateness or extent of a possible upward departure in such cases.

If the current use of intended loss is continued, however, the PAG believes that the impossibility doctrine should play a role in preventing unfair sentences based on unrealistically high intended loss figures. This is particularly so in "sting" cases, where the government can manipulate the intended loss figure almost at will to produce a higher sentence. We suggest that the impossibility doctrine be expressly included in the commentary to the fraud guideline, with allowance for upward departures in exceptional cases where the actual loss figure does not fully capture the defendant's culpability. See United States v. Gailbrath, 20 F.3d 1054, 1059 (10th Cir. 1994)(Tacha, J.)

PROBATION OFFICERS' ADVISORY GROUP
to the United States Sentencing Commission

Gregory A. Hunt
Chairperson, D.C. Circuit
U.S. Probation Office
Suite 2800
E. Barrett Prettyman
United States Courthouse
Washington, D.C. 20001-2866

Phone # 202-565-1343
Fax # 202-273-0193

Joseph J. Napurano, Vice Chairperson
J. Martin Wahrer, 1st Circuit
Mathew Rowland, 2nd Circuit
Beth A. Ault, 4th Circuit
Pat W. Hoffmann, 5th Circuit
Phelps Jones, 6th Circuit
Kathie Sylvester, 7th Circuit
J. Craig Saigh, 8th Circuit
Kenneth Young, 9th Circuit
Katherine Ismail, 9th Circuit
Caryl A. Ricca, 10th Circuit
Raymond F. Owens, 11th Circuit
Ellen S. Moore, 11th Circuit
Kim Whatley, FCS Div. Ex Officio
Jennifer J. Tien, FPPOA Rep. Ex Officio

September 30, 1997

The Honorable Richard P. Conaboy, Chairman
U.S. Sentencing Commission
Thurgood Marshall Building
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Judge Conaboy,

On behalf of the Probation Officers Advisory Group, I would like to thank you for inviting us to the Commission to have input into the current deliberations of the Commissioners in regard to fraud, circuit conflicts, and manslaughter. After being briefed on these issues, the Advisory Group made several suggestions with regard to possible amendments and/or modifications to the Sentencing Guidelines. The attached is our position paper in regard to the issues discussed.

Besides making recommendations to the Commission about the above mentioned issues, the Probation Officers Advisory Group also raised a couple of issues that concerned probation officers throughout the country. In addition, we also made some recommendations as to administrative matters. We hope that the Commission will consider our suggestions and recommendations.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Gregory A. Hunt, Chairperson
D.C. Circuit Representative

PROBATION OFFICERS' ADVISORY GROUP
to the United States Sentencing Commission

Gregory A. Hunt
Chairperson, D.C. Circuit
U.S. Probation Office
Suite 2800
E. Barrett Prettyman
United States Courthouse
Washington, D.C. 20001-2866

Phone # 202-565-1343
Fax # 202-273-0193

Joseph J. Napurano, Vice Chairperson
J. Martin Wahrer, 1st Circuit
Mathew Rowland, 2nd Circuit
Beth A. Ault, 4th Circuit
Pat W. Hoffmann, 5th Circuit
Phelps Jones, 6th Circuit
Kathie Sylvester, 7th Circuit
J. Craig Saigh, 8th Circuit
Kenneth Young, 9th Circuit
Katherine Ismail, 9th Circuit
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Raymond F. Owens, 11th Circuit
Ellen S. Moore, 11th Circuit
Kim Whatley, FCS Div. Ex Officio
Jennifer J. Tien, FPPOA Rep. Ex Officio

September 30, 1997

POSITION PAPER: PROBATION OFFICERS' ADVISORY GROUP

The Probation Officers' Advisory Group (POAG) met at the U.S. Sentencing Commission on September 10 and 11, 1997. The Commission presented several issues for the POAG to consider. Issues that were raised by the Commission staff concerned the newly created Fraud Table, the definition of "loss," increasing or changing the guidelines for Manslaughter, and resolving several circuit conflicts. In addition, the POAG members raised and discussed some of their own issues concerning the guidelines. The following are the results of our discussions.:

FRAUD

FRAUD TABLE

One of the first issues presented to the POAG representatives was the Fraud Table. The members of the POAG unanimously supported the change in the Fraud Table, especially incorporating "more than minimal planning" into that table. Members also believed that the definition of "loss" should be addressed simultaneously with the dissemination of the table. However, if the Commission does not revise the definition of "loss" at this time, the POAG members supported the revision in the Fraud Table. In a related issue, the POAG members believed that the current Fraud Table should be maintained in another section of the guidelines to ensure that the changes in the Fraud Table will not affect the referring guidelines, i.e. bribery, etc.

LOSS

In regard to loss issues, the POAG reviewed the eight issues that were presented to them in regard to possible changes in determining loss issues. The first issue the group considered was the issue of causation. The group indicated that it generally feels that the guidelines need to be simplified, and introducing causation would greatly increase the complexity of the guidelines. Therefore, the group was strongly opposed to the introduction of causation into the determination of loss.

The next issue concerned consequential damages. The POAG indicated that they concurred with the language developed by the staff of the Commission. The language explicitly directs that consideration of consequential damages may only apply to contract procurement and product substitution cases. In regard to interest, the group indicated that interest should never be considered as part of loss.

In regard to whether gain should be considered as an alternative analysis when loss is difficult to determine, the group felt that the actions suggested by the working paper were appropriate. In that option, the guideline would explicitly state that gain may only be used if there is a loss (i.e. gain cannot be used if loss is zero) and it is difficult to estimate. If gain exceeds the loss, it may be grounds for departure. The guidelines should also clarify that gain usually means net gain and not gross proceeds. The POAG agreed with this option and indicated that this will clarify the use of gain as an alternative measure to loss.

In regard to risk of loss, the group concurred with the option presented in the working paper which is that no amendment is needed.

Concerning using determination of credits to reduce loss, the POAG indicated that the

Commission should clarify whether loss is net or gross. In making this determination, the POAG indicated that the Commission should focus on the heartland of cases. The group also indicated that, in regard to Ponzi schemes, money paid to earlier victims should not be credited to determine the guideline loss amount. On the other hand, this money should be credited for purposes of determining a restitution figure. The POAG indicated that losses should not be offset by "services" rendered. With regard to the options in the working paper, the POAG indicated that both options should be added to clarify this issue. The group believed in regard to crediting loss with the value of pledged collateral, the value of the collateral should be determined by the value of the collateral at the time of the offense. This determination should not be prolonged or complicated by the Court considering subsequent fluctuations to the value of the collateral based or the changing market conditions.

In regard to intended loss, the POAG felt that the position adopted by the seventh circuit in the case of *U.S. v. Sung*, 51 F. 3rd 92, in which intended loss encompasses only those losses that stood a realistic chance of occurring, is the appropriate position.

The last issue raised with regard to loss was diversion of government benefits. The POAG adopted the position of the working paper. The working paper gives the court great deference in making such a determination in these cases, both in the determination of loss and gain, and in the decision to depart in special cases.

MANSLAUGHTER

The POAG members discussed the issues raised by the presentation provided to us by the staff of the Commission in regard to possible amendments to the manslaughter guidelines. The members felt that they had too little information from the field (i.e., Probation Officers) to make a recommendation to the Commission about possible amendments. None of the representatives had a personal knowledge about the manslaughter guidelines as none of them was involved in any such investigations. The group decided that it needed to receive input from the probation officers located in areas where Native Americans reside and that we should survey those district's offices.

CIRCUIT CONFLICTS

In regard to the circuit conflicts, the first issue that the POAG members addressed was a departure for aberrant behavior. The group supported the draft language by the Judges' Committee with regard to this issue. The group felt that a "single act" was hard to define, but it did agree that a "single act" is the most appropriate definition of aberrant behavior. In addition, the group suggested that the language be changed in the first paragraph to include "all relevant conduct." The group suggested the rephrasing would be as follows: "If the conduct comprising the offense of conviction and *all relevant conduct* represent a single act of aberrant behavior by the defendant..." The POAG also recommended that the identification of aberrant

behavior as a potential grounds for departure be moved from Chapter 1 and placed in Chapter 5 of the Guidelines Manual.

The second circuit conflict issue that the group discussed was whether falsifying bankruptcy schedules constitutes a "violation of any judicial...order" under 2F1.1 (b)(3)(B). The POAG did not believe that this enhancement should apply to bankruptcy fraud as the false statement to the Bankruptcy Court is the basis for the offense of conviction. However, the group recommended that the Commission provide clarifying language to address this circuit conflict.

The third issue concerning circuit conflicts was whether a representative of an agency, who misapplies or embezzles funds, should receive an enhancement for misrepresentation on behalf of a charitable organization under § 2F1.1(b)(3)(A). The POAG believed that the enhancement should not apply when the defendant is soliciting the funds personally. In other words, if the defendant was working at a charitable organization, but not soliciting funds, this enhancement would not apply. The group felt that this enhancement should only apply in those cases in which the defendant is misrepresenting that he is acting on behalf of the charitable organization. The POAG firmly believed that the victims' point of view should be a controlling factor in determining whether to apply this enhancement.

The fourth circuit conflict issue that was discussed was whether or not abuse of a position of trust enhancement to a defendant who falsely represented himself as someone else (imposter) should be considered. The POAG felt that the imposter may be in a position of trust. Once again, the group felt that the guidelines should adopt the perspective of the victim as to whether there is a violation of trust.

The fifth issue concerning circuit conflicts was whether obstruction of justice may be applied based on conduct solely related to, but not part of, the offense of conviction. The POAG was of the opinion that this problem has not surfaced enough to warrant comment.

The sixth issue concerning circuit conflicts was whether obstruction of justice may be based on a failure to admit to the use of a controlled substance while on pretrial release. The POAG believed that this is a treatment issue and not an obstruction of justice issue. On the other hand, the defendant's failure to disclose the use of a controlled substance could be an issue for determining acceptance of responsibility.

The seventh issue concerning circuit conflicts was whether failure to appear should be grouped with the underlying offense when the offense had been enhanced for obstruction. The group felt that this conflict is not a priority, as most judges and probation officers know how to handle these cases. The POAG indicated that if there were no incremental increase after the Multiple-Count Rules have been applied, the Court should depart upward from the guideline range.

The eighth issue discussed concerning circuit conflicts was whether a sentence to community confinement (halfway house) qualifies as "incarceration" under §§4A1.2(d)(2) and (e)(1). The group felt that it was most important to determine the precise language of the

sentence. When the defendant is sentenced to a period of custody to the Bureau of Prisons or a state Department of Corrections, the POAG believes that the sentence is a period of confinement. On the other hand, when the defendant is sentenced directly to a halfway house as part of a probation or supervised release term, this should not be considered confinement. It was recommended that the Commission more clearly define confinement and explicitly state how community confinement should be counted. While making these determinations, the Commission should take into account the issues raised in § 4A1.3 (Adequacy of Criminal History Category). For example, it is likely that a person, who is ordered directly by the Court into a community confinement center, has a less serious criminal history than someone who is placed directly into the custody of a department of corrections, and then placed into a community confinement center. The POAG suggested that the Commission review the procedures used by the Bureau of Prisons to determine credit for time served in community treatment centers. In addition, it was recommended that the Commission better define the term of incarceration, while also considering the impact to § 4A1.2(k) (revocations). There should also be consistency between Chapter 4 and Chapter 7 in regard to the definition of confinement and counting sentences involving community confinement.

The last issue, issue number nine of the circuit conflicts, concerned whether "non-violent offenses" in § 5K2.13 (diminished capacity) should be consistent with "crime of violence" under § 4B1.2 (career offender). The POAG indicated that consistency between these two sections would be appropriate.

THE POAG ISSUES

As previously stated, the members of the POAG also had some issues that they wanted to present to the Commission. The first issue concerned plea bargaining and fact bargaining in cases that are pending sentencing. The members of the group felt that this is an extremely important issue that needs to be addressed by the Commission. In addition, officers are still in favor of more alternatives for first offenders, and maybe even a first offender criminal history category. In regard to administrative matters, the POAG would like to meet at least twice annually at the Commission in order to facilitate continuity, communication, and effectiveness. In addition, the group would appreciate receiving materials from the Commission well in advance of the meeting, allowing for the representatives to solicit opinions or comments from the field. Also, the POAG members would like to meet for three days. The members indicated that there was insufficient time to complete all of their work within two days. It was especially difficult for members who had to travel great distances. Many of those members missed the end of the second day's meeting in order to catch a flight out of Washington, D.C. Lastly, the group wanted to have at least someone representing the group at each of the open meetings of the Commission. In addition, the group requested members other than the D.C. representative periodically be allowed to come to these meetings in the future.

PREPARED STATEMENT

Frank Bowman
Gonzaga University School of Law

The Problem of Loss

Let me begin by thanking the Commission and its staff for giving me the opportunity to contribute to your discussion of the meaning of "loss." My proposals are quite specific, and include a proposed consolidated economic crimes guideline to replace the current theft and fraud guidelines, §§ 2B1.1 and 2F1.1. I have taken the liberty of attaching that proposed guideline to these remarks. The views expressed here are elaborated in far greater detail in a paper I have previously provided Commission staff.[1] Without further ado, let me attempt to address the specific questions you have asked:

I. Why should the Commission tackle the definition of loss?

The best reason to tackle "loss" is that it is a golden opportunity to achieve the goal of simplification this Commission has laudably set for itself, and to do so in a category of cases comprising one-fifth of all federal criminal sentencings. A well-crafted revision of the guidelines provisions involving "loss" would be simplification in all the right senses. It would: (1) shorten the Guidelines themselves, (2) give sentencing and reviewing courts better guidance, and (3) promote sentencing outcomes consistent with one another and with the recognized purposes of Guidelines sentencing.

Moreover, this is the job the Commission was created to do. The Commission wrote guidelines for sentencing economic crimes and made "loss" the centerpiece and linchpin of the

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[1] *See, Coping With "Loss": A Re-Examination of Sentencing Federal Economic Crimes Under the Guidelines*, scheduled for publication in the VANDERBILT LAW REVIEW in the spring of 1998.

whole enterprise. Not only is the "loss" measurement the primary determinant of the sentence in crimes of dishonest acquisition, but according to the Commission's figures, a loss determination is necessary in 20% of all federal criminal sentencings. In other words, federal district court judges must make a loss finding in roughly 8,000 cases every year and the fate of 8,000 defendants every year depends on that finding.[2] If so significant a component of the Guidelines sentencing system does not work well, the Commission's mandate is to fix it. The evidence that "loss" does not work well as presently defined is compelling.

The result of the recent Federal Judicial Center survey of judges and probation officers in which both groups ranked the "loss" definition as the second most pressing issue for the Commission to address is not surprising. A search of the Westlaw database shows that the concept of "loss" in either U.S.S.G. §2B1.1 or §2F1.1 has been discussed in nearly 900 federal court opinions. There are at present splits of opinion between the circuits on *at least* eleven separate, analytically distinct, issues concerning the meaning and application of the "loss" concept.[3] Even more significant than the identifiable circuit splits is the overall sense of uncertainty, confusion, and sheer aggravation that emerges whenever lawyers and judges who

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[2] There are roughly 40,000 Guidelines sentencings per year. U.S. SENT. COMM. ANNUAL REPORT 1995, p. 41.

[3] There are surely more than eleven. Among those discussed in the longer article on which these remarks are based are differences of opinion over: (1) Whether "loss" is to be defined differently in theft and fraud cases; (2) Whether "loss" can ever include so-called "consequential damages;" (3) What "consequential damages" means in the loss context; (4) Whether lost interest should be included in "loss;" (5) When "loss" should be measured; (6) Whether assets pledged as collateral must be credited against "loss;" (7) Whether assets paid as or available to pay restitution, but not pledged as collateral by a defendant, should be deducted from "loss;" (8) Whether money repaid before detection of the crime should be deducted from "loss;" (9) Whether factual impossibility reduces "loss" to zero; (10) Whether a defendant's criminal intentions must have been realistic to be counted as "intended loss;" and (11)Whether intended loss can be measured only by applying the attempt guidelines of §2X1.1.

deal with federal economic crime discuss "loss."[4] "Loss" is not only a problem in fact, those in the best position to judge feel it to be so.

II. Would the problems with loss "be best addressed through a more comprehensive, simplified definition of loss coupled with elimination of all or some of the current commentary?"

It has been suggested that the proper approach to the "loss" conundrum would be to provide a one or two sentence basic definition of the term and then leave the details to the courts. I concur strongly with the view of Judge Gilbert and the Committee on Criminal Law that such an approach would not be helpful. The existing imperfect set of rules governing loss creates confusion for the courts and the parties. No rules would create chaos.

The problem with the current "loss" rules is not that they are too detailed. Indeed, one of their notable defects is the absence of guidance on many basic issues. The solution to redefining "loss" is not to lop off all the rules, but to draft rules that give guidance on the most commonly occurring issues and that are consistent both with recognized sentencing purposes and with each other.

III. A Proposal for Addressing the "Loss" Problem

A. <u>The Guidelines Should be Simplified By Consolidating §2B1.1 and §2F1.1</u>

There is no good reason to have two separate guidelines for theft and fraud. There are compelling reasons to consolidate §2B1.1 and §2F1.1. First, the distinction between theft and fraud is largely illusory. Although not all theft crimes are frauds, virtually every fraud could be charged as some form of theft. Federal law abounds with instances where the same course of

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[4] *See, e.g., United States v. Kaczmarski*, 939 F.Supp. 1176, 1182 n. 7 (E.D. Pa. 1996), *aff'd*, 114 F.3d 1173 (3d Cir. 1997) where Judge Dalzell refers with obvious exasperation to the task of "construing the vaporous word loss."

thievery is chargeable under multiple statutes, some of which are called "frauds," and some of which are traditional "theft-like" offenses. Second, even if it were possible to draw a meaningful distinction between thefts and frauds, it would only be useful to do so in writing sentencing guidelines if the objective were to generate different sentencing outcomes for the two categories of cases. However, the sentencing range under both the theft and fraud guidelines is driven almost entirely by loss amount. Therefore, unless the term "loss" means something different in theft and fraud cases, application of either §2B1.1 or §2F1.1 to the same set of facts will customarily produce either the identical sentencing range, or a pair of ranges so close that the top of one will approach, or even overlap, the bottom of the other.[5] Because the fraud guideline adopts the "loss" definition from the theft guideline, this is exactly what happens. Thus, in the overwhelming majority of cases, the existence of separate fraud and theft guidelines is merely a pointless duplication. Third, the existence of separate theft and fraud guidelines is mischievous. Sections 2B1.1 and 2F1.1, and their commentary regarding "loss," are *slightly* different, albeit for reasons that are not easy to discern. Consequently, creative litigants and judges try to impute meaning into the differences, which only leads to confusion.[6]

B. <u>The Consolidated Economic Crimes Guideline Should Retain the "Loss" Concept, But Identify and Account Separately for Sentencing Considerations for which "Loss" Is Not a Good Measurement</u>

A consolidated economic crimes guideline should retain as a central component a

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[5] The Sentencing Table is constructed so that the top of one sentencing range will overlap the bottom of the range two offense levels higher. U.S.S.G. Ch. 5, Pt. A (1996).

[6] *See, e.g.*, the series of Third Circuit cases beginning with *U.S. v. Kopp*, 951 F.2d 521 (3d Cir. 1991), running through *U.S. v. Badaracco*, 954 F.2d (3d Cir. 1992), *U.S. v. Coyle*, 63 F.3d 1239 (3d Cir. 1995), and *U.S. v. Maurello*, 76 F.3d 1304 (1996).

measurement akin to the current "loss" concept. The intuitive judgment, at work among Anglo-American lawmakers for at least seven hundred years, that stealing more is worse than stealing less is fundamentally sound. Nonetheless, "loss" as now defined functions as an imperfect proxy for too many sentencing values. Where possible, those values should be identified and accounted for outside the "loss" calculation. In fact, the Guidelines already do this to a large degree. For example, the adjustments for role in the offense, §§ 3B1.1 and 3B1.2, abuse of trust, §3B1.3, and acceptance of responsibility, §3E1.1, pertain to assessment of an economic criminal's mental state, and thus of his relative blameworthiness. Still, more could be done to reduce the overriding importance of the quantitative "loss" measurement. I will forego a detailed discussion of specific suggestions on how to achieve that end,[7] and turn instead to the question of what "loss" should mean in a consolidated economic crimes guideline.

C. "Loss": What Should It Mean and How Should It Be Measured?

1. *What's Wrong With the Existing Definition of "Loss"?*

The root of the "loss" problem is that the Guidelines do not now contain a meaningful definition of the term. The descriptive commentary regarding "loss" following §§2B1.1 and 2F1.1 includes a series of directives which neither singly nor together amount to a coherent definition. The basic definition of "loss" announced in the theft guideline and adopted by reference into the fraud guideline -- "the value of the property taken, damaged, or destroyed" -- uses the language of larceny. The word "taken" is a term of art, denoting to any Anglo-

[7] I have proposed: (1) Abolishing the "more than minimal planning" upward adjustment and building those two levels into the loss table, and then adding a two-level upward adjustment for sophisticated means and a two-level downward adjustment for cases *not* involving even minimal planning; (2) Adding separate upward adjustments for the number of victims and the infliction of significant financial hardship.

American criminal lawyer the "taking" element of common law larceny, with its insistence on a transfer of possession of moveable personalty. Thus, the basic definition of "loss" apparently includes only what might be termed the *corpus delicti* of basic property crimes, the "thing of value" physically abstracted from the victim. Outside the limited context of simple larceny-like offenses, this definition is virtually useless. For example, if "taken" retains some vestige of its common law meaning, when is property "taken" in a wire fraud or a bankruptcy fraud or an insider trading case, and how, and from whom? Alternatively, if "taken" is intended to invoke no particular doctrinal association, what on earth does it mean?

Perhaps the most glaring defect in the current structure is its treatment of the question of causation. "Loss" is first and foremost a measurement of pecuniary harm. When we ask what the "loss" is in any particular case, we are really asking two questions about causation: First, what economic harms resulted from defendant's conduct? Second, which among the harms the defendant caused in fact should count in law in setting his sentence? The Guidelines provisions relating to these questions and the cases construing them have created an ugly and nearly incomprehensible patchwork, which so far as I can discern looks roughly like this:

a. The Guidelines contain no rules for identifying the "victims" whose "losses" will count.

b. The relevant conduct guideline, §1B1.3, mandates a broad measurement of harm, saying that offense levels are to be determined based on "all harms resulting from" a defendant's own conduct, and thus apparently sets up a rule of pure "but for" causation.

c. However, both the fraud and theft guidelines define "loss" narrowly as the "thing taken," the *corpus delicti* of the crime.

d. Moreover, §2F1.1, Application Note 7(c), says only "direct damages" count, and excludes from consideration "consequential damages." Both these terms are drawn from contract law and are difficult, if not impossible, to apply in the criminal context. If the latter term is given its customary contract law meaning, Note 7(c) excludes from "loss" even economic harms which are both directly caused by defendant's conduct and foreseeable to him.

e. On the other hand, in cases of procurement fraud and product substitution the Guidelines specifically *include* in "loss" the "consequential damages" elsewhere excluded, if the loss is "foreseeable."

f. Likewise, if a defendant has co-conspirators or other criminal cohorts, he is responsible for all harms that resulted from all of their "reasonably foreseeable acts and omissions" in furtherance of the crime.

g. In loan fraud cases, the loss to banks caused by a drop in value of pledged collateral is a part of the "loss," regardless of whether it was foreseeable and despite the fact that such a loss is a classic "consequential damage."

h. Except in loan fraud cases, if a victim's loss is genuinely attributable to several causes, there is no rule for determining what the causal nexus to a defendant's conduct must be before the loss should be counted.

i. In any case, courts routinely evade the no-consequential-damages rule by ignoring it or by interpreting it to impose something like a rule of "proximate cause."

In short, as Professor Higgins says in *My Fair Lady*, you have a ghastly mess.

2. *How do we fix it?*

A usable definition of "loss" must address two basic problems: the *problem of*

inclusion, that is, deciding which harms to include and which to exclude from the ambit of "loss," and the *problem of measurement*, that is, creating rules that assist courts in calculating the monetary value of the included categories of economic harm.

a. The Problem of Inclusion

The problem of inclusion should be addressed by redefining "loss" in terms of cause-in-fact and foreseeability.

1. Cause in fact.

At a minimum, a defendant's conduct must be a "necessary antecedent to the harm at issue."[8] Any Guidelines definition of "loss" must at the very least require this sort of "but for" causation. If a harm would have happened regardless of defendant's behavior, there can be no justice in punishing him for its occurrence. The more difficult question is whether to impose on the "loss" calculation a standard of logical causality stricter than pure "but for" causation. Chains of cause and effect, once initiated, run on infinitely through time. As Benjamin Franklin observed, "A little neglect may breed great mischief ... for want of a nail the shoe was lost; for want of a shoe the horse was lost; and for want of a horse the rider was lost."[9] The recurring legal question is whether, when a defendant abstracts a horseshoe nail, he should be sentenced for the loss of the nail, the horse, the rider, or perhaps even greater harms flowing from their loss.

The Commission should adopt as part of the "loss" definition a standard of cause-in-fact

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[8] *United States v. Neadle*, 72 F.3d 1104, 1119 (3d Cir. 1996) (Becker, J., concurring and dissenting), *citing* 4 FOWLER V. HARPER, ET AL., THE LAW OF TORTS § 20.2, at 89-91 (2d ed. 1986).

[9] BENJAMIN FRANKLIN, POOR RICHARD'S ALMANAC, *Preface: Courteous Reader* (1758).

more stringent than "but for" causation. It seems plain that neither the Sentencing Commission nor the courts are disposed to count as "loss" harms logically remote from a defendant's conduct. The proposed "substantial factor" language maintains continuity with that established approach, and is consistent with the general principle of criminal fault that people should be sent to jail only for harms to which they have a significant connection.

ii. *Foreseeability*

In every area of law that has wrestled with it, the solution to the problem of placing reasonable limits on legal liability for harm which a defendant caused in fact has centered on the concept of "foreseeability," that is, some assessment of which harms the defendant could or should reasonably have anticipated. Criminal law is no different. Foreseeability has long been a staple of analysis both in determining guilt and in imposing sentences.

Guilt: Foreseeability is expressly an element of crimes of criminal negligence and even the most aggravated degrees of recklessness. It is also integral to determinations of guilt for crimes in which the ostensible *mens rea* involves intentionality or knowledge.[10] For example, a party to a conspiracy is responsible for any crime committed by a co-conspirator if it is within the scope of the conspiracy, or is a foreseeable consequence of the unlawful agreement.[11] An accomplice "is guilty not only of the offense he intended to facilitate or encourage, but also of

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[10] *See, e.g., People v. Rakusz*, 484 N.Y.S.2d 784 (N.Y. Crim Ct. 1985) (finding defendant guilty of assault, defined as: "with intent to prevent ... a police officer ... from performing a lawful duty, he causes physical injury to [the officer]," when an officer frisked a struggling defendant and cut his hand on the knife, because the injury was foreseeable to defendant); *State v. Williquette*, 385 N.W.2d 145 (1986) (holding that a defendant "subjects a child" to abuse if, by act or omission, "she causes the child to come within the influence of a foreseeable risk of cruel maltreatment").

[11] *Pinkerton v. United States*, 328 U.S. 640, 647-48 (1946). *See also, United States v. Laurenzana*, 113 F.3d 689, 693 (7th Cir. 1997)(defendant guilty of conspiracy to commit mail fraud where he enters scheme in which it is reasonably foreseeable that mails will be used).

any reasonably foreseeable offense committed by the person he aids and abets."[12] The felony murder rule, which imposes liability for the highest available degree of criminal homicide for killings occurring during certain dangerous felonies, in effect substitutes foreseeability of death for the intent to cause it.

Sentencing: Foreseeability of harm is also widely employed in sentencing. The Guidelines themselves repeatedly use foreseeability as the dividing line between those harms which count for measuring offense seriousness and those which do not.[13] This approach has received the imprimatur of the United States Supreme Court, even in the capital sentencing context.[14] The inclusion of foreseeable harms in the sentencing calculus is not only sanctioned by long precedent, it is entirely consistent with the fundamental principles and purposes of criminal sentencing. Criminal law is preeminently about fault. It is unjust to put someone in prison for harms he did not intend or that he could not reasonably have anticipated would follow from his choice to do wrong. It is entirely appropriate, however, to punish based on harms that would not have occurred but for the defendant's evil choices, and which the defendant either

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[12] *People v. Croy*, 710 P.2d 392, 398 n.5 (Cal. 1985).

[13] *See* §1B1.3(a) (dictating that sentencing be based on harms resulting from the foreseeable conduct of defendant's criminal partners); §2F1.1, n. 7(c) (including in "loss" foreseeable consequential damages in procurement fraud and product substitution cases); § 2F1.1, n. 10(a) (authorizing a departure for "reasonably foreseeable non-monetary harm"), § 2F1.1, n. 10(c) (authorizing departure for "reasonably foreseeable" physical, psychological, or emotional harm). *See also, United States v. Sarno*, 73 F.3d 1470 (9th Cir. 1995) (finding all losses on fraudulently procured loan attributable to the defendant even where the default was not his fault because it was reasonably foreseeable from the defendant's conduct that the loan would be approved, putting the bank's money at risk.)

[14] *Payne v. Tennessee*, 501 U.S. 808 (1990) (Approving use of victim impact evidence over the objection that such evidence concerns "factors about which the defendant was unaware, and that were irrelevant to the decision to kill," and thus had nothing to do with the "blameworthiness of a particular defendant." Justice Souter, concurring, observed that the harms to the surviving victims of homicide are morally, and therefore legally, relevant precisely because they are so plainly foreseeable.).

anticipated, or with even modest thought, could and should have anticipated.

Because the emphasis in criminal law is on fault, the definition of what is foreseeable for sentencing purposes should be relatively narrow. The proposed language on foreseeability emphasizes two points: 1) Although the idea of foreseeability is, by definition, an objective standard (we ask not what the defendant *did* foresee, but what he *could have* foreseen had he troubled to think about consequences), the definition insists that the harm have been foreseeable to *this* defendant given the facts available to him at the time he acted. 2) The standard requires that a reasonable person in defendant's shoes "would have foreseen" the harm in question "as a probable result."

The combination of a more-than-but-for cause in fact standard and a tougher-than-tort-law foreseeability standard should produce several practical results. First, a somewhat expanded universe of pecuniary harms will be counted as "loss." This is desirable as providing a closer congruence between the true harm caused by economic offenders and the sentences they serve. Second, the new rule should pose a much simpler analytical task for sentencing courts.

Some will contend that the rules proposed here will impose a greater fact-finding burden on courts. I respectfully disagree. Zealous government advocates in search of more severe sentences will present roughly the same evidence and arguments whether or not the changes advocated here are adopted. Zealous defense counsel will argue just as strenuously that the harms urged by the government have not been proven, or if proven, should not count. The only difference will be that courts will draw the lines of inclusion and exclusion from "loss" in different (and I hope easier to find) places. District courts are very well equipped to make findings of fact. That is, after all, what they do for a living. The problem with the loss

calculation has never been the factual issues; it has been with trying to apply an incomprehensible set of conflicting rules to well-understood facts.

As some workingman's sage once observed, half the key to success in any undertaking is having the right tools. The current Guidelines use the wrong verbal tools to define loss, tools designed for other tasks. The core issues in defining loss are questions about causation -- cause-in-fact and foreseeability. The Guidelines should deal with these questions squarely and should give sentencing judges the definitional tools they need to make case-by-case decisions. The tools offered here are simply specialized manifestations of the old familiar ones, rendered both comfortable and adaptable by centuries of use. Judges do not know how to merge larceny language ("taken") with contracts terminology ("consequential damages"). They do know how to determine cause-in-fact. They do know how to determine foreseeability. The Commission should let them.

For reasons of space, I will not discuss the issues of "gain" as an alternative measure of loss, and the problem of interest other than to say: (1) I believe the "gain" problem largely disappears once "loss" is properly defined; and (2) the interest problem is simply a special case of the general causation problem and its solution is readily inferable from a properly conceived set of causation rules.[15]

b. The problem of measurement

Even if the Commission were to redraft the core definition of "loss" in terms of cause-in-fact and foreseeability, there remain a number of critical problems of measurement that should be addressed in the commentary. These include: (1) The question of *when* "loss" should be

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[15] For detailed discussion of the interest problem, *see* Bowman, *supra* note 1, pp. 102-107.

measured. I have proposed a rule that "loss" should ordinarily be measured at the time of detection of the crime, subject to two exceptions. (2) The question of what amounts to credit a defendant in calculating loss. I propose a "net loss" rule which largely tracks current case law.

3. Intended Loss

The concept of "intended loss" should be retained. Because application of the Guidelines requires a method for ranking the seriousness of particular instances of crimes of the same general type, "intended loss," or something very like it is indispensable. There must be a way of distinguishing among inchoate (and also partially successful) economic crimes. Laws penalizing inchoate crimes exist because such conduct is blameworthy and because it poses a risk of actual harm. Because inchoate (or only partially successful) economic crimes are, in essence, wholly or partially unconsummated efforts to inflict pecuniary loss, it makes perfect sense to rank such crimes in large measure based on the amount of harm the defendant desired to inflict. A crook who sets out to steal a million dollars is, all else being equal, both morally less attractive and a greater social risk than one whose more modest goal is to snitch a pack of cigarettes.

Although blameworthiness and risk of harm are both considerations in punishing uncompleted conduct, the first consideration is more significant than the second. Therefore, just as in the liability phase of a criminal trial, at sentencing the factual impossibility or improbability of success of a criminal plan should, in general, be no defense. The proposed application note focuses on the defendant's state of mind, on what he intended and what he believed. It holds him responsible for losses he intended, so long as they "might reasonably have occurred if the facts were as he believed them to be." The objective is to hold defendants responsible for their evil objectives, but takes account of risk to leave a window, albeit a small one, to subtract from "loss"

those rare harms that simply could not have befallen, *even if* things were as the defendant thought them.

It might be argued that there should be a discount for unrealized, but intended, losses as compared to loss actually inflicted. There is such a discount in the consolidated guideline proposed here, but it requires a moment's thought to see it. The proposed definition of actual loss expands the universe of pecuniary harms counted in "loss" to include reasonably foreseeable ones. Hence, where a criminal plan is successful, the perpetrator will be liable, not only for those harms he desires, but for such additional harms as are foreseeable to him. By contrast, the unsuccessful criminal is responsible only for the losses he desired to inflict; "foreseeability" does not enter the picture. Hence, the cross-reference to the attempt guideline, §2X1.1, is unnecessary, as well as intensely confusing, and ought to be abandoned.

IV. CONCLUSION

As I think this body is aware, I am a fan of the Commission and the Federal Sentencing Guidelines. I think the Guidelines are an improvement on the system they replaced and, in general, work far better than their many critics believe. Nonetheless, they remain an experiment. If the experiment is to succeed over the long term, the Guidelines and the Commission which shepherds them must be flexible and innovative enough to reinvent parts of the system that do not work as they should. The Guidelines machinery for sentencing economic criminals is not broken, but it is unwieldy, inefficient, the gears are creaking, frustration is growing, and it is time for a new model. Whether the approach I have sketched out has sufficient merit to be part of the blueprint for that new model remains to be seen. At the least, I hope it provides a place to start.

Appendix A

[*A proposed consolidated economic crimes guideline*]

§2Z1.1. Economic Crimes, Including Fraud, Larceny, Embezzlement, and Other Forms of Theft; Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property

(a) Base Offense Level: **4**

(b) Specific Offense Characteristics

(1) If the loss exceeded $100, increase the offense level as follows:

	Loss (Apply the Greatest)	Increase in Level
(A)	$100 or less	no increase
(B)	More than $100	add **1**
(C)	More than $1,000	add **2**
(D)	More than $2,000	add **3**
(E)	More than $5,000	add **4**
(F)	More than $10,000	add **5**
(G)	More than $20,000	add **6**
(H)	More than $40,000	add **7**
(I)	More than $70,000	add **8**
(J)	More than $120,000	add **9**
(K)	More than $200,000	add **10**
(L)	More than $350,000	add **11**
(M)	More than $500,000	add **12**
(N)	More than $800,000	add **13**
(O)	More than $1,500,000	add **14**
(P)	More than $2,500,000	add **15**
(Q)	More than $5,000,000	add **16**
(R)	More than $10,000,000	add **17**
(S)	More than $20,000,000	add **18**
(T)	More than $40,000,000	add **19**
(U)	More than $80,000,000	add **20**.

(2) If the offense involved (A) a theft from the person of another, (B) the conscious or reckless risk of serious bodily injury, or (C) possession of a dangerous weapon, increase by **2** levels. If the offense involved either (B) or (C) and the resulting offense level is less than **13**, increase to level **13**.

(3) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by **4** levels.

(4) If (A) undelivered United States mail was taken, or the taking of such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was undelivered United States mail, and

the offense level as determined above is less than level **6**, increase to level **6**.

(5) If the offense involved an organized scheme to steal vehicles or vehicle parts, and the offense level as determined above is less than level **14**, increase to level **14**.

(6) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency, or (B) violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines, increase by **2** levels. If the resulting offense level is less than level **10**, then increase to level **10**.

(7) If the offense --
   (A) substantially jeopardized the safety and soundness of a financial institution; or
   (B) affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense,
   increase by **4** levels. If the resulting offense level is less than level **24**, increase to level **24**.

(8) If sophisticated means were used to commit the offense, or to impede the discovery of the existence or extent of the offense, increase the offense level by **2** levels.

(9) If the offense involved only minimal planning or represented a single instance of impulsive behavior, decrease by **2** levels.

(10) If the offense involved more than one victim, increase the offense level as follows:
   (A) If the offense involved 2-4 victims, increase by **1** level.
   (B) If the offense involved 5-20 victims, increase by **2** levels.
   (C) If the offense involved 21 or more victims, increase by **3** levels.

(11) If the offense caused significant financial hardship to any victim, increase by **2** levels.

(C) Cross Reference [regarding theft of firearms -- to remain same as in present §2B1.1(c).]

Application Notes:

1. "Loss" means all pecuniary harm caused by the acts and omissions specified in subsections (a)(1) and (a)(2) of §1B1.3 (Relevant Conduct) that was reasonably foreseeable to the defendant at the time of such acts or omissions. "Victims" are all persons or entities (public or private) which suffered such harms.

(a) *Pecuniary harm*

The phrase "pecuniary harm" is to be given its common meaning. Many physical and emotional harms, injuries to reputation, etc. can be assigned a monetary value. However, "loss" does not measure harms of this kind. Its purpose is to measure economic harms.

(b) *Causation*

A harm has been "caused" for purposes of this guideline if one or more of the acts or omissions specified in subsection (a)(1) or (a)(2) of §1B1.3 (Relevant Conduct) was a substantial factor in producing the harm. "Loss" should not include harms that are causally remote from the specified acts or omissions.

(c) *Foreseeability*

A foreseeable harm is one that ordinarily follows from one or more of the acts or omissions specified in subsection (a)(1) or (a)(2) of §1B1.3 (Relevant Conduct) in the usual course of events, or that a reasonable person in the position of the defendant would have foreseen as a probable result of such acts or omissions.

Examples: (1) In a case involving product substitution, the loss includes the purchaser's reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered, or modifying the product so that it can be used for its intended purpose, plus the purchaser's reasonably foreseeable cost of rectifying the actual or potential disruption of the purchaser's activities caused by the product substitution. (2) In a case of fraud involving the award of a government contract, loss includes the reasonably foreseeable administrative cost to the government and other public and private participants of repeating or correcting the contracting process affected, plus any reasonably foreseeable increased cost to secure the product or service contracted for. (3) In a case of destruction of commercial property by fire as part of a scheme to defraud, loss includes reasonably foreseeable added costs incurred by local government authorities in suppressing the fire, and reasonably foreseeable pecuniary harm to the owner of the property (if not the defendant) resulting from interruption in his business activity.

Loss does not, however, include costs incurred by government agencies in criminal investigation or prosecution of the defendant.

(d) *Cases of theft, receipt of stolen property, and destruction of property*

In cases involving larceny, false pretenses, embezzlement, and other forms of theft, as well as cases involving receipt of stolen property or the destruction or damage of property, loss includes, but may not be limited to, the value of the property stolen, embezzled, damaged, or destroyed.

(e) *Congressional intent*

In determining the loss (including the identification of the persons or classes of persons to be treated as victims), the sentencing court shall give particular weight to congressional intent. It shall be rebuttably presumed that pecuniary harm which was: (I) caused by one or more of the acts or omissions specified in subsection (a)(1) or (a)(2) of §1B1.3 (Relevant Conduct); and (ii) suffered by any person or class of persons whose interests Congress intended to protect by passage of the offense(s) of conviction or offense(s) considered by the sentencing court as relevant conduct, was foreseeable to the defendant. For example, in a case involving diversion of government program benefits, loss is the value of the benefits diverted from intended beneficiaries or uses. Similarly, in a case involving a Davis-Bacon Act violation (a violation of 40 U.S.C.. § 276a, criminally prosecuted under 18 U.S.C. § 1001), the loss is the difference between the legally required and actual wages paid.

(f) Time of measurement of loss

Loss should ordinarily be measured at the time the crime is detected. However, if the loss was higher at the time the crime was legally complete, the loss should be measured at that time. For purposes of this guideline, a crime is detected when either a victim or a public law enforcement agency has (at least) a reasonable suspicion that a crime is being or has been committed and the defendant becomes aware that such suspicion exists. Examples: (I) In the case of a defendant apprehended in the act of taking a vehicle, the loss is the value of the vehicle even if the vehicle is recovered immediately. (ii) In the case of an embezzlement in which the defendant converts to his own use money from a bank to invest or to cover short-term cash flow problems and then returns it before being caught, the loss is the amount of money originally converted. (iii) In the case of a bank fraud involving a bank officer, the crime would be detected when defendant became aware that bank examiners were reviewing irregularities in the bank's books relating to the fraud, or when the defendant became aware that federal agents were interviewing witnesses or serving grand jury subpoenas relating to the fraud.

(g) Net loss

The loss shall be the net loss to the victim or victims.

(I) The amount of the loss shall be reduced by the value of money or property transferred to the victim(s) by the defendant in the course of the offense. For example, where a defendant sells stock to the victim by fraudulently representing that the stock is worth $40,000 when it is worth only $10,000, the loss is the amount by which the stock was overvalued (i.e., $30,000). However, where there is more than one victim, the loss will be the total of the net losses of the losing victims. For example, in a Ponzi scheme in which the defendant repays early victims their entire investment plus a profit in order to keep the scheme going and attract new investments and investors, the defendant should be credited for repayments to early victims only to the extent of their original investment, plus statutory interest in an amount determined by reference to Application Note 7(I).

(ii) The amount of the loss shall be reduced by the value of property pledged as collateral as part of a fraudulently induced transaction. Where a victim has foreclosed

on or otherwise liquidated the pledged collateral before detection of the crime, the loss shall be reduced by the amount recovered in the foreclosure or liquidation. Where a victim had not foreclosed on its security interest in the pledged collateral at the time of detection of the crime, the loss shall be reduced by the fair market value of the pledged collateral at the time of detection.

(iii) With the exception of amounts recovered or readily recoverable by a victim through liquidation or foreclosure of collateral pledged by the defendant as a part of the illegal transaction(s) at issue in the case, the loss shall not be reduced by payments made by the defendant to a victim after detection of the crime. With the same exception, loss shall not be reduced by amounts recovered or readily recoverable by a victim from the defendant through civil process or similar means after detection of the crime.

(h) *Valuation*

Ordinarily, loss will be calculated using the fair market value of the property or other thing of value at issue. Where the market value is difficult to ascertain or inadequate to measure harm to the victim, the court may measure loss in some other way, such as reasonable replacement cost to the victim. When property is damaged, the loss is the cost of repairs up to the replacement cost of the property (plus any other reasonably foreseeable pecuniary harms).

(I) *Interest*

Loss shall include interest if: (I) interest was bargained for by a victim as part of a transaction which is the subject of the criminal case, or (ii) the money, property, or other thing(s) of value lost by a victim as a result of one or more of the acts or omissions specified in subsection (a)(1) or (a)(2) of §1B1.3 (Relevant Conduct) was in a form on which a return on investment would ordinarily be expected or was of a nature that it could readily be invested. In either case, loss shall include a component of interest at the statutory rate specified in -- calculated from the time at which the money, property, or other thing of value was stolen, embezzled, damaged, or destroyed, or the victim was otherwise deprived of its use or benefit, until the time the crime was detected. In all other cases, loss shall not include interest.

2. *If the defendant intended to cause a loss greater than the actual loss calculated pursuant to Application Note 1, the figure for intended loss shall be used as the "loss" in subsection (b)(1).*

a) *Factual Impossibility*

The defendant is accountable for all pecuniary harms he intended and which might reasonably have occurred if the facts were as he believed them to be.

b) *"Sting" Operations*

Intended loss includes pecuniary harms the defendant intended to cause, even if accomplishment of defendant's goals would have been unlikely or impossible because of

the participation of an informant or undercover government agent.

3. *For the purposes of subsection (b)(1), loss (or intended loss) need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information. For example, this estimate may be based on the approximate number of victims and an estimate of the average loss to each victim, or on more general factors, such as the nature and duration of the offense and the revenues generated by similar operations.*

4. *The loss includes any unauthorized charges made with stolen credit cards, but in no event less than $100 per card.*

5. *A victim suffers "significant financial hardship" if the offense caused him to file for personal bankruptcy protection, to suffer foreclosure on or eviction from his primary residence, to be terminated from employment which was a significant source of the victim's income, to suffer the closure, bankruptcy, or loss of ownership interest in any business that was a significant source of the victim's income, to lose health insurance protection for a period of six months or more, or to pay significant medical expenses during any period in which health insurance benefits were terminated or unavailable to the victim as a result of defendant's conduct, to lose a significant portion of his pension or retirement benefits, or to suffer any other financial deprivation similar in scope and effect to the examples listed above. For purposes of applying §2B1.1(b)(11) only, the term "victim" refers only to natural persons.*

[NOTE: Application Notes 5-12 of the current theft guideline, §2B1.1, would become Notes 6-13 in the consolidated economic crimes guideline. Application Notes 14-17 of the current fraud guideline, §2F1.1, are identical to Notes 9-12 in the current theft guideline, and so would be incorporated unchanged as Application Notes 10-13 of the consolidated guideline. Application Note 5 of the current fraud guideline, §2F1.1, would become Note 14 of the consolidated guideline.]

15. *For purposes of calculating the number of victims under subsection (b)(10), the court should count only those victims who were actually deprived of something of value. For example, a wire fraud in which calls were made to three different individuals successfully persuading each of them to invest in a pyramid scheme would involve three victims. However, stealing a single car would ordinarily involve only a single victim, even if the owner were fully reimbursed for the loss of the car by his insurance company.*

16. *"Sophisticated means," as used in subsection (b)(10), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine economic crime of the same type. An enhancement would be applied, for example, where the defendant used offshore bank accounts, multiple transactions through domestic financial institutions, transactions through corporate shells or fictitious entities, or sophisticated technical means.*

16. *In cases in which the loss determined under subsection (b)(1) does not fully capture the harmfulness and seriousness of the conduct, an upward departure may be warranted. Examples may include the following:*

    (a) *a primary objective of the fraud was non monetary; or the fraud caused or risked reasonably foreseeable substantial non-monetary harm;*

    (b) *false statements were made for the purpose of facilitating some other crime;*

(c) *the offense caused reasonably foreseeable physical or psychological harm or severe emotional trauma;*

(d) *the offense endangered national security or military readiness;*

(e) *the offense caused a loss of confidence in an important institution.*

In a few instances, the loss determined under subsection (b)(1) may overstate the seriousness of the offense. In such cases, a downward departure may be warranted.

Public Hearing Concerning Manslaughter

November 12, 1997

STATEMENT OF
CHIEF JUDGE RICHARD H. BATTEY
DISTRICT OF SOUTH DAKOTA
BEFORE THE UNITED STATES SENTENCING COMMISSION
NOVEMBER 12, 1997

Background

I am pleased to appear today to offer insight on my experiences with the United States Sentencing Guidelines (Guidelines). My perspective is that of a sentencing judge with the experience of two years pre-November 1, 1987, and ten years post-November 1, 1987. My experience in the criminal justice system, however, goes back much longer. I was admitted to the State Bar of South Dakota in 1953, some 44 years ago. After serving approximately twenty months as an infantry officer principally assigned as an Assistant S-1(personnel), with principal duties as a courts and boards officer, I entered a law office in the small rural town of Redfield, South Dakota (population 3,000). During the years following I was a county prosecutor (13 years), special state prosecutor, and criminal defense attorney (17 years). As a general practitioner I was involved in the many experiences of a generalist. In four years as a member of the South Dakota Board of Pardons and Paroles, I was exposed to the types and lengths of sentences handed down by the South Dakota state court judges. These duties included the interviewing of inmates in a parole or pardon hearing.

The Federal District Court of South Dakota

The District of South Dakota, of which I am Chief Judge, has three active and two senior judges. It is one of ten district courts within the Eighth Circuit.[1] The South Dakota court is highly impacted by criminal cases. According to the current Federal Court Management Statistics, it

[1] North Dakota, South Dakota, Minnesota, Nebraska, Northern and Southern Iowa, Eastern and Western Missouri, and Eastern and Western Arkansas.

ranks fifth out of 94 courts in criminal felony filings per judge. Contrast this to the fact that it ranks 90th in the number of civil filings per judge. Thus criminal cases and the consequent daily involvement with the Guidelines reflect the business of the South Dakota court.

Indian Jurisdiction

Criminal jurisdiction in Indian country is generally provided by 18 U.S.C. § 1151-1170. Specific jurisdiction is found under 18 U.S.C. § 1152, General Crimes Act, 18 U.S.C. § 1153, Major Crimes Act, and 18 U.S.C. § 13, Assimilated Crimes Act, The last statute is intended to establish a gap-filling code for Indian country and federal enclaves, providing for conformity in laws governing in the states in which the enclaves are located. This insures that people in Indian country are granted as much protection as afforded to those outside the enclave. See United States v. Kiliz, 694 F.2d 628 (9th Cir. 1982).

Indian country in the District of South Dakota is comprised of nine Indian reservations.[2] Approximately 7 percent of the population in the state reside on these reservations. The population in Indian country is approximately 50,000. The Pine Ridge Indian Reservation located in southwestern South Dakota is the second largest reservation by area in the nation. These reservations are typified by low economic status. The presence of alcohol and drugs contribute to the high level of violence. Tribal authorities struggle daily to deliver law enforcement protection to the reservation citizens. Tribal courts are either practically nonexistent or ineffective in combating crimes in Indian country. The FBI provides the major law enforcement presence on the reservations for the enforcement of federal law.

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[2] Pine Ridge, Rosebud, Yankton, Lower Brule, Crow Creek, Flandreau, Cheyenne River, Standing Rock, and Sisseton. These reservations form a part of the Great Sioux Reservation established by the Fort Laramie Treaty of 1868.

Application of the Guidelines in Indian Country

For over three years I have perceived what I believe to be gross inequity in the Guidelines and the laws of the United States as applied in Indian country. Many of these crimes are committed by family members against family members and by one friend against another friend. I have voiced my feeling at every opportunity — to the Attorney General and her assistants, members of the Criminal Law Committee of the Judicial Conference of the United States, members of the Sentencing Commission and its staff, and basically to anyone else who would listen. I hope to address these concerns in my appearance before the Commission.

The bottom line is that as presently constructed, the Guidelines do not provide all the flexibility needed to provide an appropriate sentence under the varying facts found in Indian country cases. The law is clear. Title 18 U.S.C. § 3553 sets forth the factors which the Court must consider in imposing a sentence. Far too many times the guidelines seem not to provide the type of assistance needed to apply these factors. As such, the Court is required to look to sentence departures. While the judges of the Eighth Circuit Court of Appeals are generally sensitive to the difficulties facing a sentencing judge, the judge must be constantly aware that unless guidelines setting forth offender characteristics can be found, departures under Part K (vertical departures) and Chapter four (horizontal departures) are fraught with a certain amount of danger for remand on appeal.

A case in point is my sentence in United States v. Big Crow, 898 F.2d 1326 (8th Cir. 1990). This was a case where defendant was being sentenced for assault with a dangerous weapon (18 U.S.C. §§ 1153 and 113(c)) and assault resulting in serious bodily injury (18 U.S.C. §§ 1153 and 113(f)). It involved a vertical departure downward.

The facts of Big Crow are somewhat lengthy, but essentially the case can be characterized as an assault resulting during a drinking binge involving Big Crow, the victim, and others. Big Crow picked up a block of wood during an altercation and struck the victim on the head, causing bodily injury. The injuries consisted of a severe forehead laceration with an underlying bone fracture.

Under the Guidelines, the base offense level was 15 increased by 8 levels for use of a dangerous weapon and infliction of serious bodily injury (U.S.S.G. §§ 2A2.2(b)(2)(B) and 2A2.2(b)(3)(B)). After providing a 2-level decrease for acceptance of responsibility, the adjusted offense level was 21 resulting in a range of 37-46 months. The sentence of 24 months was based upon a departure downward of 13 months under U.S.S.G. 5K2.0. The sentence was affirmed by a 2-1 panel of the Eighth Circuit Court of Appeals. In the dissent, Judge Roger Wollman did not feel that the departure was warranted under the plain reading of the Guidelines. He stated that we should not approve departures which, however appealing they may be in their result, subvert both the goal and the spirit of the Guidelines.

Big Crow has been the subject of much discussion since 1990. Over two dozen decisions in the Eighth Circuit and 28 courts of appeal and district court opinions reflect the ongoing difficulty with the decision. Defense counsel constantly attempt to bring their case under Big Crow's umbrella. Even so, Eighth Circuit cases reflect that the decision is a narrow one. See, e.g., United States v. Weise, 89 F.3d 502 (8th Cir. 1996).

U.S.S.G. § 2A1.3, Voluntary Manslaughter and
U.S.S.G. § 2A1.4, Involuntary Manslaughter

In 1994 I examined the maximum sentences prescribed by the statutes of each state for voluntary and involuntary manslaughter. This examination revealed a large disparate treatment of these crimes. For example, Alabama, 2-20 years; Arizona, 0-5 years; Delaware, 0-10 years; Louisiana, 0-40 years for voluntary manslaughter. In my own state of South Dakota, for voluntary manslaughter 0 to life, and involuntary manslaughter 0-10 years. These are simply random samples of the various statutes. A copy of my research will be filed with the staff for further detailed examination.[3]

Recognizing that the Guidelines' sentence cannot exceed the statutory sentence, the first recommendation I would make is to urge the Commission to request Congress to increase the statutory maximum for voluntary manslaughter to a much higher range, perhaps life, maybe 50 years, maybe 30 years. Manslaughter is the unlawful killing of a human without malice. It is of two kinds (18 U.S.C. § 1112). Voluntary manslaughter is the unlawful killing of a human being upon sudden quarrel or heat of passion (10 years maximum). Involuntary manslaughter is the killing by the committing of an unlawful act or the commission of a lawful act in a negligent or reckless manner (6 years maximum). The difference of four years in the statute under 18 U.S.C. § 1112(b) results in vastly disparate treatment of those persons who are the victims under the varying types of situations occurring in Indian country.

Under federal law there is much difference between the statutory sentence of second degree murder (killing with malice) (0 to life) and voluntary manslaughter (killing in sudden

[3] This research has not been updated since 1994 and may not be the current state of the law in each state.

quarrel or heat of passion) (0 to 10 years). The Guidelines also provide little difference. The base offense level for voluntary manslaughter under § 2A1.3 is 25. Assuming a Criminal History Category I, the range of imprisonment without enhancements or adjustments would be 57-71 months. Second degree murder under 2A1.2 and a base offense level of 33 with a Criminal History Category I comports to a sentence of 135-168 months. This difference of 6½ years at the low end and 8 years at the high range provide the court with little help in fashioning an appropriate sentence. Specific offense characteristics would be much help to a sentencing judge.

The base offense level for involuntary manslaughter under § 2A1.4(a) is 10 if the conduct was criminally negligent and 14 if reckless. Again assuming no enhancements or adjustments, a Criminal History Category I would comport to a sentence of 6-12 months for negligent conduct and 15-21 months for reckless conduct. Again, there are no specific offense characteristics. In most cases the court is required to depart upward if the dictates of 18 U.S.C. § 3553 are to be observed.

With these facts in mind, I would like to examine two cases which illustrate the need to (1) change the statutory maximum, (2) reexamine the base offense level, and (3) add specific offense characteristics (as many as can be reasonably applied).

United States v. Keester, 70 F.3d 1026 (8th Cir. 1995), was a case of voluntary manslaughter. The per curiam opinion is somewhat sketchy on the facts. The more detailed facts are that Keester and his former wife happened to meet in a bar one night. After drinking for a time they ended up at the wife's home where the drinking continued. Eventually they went to bed together which resulted in consensual intercourse. Later Keester asked her "Who are you sleeping with these days?" Arguably she should have declined to answer, but she did not. Keester then beat

her so viciously about the head and body that she was rendered unconscious. When Keester arose in the morning he found his former wife comatose. Rather than seek medical aid, he deposited her at her mother's home in this comatose condition. Her mother took her to the hospital. She died four hours later. Other facts appear in the opinion.[4]

At sentencing it appeared that an upward departure was warranted. There existed no specific offense characteristics would give guidance. A sentencing range of 57-71 months hardly seemed to satisfy the sentencing factors found at 18 U.S.C. § 3553. A departure to nine years (108 months) was made. Why nine years? I really did not know except that somewhere, somehow, at another time and place a more heinous crime might occur which would justify a sentence at the maximum of ten years. This is hardly a scientific conclusion, but perhaps a rational one. The decision would have been made clearer had there been specific offense characteristics in place.

Should the Commission be unsuccessful in getting Congress to raise the statutory maximum, the base offense level should be raised to somewhere near the statutory maximum or, in the alternative, use the specific offense characteristics found in § 2A2.2 for aggravated assault, adding perhaps a base offense level for acts committed against a spouse or other family member. As it stands now, it is conceivable that a defendant would receive a lesser sentence for killing a victim than for assaulting a victim.

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[4] The government charged Keester with voluntary manslaughter under 18 U.S.C. § 1112, the unlawful "killing of a human without malice" upon a sudden quarrel or heat of passion. While arguably the case was undercharged since there were multiple beatings which took place over time, a reasonable jury could find malice and therefore, return a verdict of second degree murder.

A second case which illustrates the need for Guidelines' change is the unpublished opinion of United States v. Two Crow, No. 97-1411 (8th Cir. Sept, 17, 1997). Two Crow drove his pickup truck over the center line of a highway and collided head on with another vehicle. Two Crow sustained only a minor concussion. He had been driving about 77 miles an hour and his blood alcohol level registered .318 several hours later. In the other vehicle was a grandfather and two of his young grandchildren. He and one grandson were killed. The other grandson survived with extensive injuries.

Two Crow was charged with involuntary manslaughter. The Guidelines' sentencing range was 10-16 months based upon § 2A1.4. Without any specific offense characteristics or a guide, the departure upward was to 60 months. The departure was affirmed, but again specific offense characteristics, if present, could have obviated the need for an appeal issue on the departure.

Application of Analogous Guidelines to Assimilated Crimes

Finally, I would urge the Commission to amplify or expand U.S.S.G. 2X5.1 for crimes committed under the Assimilated Crimes Act (18 U.S.C. § 13). To be instructed to find and apply an analogous offense guideline presents little direction to the court. For example, in deciding which guideline would be analogous to South Dakota Codified Laws (SDCL) 22-16-42 (vehicular battery), should the analogous guideline be § 2A1.4 (involuntary manslaughter) even though death did not occur, or § 2A2.2 (aggravated assault), even though in vehicular battery there need be no intent. Perhaps a compromise could be made applying both guidelines as analogous. There must be data on the many cases applying the Assimilated Crimes Act in Indian country and federal enclaves. I would urge the Commission to explore such data.

I want to express my appreciation to the Commission for hearing me this day.

STATEMENT
FOR
UNITED STATES SENTENCING COMMISSION HEARING
NOVEMBER 4, 1997

JON M. SANDS
ASSISTANT FEDERAL PUBLIC DEFENDER
DISTRICT OF ARIZONA

On November 12, 1997, the Commission will hold a hearing focusing on sentencing in voluntary and involuntary manslaughter offenses in federal courts. I appreciate the opportunity to address the Commission regarding these issues. Indian offenses are a major part of the practice of federal criminal law in the District of Arizona. These offenses arise from federal jurisdiction over Indian Country. As an Assistant Federal Public Defender in the District of Arizona, I have experience in representing defendants in homicide and other violent crime cases.

In addressing the Commission, I wish to focus on the following issues that will be affected by any Commission action. These issues are: (1) the effect and impact on Indian tribes; (2) the appropriateness of the present guidelines; (3) a comparison between the offenses; (4) specific offense characteristics will run counter to the goal of the guidelines; and (5) departures are appropriate for any atypical case.

1. The Effect and Impact on Indian Tribes.

It should be noted that while Indian offenses overall constitute a small percentage of the federal caseload, Indians under federal jurisdiction constitute a large portion of the prosecuted violent offenses. The Commission's 1995 annual report breaks down the approximately 40,000 federal cases as follows: 40% drug offenses, 15% fraud, 20% theft or robbery, almost 10% immigration, 7% firearms. Indian offenses made up a small slice of the 11% of cases labeled

"Other."

In terms of offender characteristics, close to 40% of the offenders are White; close to 30% are African-American; 27% are Hispanic; and only 4.3% are Others. Indians are lumped into this "Other" category. However, the "Other" racial category is responsible for close to 20% of the assault cases prosecuted in federal courts, 25% of the murders, close to 70% of the manslaughters, and over 75% of the sexual abuse cases. Indians are prosecuted almost exclusively for violent offenses on reservations. Thus, any change in the manslaughter guidelines will have a disproportionate effect on Indian offenders.

In addition, the Commission also should note that many, if not all, of the manslaughter offenses that occur on Indian reservations involve intoxication. Defendant and victim frequently know each other and are related. The incident itself most likely occurred at a drinking party. This is the ugly fact on too many Indian reservations, where there are high rates of unemployment, poverty, and despair.

In terms of involuntary manslaughter prosecution involving drunk driving, the deaths frequently involve passengers who were as drunk, if not drunker, than the driver. The passengers frequently are the ones who ask the driver to go on a "beer run" or take the action that leads to the accident. This is tragic and regrettable.

2. The Appropriateness of the Present Guidelines.

The present guidelines should not be changed. At present, the guidelines accurately reflect

the extent of punishment felt appropriate by courts and society. This is seen by the lack of departures upward from the guidelines, and the fact that sentences will be found to be mid-range or lower. The sentencing courts demonstrate that the punishment is appropriate by sentencing within the guideline range.

3. A Comparison between the Offenses.

In assessing the appropriateness of the present guideline range, the Commission must also pay attention to the "mental intent" in the manslaughter offenses. The death of any individual is tragic and terrible. The common law, however, has long recognized that the mental intent that leads to a killing is of vital importance. The mental intent of manslaughter is one that the law treats for being less culpable than of the intent required for murder. In the case of voluntary manslaughter, the intent is mitigated by a quarrel, heat of passion or other extenuating circumstance; in the case of involuntary manslaughter, the intent is mitigated by either gross negligence or reckless indifference.

Murder, on the other hand, requires a much more calculated mental intent. In first degree murder, malice aforethought and premeditation are required. In second degree murder, malice aforethought is required. A comparison with aggravated assault is also instructive, as the mental intent for that offense is one of purposely assaulting an individual with an intent to harm them. There is none of the extenuating circumstances that mitigate intent in voluntary manslaughter, or the lesser gross negligence or reckless indifference that constitutes involuntary manslaughter.

4. Specific Offense Characteristics.

The Commission, in these hearings, raises the issue of specific offense characteristics. It

questions whether there should be a specific characteristic for a prior similar conduct, alcohol, death of a child and so forth. The use of specific characteristics involves the Commission in trying to list every available feature for an offense. There is danger in this approach to manslaughter. As the Commission warned:

> A sentencing system tailored to fit every conceivable wrinkle of each case would quickly become unworkable and seriously compromise the certainty of punishment and its deterrent effect. For example: a bank robber with (or without) a gun, which the robber kept hidden (or brandished), might have frightened (or merely warned), injured seriously (or less seriously), tied up (or simply pushed) a guard, teller, or customer at night (or at noon), in an effort to obtain money for other crimes (or for other purposes), in the company of a few (or many) other robbers, for the first (or fourth) time.

U.S.S.G. Ch. 1, Pt. A, basic approach. Increasing complexity makes the system less workable. The Commission recognized that, "the greater the number of decisions required, and the greater their complexity, the greater the risk that different courts would apply the guidelines differently to situations that, in fact, are similar, thereby reintroducing the very disparity that the guidelines were designed to reduce." Id.

At present, the guidelines contain the means to address the very specific characteristics the Commission is considering for the manslaughter offenses. For example, the death of a child under 12 can be accounted for in "the vulnerable victim" adjustment in Chapter 3. Prior conduct can be accounted for in the criminal history chapter, and a departure sentence at the high end of the guideline might be warranted if there was prior conduct. Given the vagrancies of the types of offenses, and how manslaughter might occur, the Commission should refrain from introducing

specific offense characteristics. The focus, after all, is on intent. The guidelines as they stand now accurately reflect the seriousness of the offense.

5. Departures are Appropriate for any Atypical Case.

The Commission also raises the issue of departures in these offenses. Under Koon, district courts now have a much greater discretion to depart, both upward and downward. In the situations that involve manslaughter, a district court who feels that a specific manslaughter case is "atypical"

or extraordinary, the court then has the power to fashion an appropriate sentence. The Commission should allow the sentencing courts this discretion.

The Commission should be wary of changing the guidelines where the impact would be so disparate upon a specific race or ethnic group, such as Native Americans. This is especially true in manslaughter and involuntary manslaughter cases, where tribal authorities and tribal culture may also be involved.

This point was made at earlier public hearings with the guidelines were first being drafted. The Commission at that time heard testimony by Tova Indritz:

> MS. INDRITZ: (after describing an incident where a family agreed upon a unique arrangement regarding a murder) [We need] . . . more opportunity for discretion on the part of the trial judges, who really are the only ones who can take into account the particular facts which may seem unusual or may not be so unusual.
>
> COMMISSIONER BREYER: Well, you have something unusual to the country as a whole, but nonetheless of the particular community it may be premeditated crimes are less common and provoked more common, even though it's unusual in that community, in which case we don't have to write a guideline I

> wouldn't think[,] that governs all kinds of family relationships which may be common in some parts of the world, and not in others.
>
> MS. INDRITZ: I think that's the reason there should be more room for discretion.
>
> COMMISSIONER BREYER: Depart.

Tova Indritz, Testimony before the Committee on the Judiciary, Subcommittee on Criminal Justice 239 (Denver, CO Nov. 5, 1986). See also Letter from Fredric F. Kay, Federal Public Defender, District of Arizona, to the Honorable William W. Wilkins, Chairman, U.S. Sentencing Commission (Aug. 9, 1989). See generally Jon M. Sands, "Departure Reform and Indian Crimes: Reading the Commission's Staff Paper With 'Reservations'," 9 Fed. Sent. Rep. 144, 145 (1996).

CONCLUSION

In conclusion, the Commission should leave the manslaughter guidelines well enough alone. They accurately reflect the seriousness of the offense as shown by the sentences within the guideline range and the lack of departures. In addition, they are appropriate for the offense given the focus on intent. Finally, the Commission should avoid complicating an already complex scheme, and increasing disparity, by not pursuing any specific offense characteristics. The guidelines, as they now stand, can account for any of the issues the Commission has noted.

TESTIMONY OF THOMAS LECLAIRE

Director, Office of Tribal Justice
United States Department of Justice

BEFORE THE UNITED STATES SENTENCING COMMISSION

November 12, 1997

I am pleased to appear before you today on behalf of the Department of Justice to discuss sentencing in federal homicide cases. Given that the homicide guidelines have been virtually unchanged for the past 10 years, the time is appropriate for a re-evaluation of these guidelines. The Department of Justice commends the Sentencing Commission for holding this hearing and for beginning a review of this important area in federal sentencing policy.

While the number of homicides prosecuted in federal court is relatively few because of the nature of federal jurisdiction, the relevant guidelines are extremely important because of the seriousness of the crime. The federal sentencing guidelines for homicide are also significant because of the impact of these guidelines in certain portions of society, such as on Indian reservations, where murder and manslaughter by Indians is subject to exclusive federal jurisdiction.

In its endeavor to review homicide sentencing, the Commission should not limit its efforts to manslaughter. Rather, given the starting point of the mandatory term of life imprisonment first degree murder carries, the Commission should consider second degree murder as well by examining its relationship both to first degree murder and to voluntary manslaughter.

The various homicide offenses, from first degree murder to involuntary manslaughter, are all part of a continuum of seriousness. Thus, the sentences for these offenses must also represent points along a continuum. However, it is not enough for the Commission to study homicide offenses in relation to each other. As part of its efforts, we recommend that the Commission also consider the relationship of the various homicide sentences in the federal system to those in the State systems. Finally, the Commission must also determine if improvements are necessary so that the homicide guidelines further the goals of reducing unwarranted sentencing disparity while reflecting differences in offense and offender characteristics that should produce distinctions in sentences.

Today, I would like to address primarily two forms of homicide -- second degree murder and involuntary manslaughter. As a former State prosecutor in New York, a former federal prosecutor in the Districts of the District of Columbia and Arizona, and in my current position as the Director of the Office of Tribal Justice, I have had the opportunity both to prosecute many homicides and to compare sentencing practices in these various systems. In addition, Assistant United States Attorney Randy Bellows from the Eastern District of Virginia will share his recent experience in prosecuting a highly-publicized case of involuntary manslaughter and the sentencing problems that arose in that case. It is our goal to outline for the Commission's information the operation of the guidelines in real-life situations.

While I will not separately address voluntary manslaughter in any detail, the Department also urges the Commission to give careful consideration to the guideline applicable to this offense. We thank Judge Battey for bringing to the Commission's attention problems he has noted with respect to voluntary manslaughter. Because of our concerns about sentences for this offense, the Department has recommended to Congress an increase in the maximum term of imprisonment from 10 to 20 years.

SECOND DEGREE MURDER

I shall turn now to second degree murder and explain why the Department believes that a thorough examination of the applicable guideline, §2A1.2, is in order. It is important to note that under federal law first and second degree murder have much in common. Both are the "unlawful killing of a human being with malice aforethought." 18 U.S.C. §1111(a). The difference in the two degrees of murder is that the more serious form is accomplished by premeditation or in the perpetration of one of the enumerated felonies included in the federal statute, such as kidnapping, robbery, or sexual abuse. However, the difference between the presence and absence of premeditation is a jury matter that is often difficult to pinpoint. No specific period of time must elapse for premeditation to occur, and premeditation need not involve a carefully deliberated plan made in advance of the transaction that turns into murder. Often, in Indian Country cases the difference between a finding of first and second degree murder turns on the issue of intoxication -- particularly whether the degree of intoxication negates the existence of premeditation.

While premeditation or the commission of the homicide in connection with another felony characterizes first degree murder, malice aforethought is nonetheless a requirement of second degree murder. Because of the element of malice, second degree murder is an extremely serious offense reflecting a high level of culpability that should result in very significant punishment. Accordingly, the maximum term of imprisonment authorized by statute for second degree murder is life imprisonment. 18 U.S.C. §1111(b). However, the relevant sentencing guideline, §2A1.2, carries a base offense level of 33 (135-168 months of imprisonment for a Criminal History Category I offender). With a three-level reduction for acceptance of responsibility, the sentencing range drops to 97-121 months. Thus, a defendant convicted of an intentional killing committed with malice would face a guideline sentence as low as about eight years. Despite the fact that first and second degree murder have much in common in terms of their seriousness, the relatively low sentence for the latter creates a huge gap with the mandatory life sentence for the former.

We urge the Commission to evaluate the operation of the second degree murder guideline carefully. First, the Commission should consider whether the base offense level of 33 is appropriately set relative to other forms of homicide, State second degree murder sentences, and guideline sentences for other offenses. For example, the offense level for second degree murder is lower than that for aggravated sexual abuse where the victim is abducted. It is also lower than the sentence for certain bank robberies that result in injury but not death.

Next, the Commission should determine if any specific offense characteristics should be created since the current guideline has none. Some forms of second degree murder are especially aggravated because of, for example, prolonged conduct or dominance over the victim.

Finally, the Commission should study the actual operation of the second degree murder guideline in connection with other aspects of sentencing. In this regard, we have noted several significant problems. For example, many federal homicides are committed in Indian country, but tribal court sentences are excluded from the criminal history calculations in Chapter 4 of the

guidelines. USSG §4A1.2(i). It is not uncommon for a defendant to have a tribal record of assaults and other crimes but, nevertheless, to remain in Criminal History Category I, unless the sentencing judge exercises discretion to depart upward. Multiple counts are another problem since a second count of murder results in just a two-level increase over the first, and a third count results in just a one-level increase over the second -- until no increase at all is provided. USSG §3D1.4. While such vanishing incremental sentences are a problem affecting a number of offenses in the guidelines, the seriousness of homicide makes the result particularly troubling.

Because of factors such as these, I have found that a number of second degree murder cases I have prosecuted have produced sentences that were simply too low in light of the facts of the case.

I have provided the Commission with an excerpt of the court record in the sentencing of Vincent Cling, a case I handled until appointed to my current position. In January 1996, Vincent Cling and a juvenile were stopped by Navajo Police Officer Hoskie Gene as burglary suspects. Both attacked Officer Gene and began choking him. Cling and the juvenile stopped long enough to listen to Officer Gene bargain for his life and then one or both continued to choke him until dead. The evidence at trial showed that Vincent Cling had consumed alcohol prior to committing the offense and the jury returned a guilty verdict of Second Degree Murder. The court sentenced Mr. Cling to 188 months, the top of the calculated guideline range. It is clear from the transcript, which I encourage you to read in its entirety, that the court was frustrated with the amount of incarceration that it could impose under these facts as well as the perceived requirement to credit defendant with two points for acceptance of responsibility.

Another case that falls into this category involves a Navajo man who beat his common law wife to death. The beating took place over a several hour period and while they walked or ran for approximately 1 1/4 miles. Although it appeared that the victim tried several times to escape from her attacker and was recaptured in each instance, the scarcity of witnesses to the events coupled with the defendant's intoxication suggested that a First Degree Murder conviction was tenuous at best, with Second Degree Murder and Voluntary Manslaughter very possible verdicts. The resulting stipulated plea agreement to Second Degree Murder, even though an upward departure, resulted in a sentence of only 144 months. A far lower sentence than defendant was likely to receive under the same facts in state court.

INVOLUNTARY MANSLAUGHTER

I would like to address involuntary manslaughter next. Involuntary manslaughter is the unlawful killing of a human being without malice and occurs either: (1) in the commission of an unlawful act not amounting to a felony, or (2) in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death. It carries a maximum six-year term of imprisonment. 18 U.S.C. §1112.

Under the sentencing guidelines the base offense level for involuntary manslaughter is 10 if the conduct was criminally negligent or 14 if it was reckless. The guideline includes no specific

offense characteristics. USSG §2A1.4. This means that vehicular homicide resulting from reckless driving brought about by intoxication can result in a guideline sentence of just five months of imprisonment and five months of supervised release with home detention for a first offender who accepts responsibility. USSG §5C1.1(d). It is doubtful that such a low sentence serves the purposes of punishment and deterrence necessary to assure that federal roads are safe.

Given the low sentences provided, it is not surprising that there is a high rate of upward departure from the involuntary manslaughter guideline -- 11.7 percent from 1994 to 1996 -- as revealed by recent research by the Commission staff. The Commission should determine the bases for these departures, as well as for downward departures, since a pattern of departures may suggest the need for a particular guideline amendment. In addition, the Commission should take into account the fact that federal involuntary manslaughter sentences are low relative to the State sentences studied by the Commission staff. Federal sentences should reflect current attitudes toward drunk driving and the potential deterrent effect that tougher sentences may produce.

In addition to vehicular homicide resulting from drunk driving, a new type of vehicular homicide is also of concern. It is homicide produced by "road rage." Unfortunately, this type of conduct is becoming an increasingly expected occurrence on our highways. Assistant United States Attorney Randy Bellows will describe a well-known case of road rage that occurred in the Washington suburbs to enlighten you further as to the types of offenses subject to the involuntary manslaughter guideline and the kinds of factors the Commission may wish to address when evaluating this guideline.

The involuntary homicide guideline has no specific offense characteristics that take into account heightened culpability or the extra dangers present in some cases. Thus, in addition to examining the base offense level for this offense, the Commission should consider the inclusion of specific offense characteristics for such factors as the offender's past driving history and current license status for cases involving vehicular involuntary manslaughter. For example, one consideration is whether past convictions for serious driving violations should enhance a sentence more than provided by the criminal history chapter of the guidelines. While a prior conviction for careless or reckless driving counts toward the criminal history calculation, in many cases it provides only a one-point increase -- often not enough to move a defendant to a higher criminal history category. USSG §§4A1.1(c) and 4A1.2(c)(1). In addition, serious past driving violations that do not result in conviction for careless or reckless driving and past licensing actions that are not reflected in counted convictions should also be considered as potential aggravating factors to enhance the sentence. The offender's current licensing status is another relevant factor. An offender who commits involuntary manslaughter while driving on a suspended license deserves a stiffer sentence than one who has not lost his or her driving privileges.

There are many additional factors the Commission can consider in assessing the effectiveness of the current guideline, such as: (1) the duration of the conduct; (2) the number of pedestrians, other drivers, or passengers, placed at risk; (3) the degree of recklessness involved in the defendant's conduct; and (4) the road and traffic conditions at the time of the incident.

In addition to studying vehicular homicide, the Commission should evaluate the effectiveness of the involuntary manslaughter guideline for other forms of the offense. The Commission staff's research shows that about 60 percent of federal involuntary homicides are vehicular, while fights, accidental shootings, and child abuse account for many of the other cases. Again, related past conduct is a factor particularly relevant to these offenses, but such past conduct may receive inadequate treatment in the criminal history guidelines.

Finally, the problems I discussed with respect to second degree murder are also characteristic of involuntary homicide. The exclusion of tribal criminal history understates the need for punishment in many cases. In addition, the multiple count rules, which provide at most two additional offense levels for an additional death, are a real problem, as evidenced by the Narkey Terry case.

In conclusion, the study of the homicide guidelines is an area of great importance. Although the number of cases is small relative to other offenses in the federal system, the need to arrive at sentences that serve the purposes of sentencing -- just punishment, deterrence, incapacitation, and rehabilitation -- is paramount for all offenses, especially those that result in the taking of human life. The Department of Justice would be pleased to aid the Commission in its study of the homicide guidelines and in the development of needed revisions.

Thank you for the opportunity to discuss this important area of the law.