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# UNITED STATES SENTENCING COMMISSION

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**WRITTEN TESTIMONY**

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**PUBLIC HEARING  
MARCH 12, 1998**

# Agenda

United States Sentencing Commission

## PUBLIC HEARING

Thursday, March 12, 1998

Judge Richard P. Conaboy, Presiding

9:30 a.m.

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### Welcome and Introduction of Commissioners

*Dr. John H. Kramer  
Staff Director, U.S. Sentencing Commission*

### Opening Statement

*Judge Richard P. Conaboy  
Chairman, U.S. Sentencing Commission*

- 1 9:45 a.m. **John Bliss**  
*International AntiCounterfeiting Coalition*
- 2 9:55 a.m. **David Wikstrom**  
*New York Council of Defense Lawyers*
- 3 10:05 a.m. **Dennis Lynch**  
*Department of the Treasury*
- 4 10:15 a.m. **Robin Spires**
- 5 10:25 a.m. **Robin Piervinanzi**
- 6 10:35 a.m. **Kathleen M. Williams**  
*Federal Public and Community Defenders*
- 7 10:45 a.m. **Shari Steele**  
*Electronic Frontier Foundation*
- 8 10:55 a.m. **Christopher Fleming**
- 9 11:05 a.m. **Mary Jo Rakowski**
- 10 11:15 a.m. **Ted Brown**  
*Internal Revenue Service*







**PREPARED TESTIMONY OF JOHN S. BLISS  
PRESIDENT, INTERNATIONAL  
ANTICOUNTERFEITING COALITION**

**UNITED STATES SENTENCING COMMISSION**

**March 12, 1998**

My name is John Bliss and I am President of the International AntiCounterfeiting Coalition (IACC). The IACC is a non-profit trade association comprised of more than 170 members, representing corporations, business trade associations and professional firms whose livelihoods depend on the protection of intellectual property rights. Our members are drawn from a cross-section of U.S. industry including auto, apparel, luxury goods, pharmaceuticals, food, computer software, entertainment, and others. Consumers who use the products of our manufacturing members expect these products to be safe and to be of high quality. Unfortunately counterfeiters too often undermine the expectations of consumers by stealing the names and reputations of legitimate manufacturers to sell inferior products for quick profits.

On behalf of the IACC, let me express my gratitude for being afforded this opportunity to testify and offer comments on how Sec. 2B5.3 (Criminal Infringement of Copyright or Trademark) should be amended to best effectuate congressional directives set forth in P.L. 105-147, the No Electronic Theft Act (NET).

The IACC and its members maintain that the only way to effectively deter counterfeiting is to assure that counterfeiters receive jail time for their actions. Stringent criminal penalties are necessary because the nature of counterfeiting as an illicit underground operation does not lend itself to civil enforcement. As a cash business, damages are difficult to prove in counterfeiting cases, and counterfeiters treat monetary damage awards and fines as merely the cost-of-doing-business. The only real deterrent to counterfeiting is the imposition of criminal penalties that result in actual jail time served of one year or more.

### **Scope of Counterfeiting**

In 1982, counterfeiting cost the U.S. an estimated \$5.5 billion. Today, the problem has become an epidemic, generating losses of over \$200 billion. This explosive growth has been accompanied by a migration in the availability of counterfeits from traditional locations like city streets, flea markets, swap meets, and sports stadiums to suburbs, strip-malls, and the shelves of legitimate retail stores.

Of particular concern to the IACC is the increasing availability of fakes that present health and safety risks. Three recent examples underscore this point.

(1) Procter & Gamble, maker of Head & Shoulders shampoo, was forced to take the extraordinary but appropriate step of placing half-page advertisements in at least 27 national newspapers informing the general public that counterfeit Head & Shoulders was available in retail stores. A chief concern of the manufacturer was the fact that the fakes may have contained bacteria, risking infection in users with weakened immune systems.

(2) Counterfeit-labeled infant formula recently found its way onto shelves in Safeway and Pak n' Save grocery stores in 16 states. According to press reports, the fake baby formula caused rashes and seizures in many



of the babies who were given it, prompting concerned parents to notify the legitimate manufacturer.

(3), Counterfeit-labeled confectionery food was seized during a raid in Boston. Illegally labeled as a product of Borden Eagle Brand, the so-called "Almond Bark" butterscotch candy had been stored in unsanitary conditions. Fortunately, while the counterfeit product was awaiting distribution, investigators located the fake food, and confiscated the product.

Another concern is organized crime's growing involvement in product counterfeiting. Attracted by the high profits and low risks generated by counterfeiting and piracy, these notorious organizations operate vast distribution networks to transport fake goods and support other criminal activity. For example, in three recent raids conducted in Los Angeles, law enforcement seized counterfeit Microsoft software and other material with a potential retail value in excess of \$10.5 million. Implicated in this activity were three Chinese organized crime groups known as triads. Los Angeles Sheriff's deputies seized counterfeit software, manuals and holograms and were surprised when they stumbled upon four pounds of plastic explosives, two pounds of TNT, shotguns, handguns, and silencers.

Organized crime has also used counterfeiting to further drug trafficking operations. In a recent New Jersey case, police seized \$400,000 worth of counterfeit handbags. During the raid, law enforcement officials used a trained police dog to discover that heroin had been stitched into the linings of the counterfeit designer bags. Contraband used to transport contraband.

Finally, the sale of counterfeit goods adversely impacts the economy. New York City alone loses over \$400 million a year in lost sales and excise taxes. The U.S. Customs Service estimates that hundreds of thousands of Americans lose their jobs every year due to counterfeiting, and the automobile industry says that they could hire 210,000 additional workers if auto parts counterfeiting could be eliminated. And small legitimate retailers and entrepreneurs suffer as they are forced to compete with companies and retailers selling illegal low-cost fakes.

As these examples demonstrate, counterfeiting is no longer small mom-and-pop operations sewing labels on T-shirts. Counterfeiters are sophisticated, organized crime groups that use counterfeiting to fund and support other criminal activities.

### **Congressional Intent**

Faced with evidence regarding the extent of counterfeiting and its harms to society, Congress recently took several steps to increase the level of priority federal law enforcement attaches to intellectual property crimes. First, congress passed P.L. 104-153, the Anticounterfeiting Consumer Protection Act of 1996, (ACPA). The ACPA recognized that "[t]he counterfeiting of trademarked and copyrighted merchandise -- (1) has been connected with organized crime; (2) deprives legitimate trademark and copyright owners of substantial revenues and consumer goodwill; (3) poses health and safety threats to American consumers; (4) eliminates American jobs; and (5) is a



multibillion-dollar drain on the United States economy." The Senate Judiciary commented that its purpose in passing the ACPA was to "make the dangerous crime of counterfeiting a higher priority for law enforcement and to provide those charged with enforcing the laws the tools they need to do the job." (Senate Report-104-177)

The ACPA sought to accomplish congress' goal by making criminal infringement of a copyright and trafficking in goods or services bearing a counterfeit trademark predicate acts under the Racketeer Influenced and Corrupt Organizations (RICO) statute. Consequently, law enforcement may now combat the entire structure of a counterfeiting organization, from those providing the financing to those involved in the manufacture, distribution and sale of the copies. Criminals sentenced under RICO are also subject to enhanced penalties.

Second, Congress passed the NET, which directs the USSC, to:

(1) ...ensure that the applicable guideline range for a defendant convicted of a crime against intellectual property (including offenses set forth at section 506(a) of title 17, United States Code, and sections 2319, 2319A, and 2320 of title 18, United States Code) is **sufficiently stringent to deter such a crime** and to adequately reflect the additional considerations set forth in paragraph (2) of this subsection. [emphasis added]

(2) In implementing paragraph (1), the Sentencing Commission shall ensure that the guidelines provide for consideration of the retail value and quantity of the items with respect to which the crime against intellectual property was committed.

By directing the Commission to create penalties to deter counterfeiting and piracy Congress recognized its need to increase the actual length of sentences awarded for crimes under title 18, sections 2319, 2319A and 2320.

Congress' directives also have the effect of signaling the Commission to make changes in order to meet obligations set by international agreements to which the United States is subject. Specifically, the United States is obligated by membership in the World Trade Organization to provide penalties including, "imprisonment and/or monetary fines sufficient to provide a deterrent."<sup>1</sup> The North American Free Trade Agreement also requires participating countries to provide penalties to deter counterfeiting activity.<sup>2</sup>

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<sup>1</sup> Trade Related Aspects of Intellectual Property Rights (TRIPs) Section, Part III, Section 5, Article 61

Members shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity.

<sup>2</sup> North American Free Trade Agreement, Part Six, Chapter Seventeen, Article 1717: Criminal Procedures and Penalties

1. Each Party shall provide criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale. Each part shall provide that penalties available include imprisonment or monetary fines, or both, sufficient to provide a deterrent, consistent with the level of penalties applied for crimes of a corresponding gravity.



It is important to note that in its directive to the Commission, Congress did not make corresponding changes to USC 2320, the underlying statute governing trademark counterfeiting. One explanation for Congress's omission is that it believes that existing penalties under the statute are stringent enough to provide a deterrent, if enforced.

Currently, USC 2320 carries with it penalties for first time offenders of up to \$2,000,000 in fines and/or imprisonment of up to 10 years for individuals, and fines of up to \$5,000,000 for corporations. Subsequent convictions may yield fines of up to \$5,000,000 and/or 20 years imprisonment for individuals and \$15,000,000 for corporations. Compared with its trading partners, these penalty levels rank among the highest in the world.

Unfortunately, under current USSC Guidelines, a counterfeiter convicted of violating USC 2320 would have to be caught with over \$120,000 worth of counterfeit merchandise to receive a minimum sentence of one year in jail. To receive the maximum sentence allowed by USC 2320, the counterfeiter would have to be convicted of trafficking in over \$80,000,000 worth of counterfeit merchandise. One result of these high monetary thresholds is that prosecutors are discouraged from pursuing all but the largest counterfeiting cases, because only then can they obtain meaningful criminal sentences under the sentencing guidelines.

One IACC member in particular has experienced difficulty in New Jersey and Southern Florida where federal prosecutors either required high monetary and evidentiary thresholds for prosecution, or outright declined to take any counterfeiting cases.<sup>3</sup> One of the primary reasons cited for not taking the cases was the low penalties associated with counterfeiting under the Federal Sentencing Guidelines.<sup>4</sup> These difficulties have a domino effect on federal law enforcement with the Federal Bureau of Investigation and the US Customs Service frequently declining cooperation because they knew federal prosecutors would not take the case.<sup>5</sup>

## Recommendations

### ***Support Move to Toughen Fraud Standards***

The IACC supports the Commission's proposal to strengthen fraud-related penalties as they apply to counterfeiting and piracy. Although under the proposed amendments first time offenders would have to be convicted of trafficking in over \$40,000 worth of counterfeit goods before facing a minimum sentence of one year in jail, the adjustments should help to raise the average sentence under 2320 above the one year level.

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<sup>3</sup> Letter from Alfred T. Checkett, Corporate Security, Calvin Klein Cosmetics, to John Bliss, President, International AntiCounterfeiting Coalition, September 24, 1997.

<sup>4</sup> Conversation with Alfred T. Checkett, October 1997.

<sup>5</sup> *Ibid.* at 3.



### ***Counterfeiting better linked to theft***

Counterfeiting is typically viewed as a fraud crime against the consumer, a viewpoint reemphasized by the USSC's use of the Fraud loss tables to calculate penalties. Counterfeiting and piracy, however, are more akin to theft. Counterfeiting is the theft of another's reputation and goodwill, along with their marketing and investment resources in order to sell cheap, inferior goods at high profits. Bruce Lehmen, former Assistant Secretary of Commerce, Commissioner of Patents and Trademarks, stated in an interview that, "[t]here is no difference between this economic crime [counterfeiting] and the harm that it has on Americans than literally if somebody walks in and steals money out of your purse, or money out of your wallet or from your credit card. . . .It's taking away from our own ability to make a livelihood and have a workable economy." The Commission should consider linking counterfeiting and piracy crimes to the higher theft penalties, rather than to fraud.

### ***Goal to require minimum penalty of one year imprisonment for most counterfeiters***

As previously mentioned, the IACC maintains that the only way to deter counterfeiting activity is to raise criminal penalties and impose jail sentences of at least one year. In those states that have passed new felony statutes and aggressively enforced the new laws, police, consumers and trademark owners have seen a marked drop in the level of counterfeiting activity. Enforcement from the federal level which results in actual jail time served will serve notice to counterfeiters that their nefarious activities will no longer be tolerated in the United States.

### ***Calculating losses***

The IACC supports the proposed Department of Justice language to "calculate the 'loss to the copyright or trademark owner' in any reasonable manner." As mentioned above, it is very difficult to calculate damages to a trademark holder from counterfeiting because counterfeiters operate a cash business with a limited "paper trail." Counterfeiting also does not necessarily equate into a one-for-one sales loss, since counterfeit merchandise is often sold at a price point far below the actual retail value of the legitimate product. Congress recognized these difficulties when considering the ACPA and added a provision to the civil law allowing trademark holders to elect statutory damages on a per-mark basis. In the criminal context, courts should consider all aspects of the crime, the value of the legitimate goods, the value of the fakes, harm to reputation, dilution of the trademark, and other market forces when evaluating the amount of losses.

### **Conclusion**

The passage of ACPA in 1996 marked the most significant changes in counterfeiting and piracy law in over a decade. Unfortunately the gains made under ACPA will be a Pyrrhic victory until the Federal Sentencing Guidelines are amended to be more commensurate with the stringent sentences proscribed by Congress.







NEW YORK COUNCIL OF DEFENSE LAWYERS

COMMENTS OF THE NEW YORK COUNCIL  
OF DEFENSE LAWYERS REGARDING PROPOSED  
1998 AMENDMENTS TO THE SENTENCING GUIDELINES

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

Our members thus have gained familiarity with the Sentencing Guidelines both as prosecutors and as defense lawyers. In the pages that follow, we address a number of proposed amendments of interest to our organization.

The contributors to these comments, including members of the NYCDL's Sentencing Guidelines Committee, are Marjorie J. Peerce and David Wikstrom, Co-Chair, and Brian Maas, Paul B. Bergman and Abraham L. Clott, an attorney with Federal Defenders in the Eastern District, New York.

COMMENTS RESPECTING PROPOSED AMENDMENTS 1-5, RELATING  
TO REVISIONS OF THE THEFT, FRAUD AND TAX GUIDELINES.

Introduction

The Commission has proposed extensive changes to the sentencing guidelines covering theft, fraud and tax offenses, including a broadening of the definition of "loss" for purposes of calculating monetary adjustments, consolidation of the guidelines for theft, fraud and property destruction, increasing the severity of punishment by changes to the loss tables, and resolving circuit conflicts in the loss area. The NYCDL believes that the Commission should take steps to address the uncertainty and confusion which exists in the District and Circuit courts with respect to the issue of "loss," and that the Commission's lengthy study and thoughtful proposals are valuable. More guidance from the Commission on the numerous and significant issues over which the circuits are split is plainly necessary if the Commission is to fulfill its statutory mandate to enact guidelines which avoid unwarranted sentencing disparities among defendants.

We believe, however, that this is a task which can readily be accomplished within the framework of the current definitions and tables, by resolving circuit splits and providing additional guidance as to the difficult legal questions which sporadically vex courts and litigants alike. We do not believe it is necessary in pursuit of this mission to revamp the

definition of "loss" to broaden the universe of economic harm that is counted in determining the sentence, as Amendment 4 proposes to do, or to modify the enhancement tables to provide for additional punishment, as Amendment 1 proposes to do. We also question the assumption that fraud and similar crimes are not punished severely enough. As set forth below, considerable empirical support exists for the proposition that the current guidelines provide for sentencing ranges of more than sufficient severity. We therefore oppose both Amendments 1 and 4.

**Amendment 1 -- Proposed Changes to the Theft,  
Fraud and Tax Loss Tables**

This Amendment presents two options for revising the theft, fraud and tax loss tables to raise penalties for economic offenses. The NYCDL opposes the Amendment.

We question the assumption that is implicit in the proposed amendments which seek to achieve greater punishment for "white collar" defendants. The position that fraud and similar crimes are not punished with sufficient commensurate severity has no basis in any empirical data. It is a sentiment which runs essentially against the grain of the Commission's statutory purpose to "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence. . ." 28 U.S.C. § 994(j). We recognize, of course, that the statute continues, "or an



otherwise serious offense." That did not mean, nor could it fairly be interpreted to mean, that the Congress intended to endorse a gradual obliteration of a class of non-violent criminal behavior from the sweep of the section.

In addition, Congress expressly directed the Commission that the guidelines ". . . shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, . . ." 28 U.S.C. § 994(g). The NYCDL is unaware of any study that has been undertaken by the Commission which would assess the impact of the increased incarceration that would necessarily result from an escalation of the loss tables and the expanded definition of economic harm that has been proposed. What is particularly ironic, indeed, in the Commission's overall punitive objectives is that the rate of criminal activity has steadily declined in the country since 1990, yet the nation's prison population has steadily increased, with the Federal prison population experiencing one of the highest growth rates. See Appendix, *New York Times* article, "'Defying Gravity,' Inmate Population Climbs," January 19, 1998.

None of these critical matters appear to have been the subject of any rigorous study or consideration. For example, the Commission's "Loss Issues" Working Paper of October 14, 1997, contains no reference to either the impact on prison population or the Congressionally expressed preference that first time, non-

violent felony offenders, be sentenced to non-incarcerative sentences. There is not even a reasoned discussion of why there should be a general increase in sentences of so-called white collar criminals.

It all seems to be nothing more than a viscerally received truth that white collar criminals should be punished more severely than they are already. What the NYCDL finds particularly disturbing in that approach is its attempt to rationalize the sentencing increase under the guise of redressing a disparity in sentencing. That "spin" is reflected, most notably, in the synopsis of the first proposed amendment where the Commission has stated with respect to the two options, each of which would increase sentences: "The purpose of both options is to raise penalties for economic offenses. . .in order to achieve better proportionality with the guideline penalties for other offenses of comparable seriousness." Under the Guidelines, however, disparity in sentencing is a statutorily defined concept that seeks to eliminate disparities in sentences "among defendants with similar records who have been found guilty of similar conduct." (emphasis added) See 18 U.S.C. § 3553(a)(6). Indeed, the limited scope of that injunction is reiterated in 28 U.S.C. § 1991 (1)(B), where the Commission is mandated to avoid "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct. . . .".

The legislative scheme did not broadly mandate the Commission to eliminate disparity between "offenses of comparable seriousness," and certainly not to erode the sharp difference that ought to exist between the punishment of violent and non-violent crime.

The consideration of all of these matters at the staff level and at the pre-amendment stage is of the utmost importance, not only for the reasons we have already outlined but for other reasons as well. The Commission should be, but has not been, institutionally skeptical of the politically expedient clamor to further increase the rate and duration of imprisonment. For example, at the Commission's October 15, 1997 panel discussion concerning loss, all of the invited panelists, with one exception, advocated the theme that sentences were too low, in their views, for white collar defendants.

More than that, the panelists purported, without reference to their authority to do so, to speak on behalf of large and influential institutional groups within the criminal justice system when they endorsed changes that, invariably, will increase the length of imprisonment for first time, non-violent felony offenders.

In contrast, for example, to the position expressed by District Judge Rosen, speaking on behalf of the Criminal Law Committee of the Judicial Conference, is the result of a 1996 FJC Survey of district judges regarding the appropriateness of



severity levels of the theft and fraud guidelines. Approximately 46% of the judges polled, believed that the theft and fraud tables appropriately punished defendants. With respect to small monetary losses, the judges were evenly divided (approximately 14% on each side) between those that believed the guidelines over-punished or under-punished defendants. No specific inquiry was made of judges with respect to midrange monetary losses and, even as to large monetary losses, only a minority, slightly more than a third of judges polled, believed that defendants were under-punished.<sup>1</sup>

In actual practice, district judges further underscore the appropriateness of the punishment presently available under the Guidelines. The offense categories of larceny, embezzlement and fraud are fined at higher levels and with greater consistency than any other primary offense category. For example, in the 1991 fiscal year, two thirds of all cases in those categories resulted in either a fine or an order of restitution.<sup>2</sup> Nearly 50% of all such defendants also received prison sentences in 1991.<sup>3</sup> No other primary offense category grouping has the combined rate of imprisonment and fine/restitution that exists

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<sup>1</sup> See, Attachments to April 2, 1997 Memorandum of Commissioner Goldsmith to All Commissioners.

<sup>2</sup> Appendix B, 1991 Annual Report, USSG.

<sup>3</sup> Id.

with respect to those three primary offense categories.

In 1996, the prison punishment of those three primary offenses was reflected in several tables of the Commission's 1996 Sourcebook of Federal Sentencing Statistics. Downward departures were ordered in more than 25% of all fraud cases; in comparison, upward departures were ordered in just 1.4% of fraud cases. In embezzlement cases, the comparison between downward departures and upward departures was even more dramatic: 17.9% versus 0.1%. In larceny cases the comparison was 13.7% as against 1.4%. Even where the substantial assistance departure is eliminated from the calculations, the ratio between downward and upward departures is still significant: fraud, 6½ to 1; larceny, 4½ to 1; embezzlement, 135 to 1. These comparisons demonstrate that, in such individual cases, federal judges believe that downward departures are often warranted while upward departures rarely are. Moreover, the same type of ratios are revealed when an analysis is made of all sentences which have been imposed within the guidelines range. The ratios between sentences in the first and those in the fourth quarter of the range are: larceny, 7 to 1; fraud, 4 to 1; embezzlement, 19 to 1. Thus, it is simply insupportable to suggest that federal judges believe that sentences in this area are too low.

From the overall sentencing statistics, it seems reasonable to conclude that, since the advent of Guideline

sentencing, a white collar defendant is far more likely to receive a sentence of incarceration than he would have before the guidelines. Moreover, there seems little doubt that such a sentence will be a longer one than a pre-Guidelines sentence. The departure pattern described above strongly suggests that judges consider that the current Guideline sentencing provisions provide, in individual cases, a wholly adequate range within which to impose sufficiently punitive sentences of incarceration. No other reasonable conclusion can be drawn from the sharp differences between downward and upward departures and the equivalently high ratio of first to fourth quarter range sentences. In simple terms, such prison sentences have been toward the lower end of the range and district judges have found adequate reasons for downward departures in a statistically significant number of cases.

One would ordinarily expect that this type of long range experience under the Guidelines would logically lead the Commission to conclude that the offense/prison levels for white collar crimes were, if anything, considered by Federal judges to be higher than they ought to be. Instead, the Commission has paradoxically based much of the proposed changes in white collar sentencing on the assumed but unwarranted premise that white collar sentencing should be harshened "in order to achieve better proportionality with the guideline penalties for other offenses



of comparable seriousness." Given the faulty premise that underlays that position, a regulatory scheme that seeks to increase punishment could not be in accord with the Congressional mandate creating this Commission.

**Amendment 3 -- Consolidation of Guidelines for Theft, Property Destruction and Fraud Offenses**

The NYCDL endorses the Commission proposal to consolidate the guidelines for Theft, Fraud and Property Destruction offenses into a single guideline for Economic Harm. In terms of individual harm, defendant culpability, and breach of societal norms, these offenses are largely synonymous. Most thefts could be charged as frauds, and vice versa; the motives for such offenses are typically the same, and the same social and individual harm is caused. Such offenses are punished under their different guidelines in such similar fashion that it is doubtful that the Commission intended to create different outcomes in the first place. And, as noted above, the minor variations in definitions and application notes under the different sections have led to disparate results and endless speculation as to the Commission's intention in drawing such fine distinctions.

Since a single guideline would eliminate the confusion surrounding the current trifurcated model, streamline application of the guidelines, and impose consistency of definition and application, the NYCDL endorses Amendment 3.

Amendment 4 -- Proposed Change in Definition of "Loss"

Our primary objection to both Option 1 and Option 2 is the change whereby "actual loss" is defined to include "reasonably foreseeable harm resulting from the conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct)."

We agree with the view of many courts and commentators that the current, larceny-based definition is imperfect. In a variety of contexts, as case law over the last decade has confirmed, "the value of the property taken, damaged or destroyed" is not a definition of the utmost helpfulness. This situation, in light of theft and fraud guidelines (and the commentary accompanying them) which are slightly different, and subjected to creative litigation, has spawned difficult and irreconcilable issues and holdings. More guidance and greater specificity is called for.<sup>4</sup>

But any algorithm by which certain objective facts are measured, quantified and tabulated, then translated into a subjective factor -- culpability or blameworthiness -- and ultimately translated back again into another, ostensibly objective, measurement -- how much time a particular human being should be imprisoned for -- will be imperfect.

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<sup>4</sup> For this reason alone, we believe, Option 1, which provides for a dramatically simplified and shortened definition of loss, opening the door to maximum discretion and minimal guidance to sentencing judges, makes a bad situation worse and should be rejected.

Theoretically, in criminal cases, more harm should be correlated with more punishment, just as in civil cases more damages should be correlated with larger monetary judgments. Thus we believe that, while imperfect, the idea of "loss" as an enhancement component in the sentencing determination in theft and fraud cases makes sense. The difficulty for the Commission has always been to strike the balance between little definitional guidance, which inevitably will result in disparity and confusion, and extensive definitional guidance, which will result in burdensome litigation and which, in the final analysis, results in over- or under-punishment in unusual cases anyway. The "solution" to this dilemma is that there is no solution: the answer is almost always ideological and always depends on point of view and frame of reference. Some feel strongly that the system must guard against the too lenient punishment of a criminal who caused no loss (although he intended to cause a large one) while others feel just as strongly that it is wrong to imprison someone for harms caused by factors over which he or she had no control. For every prosecutor who urges a sentencing judge not to reward Professor Bowman's archetypal car thief who stole the Mazda while believing it to be the Maserati, there is a defense lawyer who, just as fervently, urges on the sentencing court the injustice of imposing a luxury-car sentence on his



econobox client.<sup>5</sup>

We believe, however, that the Commission must not lose sight of the primary purpose of incarceration: to punish the offender. Prison is not for rehabilitation (28 U.S.C. § 994(k)), and the Commission should certainly not be driven by concern for making the victim whole. For purposes of determining how much to punish an offender, there is no need to tabulate each portion of every type of "harm" to each victim, as if these variables somehow translate into the "perfect" prison sentence, or as if justice will be thwarted if some of the variables are omitted.

As presently promulgated, the guidelines determine the quantity of punishment by primary reference to the characteristics of the offender, not characteristics of the victim or other circumstances. Thus, in a fraud case, the base offense level is set at 6. This level is subject to a variety of enhancements which appropriately relate to some attribute of the defendant or the nature of his conduct: if he engaged in more than minimal planning, add 2; if he misrepresented that he was acting on behalf of a charity, add 2; if he violated a judicial

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<sup>5</sup> And, as the results of the Commission's Just Punishment survey indicate, there is no consensus as to which of these litigation positions should prevail: the public's view will often depend on whether the driveway from which the car was stolen was located in Alabama or Massachusetts. See Berk and Raggi Report to the U.S.S.C. regarding Just Punishment survey, summarized at U.S.S.C. 1996 Annual Report, p. 42 (noting "strong regional differences in punishment preferences. . .").



order, add 2; if he risked bodily injury to another, add 2, if he used foreign bank accounts, add 2, if he used a special skill, add 2; if he abused a position of trust, add 2; if he was a manager, add 2; and so on. And in addition to these adjustments, there is the additional adjustment for a loss which exceeds \$2,000.

We believe this formulation is a practical method of resolving the question "how much time in prison?" because it focuses primarily on the characteristics and conduct of the offender, together with the direct harm he actually caused. It is fundamentally sound to hold a defendant accountable for factors over which he has control. The change proposed by the Commission in Amendment 4 alters this formulation dramatically because it imports into the calculation notions of foreseeable harm and consequential damages, thus introducing the concept that a defendant might deserve a longer prison sentence because of factors over which he had no control. While there may be cases in which foreseeable consequential damages are so significant that an upward departure may be warranted, the NYCDL opposes the proposal to make consequential damages part of the definition of loss.<sup>6</sup>

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<sup>6</sup> If, as hypothesized above, two identical car thieves stole identical Mazdas from two victims, and Victim 1 leased a car for two months until his Mazda was recovered, while Victim 2 had bad credit and therefore had to walk to work for two months until his Mazda was recovered, it makes no sense, we submit, for

Adding consequential damages to the loss definition will generate a significant additional burden of litigation and fact-finding, to be borne by parties, attorneys, probation officers, district judges and circuit judges alike. Furthermore, disparities are just as likely to emerge, as various courts set precedent on factual questions such as what (and how much) harm is "reasonably" foreseeable, what facts establish "causation," and the like. And finally, the unusual case in which the loss determination does not adequately capture the "harmfulness and seriousness of the conduct" is already accounted for under Application Note 10 of the existing guideline, where a variety of upward departures are invited.

The NYCDL therefore opposes Amendment 4's modified definition of loss.<sup>7</sup> With respect to the balance of Amendment 4, the NYCDL endorses the following options with respect to the loss issues which have arisen under the case law:

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Thief 1 to get a longer prison sentence because Victim 1 suffered consequential pecuniary harm while Victim 2 did not. Furthermore, might not Thief 1's attorney urge that Victim 1 should have mitigated his damages and walked to work, and that the consequential damages should therefore not be counted because the incurring of them was largely within the victim's own control?

<sup>7</sup> For the same reasons, the NYCDL favors the deletion of the special rule in procurement fraud and product substitution cases. Instead, courts should have discretion to depart upward in cases where reasonably foreseeable consequential damages and administrative costs are so substantial that the direct damages sustained by the victim do not adequately reflect the defendant's culpability.



Use of "Gain" as an Alternative to Loss Under  
Application Note 2(a)(6)

The Commission seeks comment on two proposals whereby gain to a defendant may be used as an alternative to loss in certain circumstances. We believe that the decision of the Third Circuit in United States v. Kopp, 951 F.2d 521, 530 (3d Cir. 1991), is correct. The enhancements for monetary loss under § 2B1.1 and § 2F1.1 as a measurement of harm, and thus blameworthiness, focus on the victim. To permit the defendant's gain to serve as an alternative measure of loss even in cases where the victim's loss can be precisely measured would undermine this premise. Thus, the rule should be clarified to provide that gain may be used as an alternative to loss only where actual loss cannot be calculated.

The NYCDL does not believe that the Guidelines should be amended to permit gain to be used whenever it is greater than actual or intended loss. As noted above in our discussion of the proposed amendments to the loss tables, the calculations under the existing tables typically lead to adequate sentences, and there is no need to change the rule. However, the discretion now given to the courts in Application Note 10 to consider an upward departure where the loss calculation does not fully capture the harmfulness or seriousness of the conduct should be amended to make explicit reference to cases in which the defendant's gain far exceeds the victim's loss. Such a change will help assure

that unjust results are avoided where, in the court's view, the defendant's gain is a more reliable indicator of culpability than the victim's loss.

**Inclusion of Interest under Application Note 2(C)**

The NYCDL favors Option A, which provides that loss does not include interest of any kind, so long as in an unusual case the district court retains the power to depart. As discussed above, actual loss should ordinarily drive the calculation of the loss enhancement, if any. The length of a jail sentence under the Guidelines should not be determined upon consequential damages, and the same principle, we submit, precludes the inclusion of interest. Sentencing should not be based upon frustrated expectations. For purposes of calculating loss, we do not believe there is a meaningful distinction between the time-value of money diverted from a victim who could otherwise have invested his funds, and the interest another victim expected to receive on a fraudulent transaction itself. This is particularly true when the bargained for return is itself part of the fraudulent misrepresentation. A defendant who fraudulently borrows \$100 on the promise to repay \$150 is no more culpable than the defendant who steals \$100 on the promise to repay \$125.

Even if the rule were otherwise, in most cases interest would be only a small portion of the overall loss figure. The

added litigation burden, and increased complexity of the guideline, would therefore not substantially alter, let alone improve upon, the use of "loss" as an analog for culpability.

We therefore endorse Option A, excluding interest except as a possible ground for departure.

**Special Rules for Credits Against Loss and for Ponzi Schemes under Application Note 2(B) and 2(D) (2)**

Section 2F1.1 currently allows a defendant to receive a credit against the loss figure in two specific types of cases, but is silent on others. In product substitution cases, the value of the fraudulently substituted product is credited against the loss amount. In loan application cases, under § 2F1.1, comment. (n. 7(a), (b)), the amount of payments made before the crime is discovered plus the value of "any assets pledged to secure the loan" are credited against the amount of the loan.

The NYCDL endorses proposed Application Note 2(B), which provides for a general rule that economic benefit given to the victim prior to discovery of the offense shall be credited in determining the amount of loss. This rule is consistent with current Application Note 7, and consistent with the general rule that net loss adequately measures harm. This proposal has the benefit, however, of defining the time of measurement, defining the "time the offense is detected," and clarifying the impact of acts of the defendant which diminish the value of pledged



collateral. These issues have produced several circuit conflicts, and greater guidance from the Commission is warranted to produce sentencing results which are consistent with one another. In addition, the special rule providing that in a Ponzi-type scheme, the loss consists of the net loss to losing victims represents a thoughtful proposal which avoids both the overpunishment created by excluding all such repayments to victims (United States v. Mucciante, 21 F.3d 1228, 1237-38 (2d Cir.), cert. denied, 513 U.S. 949 (1994), and underpunishment by crediting payments to "investors" who made a profit. (See, United States v. Orton, 73 F.3d 331 (11th Cir. 1996)).

**Special Rule for Cases Involving Diversion  
of Government Benefits under Application Note 2(D)(4)**

The NYCDL believes Option B is preferable. Although basing loss on the gain to criminally responsible participants, is an apparent contradiction to the comments set forth above, in fact this option adequately measures the defendant's culpability. Where the benefits are simply pocketed, the "gain" to the defendant and the loss to the intended recipient are identical; where goods or services are provided by the defendant to the intended recipients, an offset to the defendant's gain will, to that extent, occur; and where loss is simply impossible to determine accurately (e.g., a medical provider paying kickbacks to a referring physician), the gain will adequately measure harm. United States v. Barnes, 117 F.3d 328 (7th Cir. 1997). Option A,

which simply adds up the "value of the benefits derived from intended recipients," while easy to apply, will undoubtedly produce overpunishment in many instances, and cause some district judges to stretch departure factors to compensate. Option B is more sensible and provides much more guidance, and is therefore preferable.



Non-Economic Factors Under Application Note 2(E)

Option 2 presents two additional proposals for treatment of non-economic considerations which themselves might warrant upward departures. Option A identifies five non-economic factors (a primary non-monetary objective, the risk of substantial non-monetary harm, an offense committed for the purpose of facilitating another felony, risk of reasonably foreseeable physical or psychological harm, and a risk of "reasonably foreseeable... substantial loss in addition to the loss that actually occurred) as specific aggravating offense characteristics, warranting either a 2- or 4-level upward adjustment. Option B makes such factors, in addition to other specified non-economic factors, departure considerations only. Option B is the lesser of two evils.

These non-economic factors are already identified in the application notes as factors which, if present in a particular unusual case, might warrant an upward departure. Furthermore, such factors are infrequently utilized as departure considerations. Statistics contained in the Commission's 1996 Sourcebook of Federal Sentencing Statistics indicate that upward departures occurred in only 1.4% of fraud cases.

In connection with the instant proposals, the Commission has identified no reason or justification for making these rarely-used factors specific offense characteristics.

Since in the vast majority case the direct economic harm caused by a defendant's conduct is apparently adequate to serve as a rough analog for harm and, correspondingly, punishment, there is no reason to further refine, let alone complicate, the loss determination. Option B, which continues the treatment of non-economic factors as departure considerations only, is preferable.

### Proposed Issues for Comment

#### **7(A) Aberrant Behavior**

We support the proposal to create a chapter 5 guideline identifying aberrant behavior as a suggested ground for downward departure. We suggest, however, that the second sentence of the proposed guideline requiring that the act be both "spontaneous" and "thoughtless" is unnecessarily restrictive. Almost no criminal acts, except perhaps a purely impulsive theft, are committed completely spontaneously. And "thoughtless" is not a useful standard in this context. Any act committed with literally no thought whatsoever is almost impossible to imagine, and, in any event, probably not a crime in the first place. If it was the intent of the drafters in using the word "thoughtless" to convey the notion that the departure should be limited to those whose criminality was uncharacteristic and impulsive, then that should be more clearly defined.

#### **7(B) Misrepresentation with respect to Charitable Organizations**

We oppose any amendment of the guideline at this time

because there is no true conflict among the circuits. The Fourth Circuit has held that the enhancement required by § 2F1.1(b)(3) for misrepresenting that one is acting for a charitable organization applied to a president of a charitable organization that collected money from the public for bingo games but kept ten percent of the proceeds for himself and his cronies. United States v. Marcum, 16 F.3d 599 (4th Cir.), cert. denied, 513 U.S. 845 (1994). The Tenth Circuit has held that the enhancement did not apply to an official of a public agency who diverted money that the agency received as grants from the government. United States v. Frazier, 53 F.3d 1105 (10th Cir. 1995). These decisions are not inconsistent. Frazier simply held that the facts of that case did not involve any misrepresentation whereby the defendant preyed on the charitable impulses of his victims, and the Circuit distinguished Marcum on this basis. The proposed amendment is therefore unnecessary and may invite unintended sentence enhancements whenever an offense involves a charitable organization--a result plainly not intended by the Commission.

**7(C) Violation of Judicial Process**

The Commission has proposed two options for amending the commentary to § 2F1.1(b)(3) which requires a two-level enhancement "[i]f the offense involved . . . violation of any judicial or administrative order, injunction, decree or process not addressed elsewhere in the guidelines." Option one would



expand the explicit scope of the enhancement to require its application "if the offense involves a violation of a special judicial process, such as a bankruptcy or probate filing." Option two would limit the scope of the enhancement to those cases in which "the defendant commits a fraud in contravention of a prior official judicial or administrative warning, in the form of an order, injunction, decree or process, to take or not to take a specified action." The Commission has stated that some amendment is necessary to address a conflict among the circuits as to whether the enhancement applies when the defendant has filed fraudulent forms in bankruptcy or probate courts.

We oppose any amendment of § 2F1.1(b)(3) at this time because there is no real conflict among the circuits. There is no indication in the appellate case law that similarly situated defendants are being treated differently as a result of different interpretations of the guidelines by different circuits.

Every circuit which has considered the issue (the seventh, eighth, ninth, tenth and eleventh) has held that § 2F1.1(b)(3) applies in the case of bankruptcy fraud. United States v. Mesner, 107 F.3d 1448 (10th Cir. 1997); United States v. Welch, 103 F.3d 906 (9th Cir. 1996) (per curiam); United States v. Michalek, 53 F.3d 325 (7th Cir. 1995); United States v. Bellew, 35 F.3d 518 (11th Cir. 1994) (per curiam); United States v. Lloyd, 947 F.2d 339 (8th Cir. 1991) (per curiam). The First

Circuit declined to reach the issue because it had not been considered by the district court; that circuit, however, explicitly invited the district court to consider the issue on remand. United States v. Shaddock, 112 F.3d 523 (1st Cir. 1997). Finally, the Second Circuit declined to extend the reasoning of these decisions from bankruptcy court filings to probate court filings. United States v. Carrozella, 105 F.3d 796 (2d Cir. 1997).

The only hint of a "conflict" among the circuits is dicta in one Second Circuit decision concerning probate court, which may suggest that it might question the applicability of the enhancement in bankruptcy fraud cases were the issue to be presented. Nevertheless, the state of the law is overwhelmingly clear: application of the enhancement has been affirmed in every bankruptcy fraud case in which the issue has been squarely presented and there is no suggestion that bankruptcy fraud defendants are being treated differently by different circuits.

There is insufficient appellate consideration of the issue in contexts other than bankruptcy filings to warrant promulgating an amendment that may have unintended consequences. Option one invites litigation over the meaning of "special" process, invites application of the enhancement in any case involving bankruptcy or probate, and invites litigation of the

question of what sorts of proceedings are analogous to bankruptcy and probate. Although option two is preferable to option one (because it gives a more clear indication of what the Commission views as the proper scope of the enhancement), we would suggest waiting until the issue has been discussed in more than one reported opinion.

**7(D) Grouping Failure to Appear Count with Underlying Offense**

We support the Commission's proposal to clarify the application of § 2J1.6 and to make clear that the procedure does not violate any statutory mandate.



7(E) Impostors and the Abuse of Trust Adjustment

The Commission has proposed an explicit expansion of the scope of § 3B1.3 to require a two-level enhancement whenever "the defendant provides sufficient indicia to the victim that the defendant legitimately holds a position of private or public trust when, in fact, the defendant does not." We oppose this expansion of the enhancement which will result in an unnecessarily vague definition of "abuse of position of trust" and the possibility of duplicative or even multiplicitous enhancements for the same factors.

The appropriate sentence for an imposter is typically an issue in a fraud case. The issue has arisen, for example, when a con-artist holds himself out as an investment adviser, United States v. Queen, 4 F.3d 925 (10th Cir. 1993), cert. denied, 510 U.S. 1182 (1994), or medical professional, United States v. Gill, 99 F.3d 484 (1st Cir. 1996); United States v. Echervarria, 33 F.3d 175 (2d Cir. 1994). The guidelines appropriately punish such con-artists by treating their conduct as fraud; the guideline for fraud (§ 2F1.1) obviously takes into account that the gist of the offense is some scheme by which the perpetrator held himself out to be something he was not or otherwise tricked the victim out of his funds. The fraud guideline itself already provides an enhancement if the fraud was perpetrated by a particular misrepresentation that the defendant

was "acting on behalf of a charitable, educational, religious or political organization, or a government agency." § 2F1.1(b)(3). An additional enhancement of two-levels is already required if the victim was "unusually vulnerable" or "otherwise particularly susceptible to the criminal conduct." § 3A1.1(b). Two more levels are required on top of that if the defendant abused a "special skill." § 3B1.3. Finally, an upward departure is invited if the victim suffered unusual psychological harm. § 5K2.3.

In the context of this carefully drafted system of multiple enhancements, the purpose of an additional enhancement for abuse of a position of trust is, as stated in the present commentary, that "[p]ersons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily non-discretionary in nature." Present § 3B1.3, by requiring an enhancement for abuse of position of trust or use of a special skill, is thus tailored to identifying a class of defendants who are deserving of more punishment because they took advantage of a relatively insulated position bestowed as a perquisite of professional achievement, to commit a crime that they believed would not be discovered. The proposed amendment, by extending the enhancement to impostors who did not otherwise use a special skill, converts the enhancement from one limited to a carefully defined class of more culpable

defendants to one potentially applicable in garden-variety fraud cases whenever a con-artist takes advantage of a naive victim by holding himself out to be something he is not. That conduct, as suggested above, is already squarely taken into account by the existing fraud guidelines and potentially applicable enhancements. The Commission has not cited any data or case studies whatsoever tending to indicate that such fraud is under-punished and that fraud sentences should generally be increased. In the absence of such a showing, there is no reason to amend the guideline.

**7(F) Instant Offense and Obstruction of Justice**

The Commission has suggested three alternative amendments to § 3C1.1 and/or the Application Notes to clarify the scope of the phrase "instant offense" as used in this section. The Commission asserts that there is a need for clarification because several circuits have interpreted "instant offense" as going beyond the investigation and prosecution of the defendant to include proceedings involving co-defendants. Thus, the Commission believes that § 3C1.1 should define "instant offense" so as to eliminate the differing interpretations.

We support option two, which limits the scope of the obstruction of justice enhancement to conduct relating to the "defendant's instant offense of conviction." Option one would extend the enhancement to conduct in the course of related cases



but beyond the scope of the relevant conduct for the offense of conviction. The cases cited by the Commission in support of option one all arise from the same limited fact pattern: a defendant pleads guilty but is believed to have committed perjury at a co-defendant's trial.

While we acknowledge that this fact pattern is troubling, we suggest that it is inappropriate to extend application of any chapter three adjustment beyond the scope of relevant conduct. The guidelines are drafted carefully in view of the preponderance standard that applies at sentencing to limit consideration to matters defined as relevant conduct--a standard that applies to all issues under chapters two and three. The limitation provided by the relevant conduct guideline is necessary to avoid the prospect of using a sentencing proceeding to punish a defendant for any wrong he may have committed over the course of his life. Perjury at a co-defendant's trial is a separate criminal offense that can and should be prosecuted separately. Such an act of perjury can already be considered in the case of a defendant who has pled guilty as relevant to the determination whether he should be awarded a downward adjustment for acceptance of responsibility. Carving out an exception to the relevant conduct rule for one chapter three guideline inappropriately erodes the principal foundation of guideline

sentencing and whatever claim to legitimacy the guideline accordingly may possess.

We believe that the Second and Seventh Circuits have properly interpreted the phrase "instant offense" as being limited to the actual investigation and prosecution of the defendant. See United States v. Perdomo, 927 F. 2d 111 (2d Cir. 1991) and United States v. Partee, 31 F. 3d 529 (7th Cir. 1994). As the Partee court noted, any broader definition would require the concept of "relevant conduct" being applied to § 3C1.1 without there being any indication that the Commission intended this result. Id. at 532. In fact, the wording of § 3C1.1 strongly suggests that this two point enhancement was intended to be applicable only when a defendant took steps to interfere with his or her own prosecution. Only under those circumstances was an enhancement for an uncharged obstruction or perjury offense considered appropriate.

Despite this seemingly clear limitation in the application of § 3C1.1, several circuits have upheld enhancements where a defendant who has pleaded guilty provided allegedly false testimony exculpating co-defendants, United States v. Walker, 119 F.3d 403, 405-07 (6th Cir. 1997), United States v. Powell, 113 F.3d 464, 468-69 (3d Cir. 1997); United States v. Acuna, 9 F.3d 1442, 1444-46 (9th Cir. 1993), or falsely exculpated co-defendants as part of a plea allocution, United States v. Bernaugh, 969 F.

2d 858,860-862 (10th Cir. 1992). In each case, the court held that "instant offense" included the prosecution of co-conspirators for the same offense of which the defendant was convicted. Although the result in these cases seems to be inconsistent with the narrow language of § 3C1.1, each court has upheld the enhancement based primarily on the sentencing court's familiarity with the case itself and its ability to make an informed assessment of the truthfulness of the testimony at issue. However, as the Third Circuit made clear in Powell, § 3C1.1 does not apply to false statements or other obstructive conduct of a defendant concerning crimes for which the defendant has not been charged regardless of whether there is a close relationship between the charged and uncharged offenses. Powell at 468.

This limited expansion of "instant offense" to include prosecutions of co-defendants results more from a pragmatic reaction to perjury before a sentencing judge than from a reasoned analysis of § 3C1.1 itself. Although it is obviously difficult for courts to ignore such perjury in sentencing, the expansion of "instant offense" beyond the prosecution of the defendant creates a slippery slope which the Commission should avoid. In fact, neither of the options which purport to implement the "majority appellate view" are clearly limited to instances of perjury in trials of co-defendants and, therefore,



create a risk of expanding § 3C1.1 well beyond its intended scope. For instance, option 1(a) proposes a definition of "instant offense" which includes any state or federal offense committed by the defendant or another person that is closely related to the offense of conviction. Under this definition, a two point enhancement would be appropriate if a defendant made a false statement about crimes for which the defendant was investigated but not charged or even about related crimes in which the defendant was not alleged to have participated but about which he or she is believed to have knowledge. This expansive definition of § 3C1.1 was explicitly rejected by the Powell Court, see also United States v. Woods, 24 F.3d 514, 516(3d Cir. 1994), United States v. Kim, 27 F.3d 947, 958 (3d Cir. 1994) and should not be incorporated into the Guidelines.

Option 1(b)'s use of the phrase "closely related offense" is similarly problematic. Although this proposed amendment includes an Application Note which mentions a co-defendant's case as an example of a "closely related case", it does not limit "closely related case" to trials of co-defendants. Moreover, it does not provide any other limiting definition, thereby creating the opportunity for creeping expansion as well as disparities as courts struggle to define "closely related case".

Section 3C1.1 was not intended to be extended in this

way and the Commission should adopt the second option to make clear that even this limited expansion goes beyond the intended reach of § 3C1.1. Short of that result, the Commission should decline to amend the section at all.

**7(G) Failure to Admit Drug Use While on Pretrial Release**

We support the Commission's proposal to amend the commentary § 3C1.1 by making clear that "lying to a probation or pretrial services officer about defendant's drug use while on pre-trial release" will ordinarily not warrant a two-level enhancement for obstruction of justice. The enhancement should be reserved for material obstruction as described in application note 3 of the present guideline.

7(H) Meaning of "Incarceration" for Computing Criminal History

The Commission has proposed two alternative amendments to the Application Notes to § 4A1.2 to resolve the question of whether a sentence directing that someone reside in a community treatment center or halfway house following revocation of parole or probation constitutes "incarceration" for purposes of computing a defendant's criminal history score.

We support option two, which excludes confinement in a community treatment center or a halfway house, and home detention from the definition of incarceration in determining the defendant's subsequent criminal history. Placement in such facilities is often necessary to deal with such problems as substance abuse. Indeed, we have often advised defendants with substance abuse problems to consent to such confinement in the course of their probation or supervised release to assure that they receive the help they need to overcome their problems. The prospect of an increased criminal history score in the future would create a disincentive, however, for consenting to such treatment and cooperating with such placements. Option one would therefore introduce an unnecessarily adversarial element into the relationship between a defendant and counsel, on the one hand, with the Probation Department on the other.

The need for this particular amendment has been created by the conflict between the decision in United States v. Rasco,



963 F. 2d 132 (6th Cir. 1992) which held that residence in a halfway house after the revocation of parole constituted a sentence of incarceration for purposes of § 4A1.2(e)(1) and the decision in United States v. Latimer, 991 F.2d 1509 (9th Cir. 1993) which explicitly rejected the reasoning of the Rasco court and held that residence in a community treatment or halfway house did not constitute a sentence of incarceration.

The reasoning of the Latimer court is consistent with both the language and the underlying policy of the Sentencing Guidelines and should be incorporated into the Application Notes through adoption of Option 2. As the Latimer court points out, the Guidelines make clear distinctions between sentences of incarceration and halfway house or community confinement at various places in the Guidelines including Article 4 concerning the calculation of criminal history. The distinction is created in the Guidelines as part of the effort to ascertain the significance of a prior conviction without the need to relitigate or reconsider the prior offense. If a defendant was incarcerated during the fifteen year period prior to the offense for which sentence is being imposed, the Guidelines presume that the offense was sufficiently serious to warrant increasing the defendant's criminal history score by two or three points. Conversely, if the particular defendant was placed in some sort of community confinement, the Guidelines presume that the offense

was not sufficiently serious and only adds one point to a defendant's criminal history score.

The same analysis should apply in the context of parole or probation revocation. Section 4A1.2(k) explicitly refers to a "term of imprisonment" upon the revocation as being the operative factor. Thus, it is clear that not all revocations of parole or probation will trigger criminal history analysis; rather, it is only those revocations that result in a defendant having been incarcerated. Given that there are many possible grounds for revocation which will vary from jurisdiction to jurisdiction, and given that the available penalties upon revocation also vary from jurisdiction to jurisdiction, it is clear that the Commission determined that it was the imposition of a sentence of imprisonment which would signal a sufficiently serious violation to require inclusion in criminal history calculation. Thus, the use of the word "incarceration" in § 4A1.2(k)(2)(b) demonstrates that the commission reserved the possible application of a three point criminal history increase for those situations where the revocation was considered sufficiently serious to result in a return to prison.

The appropriateness of this result is made clear when one considers the differing bases for revocation decisions. Although the Rasco defendant (as well as Latimer) had his parole revoked because of a subsequent conviction, parole and probation



can be revoked for behavioral reasons such as a failure to report or cooperate with supervising officers or because of a substance abuse problem. Although these situations could well result in some sort of community confinement as a way to facilitate the offender's adjustment or treatment, it does not equate with the sort of conduct which is intended to result in a three point increase in a criminal history calculation.

The Guidelines should remain internally consistent so that sentences of incarceration do not include residence in community confinement or halfway house under any circumstances. Revocation decisions should not be considered differently from the original sentence and the decision to require residence in a community non-prison facility should not be treated as a sentence of incarceration.

**7(I) Whether Downward Departure Precluded if Defendant Commits a "Crime of Violence."**

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The Commission invites comment on four options presented which address a circuit conflict on whether a downward departure is available if the defendant has committed a crime of violence. As it currently exists, the Policy Statement set forth in § 5K2.13 provides that Diminished Capacity not resulting from voluntary use of drugs or other intoxicants may warrant a sentence below the applicable guideline range only if the defendant has committed "a non-violent offense." The issue dividing the circuits has arisen from district and circuit court



analysis of whether or not "non-violent offense" under § 5K2.13 is the same as the term of art "crime of violence," as defined in § 4B1.2 in connection with career offenders. While many courts have construed the terms as synonymous, the NYCDL believes that the view enunciated in United States v. Chatman, 986 F.2d 1446 (D.C. Cir. 1993) and United States v. Weddle, 30 F.3d 532 (4th Cir. 1994) is correct, and the rule should be changed.

The guidelines should make a distinction between definitions applicable to the conduct of career offenders -- recidivists who commit repeated crimes of violence or narcotics dealing -- and offenders whose capacity is diminished because of some mental or psychological infirmity. When the defendant suffers from a mental infirmity, several of the traditional justifications for imprisonment -- punishment, incapacitation and specific deterrence -- are diminished, since the mental infirmity to some extent affected the actions or the defendant's volition in the first place. The reasons career criminals are sentenced for longer periods of time is that earlier punishment has been an ineffective incapacitant and deterrent, and because society must protect itself from such individuals for longer periods of time. These precepts are inapplicable to an offender suffering from diminished capacity. Such an individual needs less punishment and more treatment and/or medication. While the protection of society is clearly paramount, that need can be adequately addressed without the limitations contained in § 5K2.13 as it currently exists. We also believe that the § 4B1.2 definition of "crime of violence" as one involving the "use, attempted use or threatened use of physical force" refers to intentional crimes, and not to crimes with a lesser mental state, i.e., crimes committed through recklessness or by defendants suffering from diminished capacity. This seems plain from the syntax of the

section, and from its placement in the definitional section for "career offenders," since it seems obvious that one could not become a career offender through diminished capacity, negligence, recklessness, or the like. This was the reasoning behind the Seventh Circuit's decision in United States v. Rutherford, 54 F.3d 370 (7th Cir. 1995), construing the career offender section.<sup>8</sup>

The NYCDL therefore endorses Option 4, which eliminates § 5K2.13's unwarranted limitation to nonviolent offenses, while maintaining that a departure will not be appropriate where the offense or the defendant's criminal history indicate a need to protect the public.

**7(A) Proposed Issue for Comment; Should Policy Statement § 5K2.0 Be Amended to Incorporate the Analysis and Holding of Koon v. United States and, if so, How?**

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Policy Statement § 5K2.0 of the Sentencing Guidelines makes clear that sentencing courts retain the authority under the Sentencing Guidelines to depart from the applicable Guideline range. However, this Policy Statement describes the scope of

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<sup>8</sup> Indeed, it is arguable that the "crime of violence" definition in §4B1.2 is itself overbroad. We believe that subdivision (ii), the catch-all provision, or so-called "'otherwise' clause," in §4B1.2, was in fact an impermissible broadening, if not a misreading, of the original Congressional enactment of the Sentencing Guidelines. See the discussion in United States v. Parson, 955 F.2d 858, 874 (3d Cir. 1992), and United States v. Rutherford, 54 F.3d 370 (7th Cir. 1995), in which both Circuit Courts invite the Commission to reexamine the "crime of violence" definition.



this authority in fairly general and non-instructive terms. Given the insights into departures provided by the Supreme Court in its decision in Koon v. United States, 116 S. Ct. 2035, 135 L.Ed. 392 (1996), the policy statement should be amended to incorporate both the Supreme Court's own statement as to the role of departures in the sentencing scheme and its analytical structure for determining whether and to what extent a sentencing court may rely on certain considerations to base a departure determination.

With respect to amplifying on the policy underlying departures, the Policy Statement should be introduced by the first paragraph of Section V of Justice Kennedy's decision. In this paragraph, the Court made clear that the sentencing judge retains discretion under the Guidelines

"to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." 135 L.Ed. 2d at 422.

Although this expression of policy is not inconsistent with § 5K2.0 as presently worded, its inclusion in the Policy Statement will make clear that departure analysis is to play a central role in any sentencing decision.

In addition, a Policy Statement introducing the subject of discretionary departures is incomplete without the Supreme Court's analysis of how a sentencing court should approach the

issue of whether a departure is appropriate in a particular case. To that end, the existing Policy Statement should be amended to add the following language from the Court's decision.

Before a departure is permitted, certain aspects of the case must be found unusual enough for it to fall outside the heartland of cases in the Guideline. To resolve this question, the district court must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing. Whether a given factor is present to a degree not adequately considered by the Commission, or whether a discouraged factor nonetheless justifies departure because it is present in some unusual or exceptional way, are matters determined in large part by comparison with other Guidelines cases. 135 L.Ed. 2d at 413.

The Koon decision also made clear that a sentencing court may consider any factor as an appropriate basis for departure except for those few factors proscribed by the Sentencing Commission itself. Thus, if a factor is not explicitly proscribed, a sentencing court may exercise its discretion to "determine whether the factor, as occurring in the particular circumstances, takes the case outside the heartland of the applicable guideline." This statement should be added to the Policy Statement.

Finally, the Koon decision clarifies the distinction between "encouraged" and "discouraged" factors and sets forth the scope of the sentencing court's discretion with respect to the different categories of sentencing factors. The Court's

definitions of "encouraged" and "discouraged" factors should be explicitly incorporated into the Policy Statement in the language used by the Court. Moreover, the Supreme Court's analysis of how a sentencing court is to apply "encouraged factors" and "discouraged factors" to the facts of a particular case must be added to the Policy Statement in the Supreme Court's own words.



As to "encouraged factors", the Policy Statement should first clarify that the factors that the Sentencing Commission concedes have not adequately been taken into consideration have been deemed "encouraged factors" by the Supreme Court. Having defined "encouraged" factors in this way, the Policy Statement should then incorporate the Supreme Court's explicit direction that a sentencing court is authorized to depart based on an encouraged factor if the applicable Guideline does not already take the factor into account.

As to "discouraged" factors, the Policy Statement should incorporate the Supreme Court's statement as to how such factors are to be used:

If the special factor is a discouraged factor or an encouraged factor already taken into account by the applicable guideline, the court should depart only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present.  
135 L.Ed. 2d at 411.

This statement would substitute for the last paragraph of the current Policy Statement. In addition, the Supreme Court's prescription as to when and how "discouraged" factors can be used as the basis of a departure is inconsistent with the Commentary to the Policy Statement and the Commentary should be deleted.

New York, New York  
March 6, 1998

Respectfully submitted,

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DEPARTMENT OF THE TREASURY  
WASHINGTON, D.C.  
March 5, 1998

SECRETARY OF THE TREASURY

The Honorable Richard P. Conaboy, Chairman  
United States Sentencing Commission  
Thurgood Marshall Federal Judiciary Building  
One Columbus Circle, N.E.  
Washington, D.C. 20002-8002

Dear Chairman Conaboy:

I write on behalf of the Department of the Treasury about an issue that is of great concern to us -- computer-generated counterfeit U.S. currency produced by inkjet printers and color copiers. By this letter, we hope to focus your attention on this growing problem and to explain why the existing Sentencing Guidelines do not adequately address the significant threat it poses to our law enforcement interests as well as to the integrity of U.S. currency worldwide.

Advances in computer technology have dramatically changed the nature of production used in counterfeiting. Operations have evolved from using the traditional method of offset printing to using personal computers connected to scanners or digital input devices, together with inkjet printers and full color copiers. Inkjet printers and copiers are relatively inexpensive, readily available, easily transportable and user-friendly. When using the technology currently available, these devices are capable of producing high-quality counterfeit currency. Paramount to the process, once the image of a currency note is scanned or digitally captured, a personal computer may be used to enhance its quality. The image can then be transmitted electronically -- computer-to-computer over the Internet -- and printed by individuals who lack any specialized computer or graphics knowledge. As a result, today's counterfeiter is able to produce counterfeit currency using a high-quality inkjet printer that can cost as little as \$300.

Statistics show a dramatic increase in the incidence of computer-generated counterfeiting during the past three years. This trend creates serious enforcement problems. In contrast to offenders using offset presses, computer counterfeiters can easily develop or obtain counterfeit images, print them without specialized equipment in batches of any size, and transmit the images to anyone instantaneously. Traditional law enforcement methods, as well as the Sentencing Guidelines, must be adapted to meet the challenges created by this ever-changing technology.

The increase in computer-generated counterfeiting cases represents not only a threat to our law enforcement interests, but also seriously threatens the integrity of our U.S. currency. Maintaining the stability and integrity of U.S. currency is essential to preserving the benefits derived from the dollar's status as a world currency. U.S. bearer obligations serve as a stable and accepted medium of exchange and store of value that is often preferred to local currencies worldwide, particularly in the former Soviet Union, Eastern Europe and Latin America. In addition to the investment and trade benefits associated with the dollar's position as a reserve currency, the



demand for U.S. paper currency provides direct economic benefits for the U.S. government.

According to the Federal Reserve's estimates, approximately \$270 to \$300 billion in U.S. currency is circulating overseas. Applying the 5.7 percent average interest rate on the Federal Reserve's portfolio of government securities during 1996, overseas currency holdings of this magnitude will generate about \$16 billion in interest earnings per year. A 10 percent reduction in overseas holdings of U.S. currency arising, for example, from concern over counterfeiting, would decrease interest earnings and raise the budget deficit (and therefore Treasury's borrowing requirement) by about \$1.6 billion per year for as long as the reduction in holdings persisted.

Any perceived toleration of counterfeiting seriously undermines the broad government interest in maintaining the integrity of U.S. currency. To ensure that integrity, we have undertaken a number of initiatives. For example, we have redesigned certain currency with the intent of re-designing successive denominations and will continue our efforts to educate the public on the security features of each of these new bills. Additionally, the Secret Service has adopted a "zero tolerance" policy for counterfeiting crimes; every case is investigated and pursued. Finally, the Attorney General has joined us in encouraging U.S. Attorneys nationwide to give heightened priority to the prosecution of computer-generated counterfeiting cases. We now hope to work with you to ensure that the Sentencing Guidelines adequately punish criminals who engage in counterfeiting, particularly those who exploit the new computer and printer technologies referenced above.

\* \* \*

As currently written and applied, the Sentencing Guidelines do not adequately address the seriousness of counterfeiting cases, especially those involving computer-generated counterfeit notes. As you know, the current guideline applicable to offenses involving counterfeit U.S. currency, U.S.S.G. § 2B5.1, begins with a Base Offense Level of 9 and provides for incremental increases in offense level in accordance with the fraud monetary loss table in § 2F1.1. Thus, a defendant's guideline range in counterfeiting cases depends largely on the amount of counterfeit inventory seized when the operation is shut down. A low seizure amount results in little if any increase to the base offense level, which in turn yields a minimal sentence. For instance, if the amount of seized counterfeit currency is less than \$5,000 and a defendant accepts responsibility for his actions, under the current guidelines he may be eligible for a sentence of straight probation.

This is exactly the scenario most often encountered in counterfeiting cases involving computer-generated notes and inkjet printers. As reflected in the investigative files of the Secret Service, these cases rarely involve seized currency in excess of \$2,000, much less \$5,000. A counterfeiter using an inkjet printer to produce computer-generated notes can run off currency on an as-needed basis and does not need to maintain a large inventory of counterfeit currency. This differs markedly from the more traditional offset printing method, where the cost of a single production "run" and other factors caused defendants to create large inventories of counterfeit currency at one time. Therefore, computer generated counterfeiting cases usually result in minimal inventory



seizures, and consequently, minimal prison terms under the existing Sentencing Guidelines -- despite the law enforcement and financial risks presented by the criminal activity.<sup>1</sup>

The proposed amendments to the fraud, theft, and tax guidelines for the 1997-98 amendment cycle, now published in the Federal Register for public comment, do not address this problem. The amendment options for §2B5.1 call for the elimination of the fraud monetary table in §2F1.1 and the substitution of a new Reference Monetary Table in U.S.S.G. §2X6.1. While these options raise penalties for economic offenses that have medium to high dollar losses, they leave virtually unchanged the penalties applicable to cases involving lower dollar amounts. This simply fails to confront the very real and growing threat presented by computer-generated counterfeit. The penalty for such offenses remains dependent on the amount of counterfeit currency seized. Indeed, one of the amendment options (Option 1) appears to take a step backward by raising the "cutting point" for the initial offense level increase from \$2,000 to \$5,000. We, of course, do not favor this option, and instead would argue for any combination of options in §2B5.1 and §2X6.1 that provide for the greatest penalty increase at the lowest monetary threshold.

In our view, the necessary remedy must go beyond the amendment options that are currently being considered by the Sentencing Commission. First, we believe that the base offense level in §2B5.1 should be increased by two levels in order to adequately address the harm counterfeiting offenses cause to the integrity of the U.S. currency both domestically and abroad. Further, we ask the Commission to consider adding a specific offense characteristic that would increase the adjusted offense level an additional two levels in all cases involving counterfeit notes produced on printers and full color copiers.<sup>2</sup> This latter amendment would prevent, at least in part, the sentencing windfall defendants currently enjoy through the use of new counterfeiting technology in place of the traditional offset printing method.

In order to further explain the need for these guideline changes, the Secret Service would welcome the opportunity to make a special presentation to you and the rest of the Commission, or your staffs, on the capabilities of new counterfeiting technology and its rapid increase over the past few years. A non-public setting is more appropriate for this type of presentation because of the nature of the information discussed. Additionally, we look forward to presenting more general testimony at the public hearing on March 12, 1998.

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<sup>1</sup> Admittedly, offenses involving the manufacturing of counterfeit currency or the possession of counterfeiting devices and materials prescribe a higher guideline range, see U.S.S.G. §2B5.1(b)(2), but even in those cases a defendant who accepts responsibility may be eligible for a minimum imprisonment term of only one year.

<sup>2</sup> For cases involving the simple possession or passing of counterfeit notes, this would increase the offense level to 13, assuming the base offense level were increased to 11 as we recommend. For cases involving manufacturing or possession of counterfeiting devices, this would raise the adjusted offense level from 15 to 17.

We hope you will support our efforts to achieve this needed sentencing reform, and we look forward to working with you and the entire Commission on this issue.

Sincerely,

Handwritten signature of Robert E. Rubin in black ink.

Robert E. Rubin

cc: Attorney General Janet Reno  
Michael Corlander, U.S. Sentencing Commission







2540 Chadwick Court  
Woodbridge, VA 22192  
(703)490-3964

March 2, 1998

Michael Courlander

United States Sentencing Commission  
1 Columbus Circle, N.E.  
Suite 2-500  
Washington, DC 20008

Dear Mr. Courlander:

My name is Robin Spires. I recently became aware of a public hearing before the Sentencing Commission and would like to be granted the opportunity to express my views on the current Federal Guidelines regarding drug offenses.

My brother has recently been sentenced to 10 years in a federal prison based upon these Guidelines. Growing up in a Christian family, we never really paid much attention to such issues, thinking they would never apply to us. Now after living through my brother's ordeal, I realize that a great injustice has been done.

Let me briefly explain the circumstances surrounding my brother's case. He owned an Auto Body Shop/Used Auto Sales business. Unfortunately, this line of work seems to attract deceitful and dishonest characters. My brother, although a decent and honest man, was lured into the world of drugs as a way to make "easy money". Through the investigation of another individual my brother was brought up on charges. As part of a plea agreement, the Federal Prosecutor told my brother and his attorney that \$50,000 and the forfeiture of a \$40,000 truck must be delivered immediately or my brother would spend 20 years in jail. Having obtained my brother's financial records, showing a negative net worth, it was clear that he had no money. It was implied that it didn't really matter where the money came from. No one else in the conspiracy was required to pay any money. How convenient that my family had the means to do this, while none of the others did. My parents paid the money for my brother and felt it was extortion on the part of the government. Upon doing this my brother was given the hope of Substantial Assistance. (Which they paid.) Additionally, my brother wore a wire four times, twice on his own with no police backup. Information gathered eventually led to the arrest and incarceration of a person. My brother continued to contact the Prosecutor's Office asking if there was anything else he could do. Substantial Assistance was dangled in front of my brother like a carrot. Upon sentencing, "all bets were off". Although everyone agreed that my brother had earned Substantial Assistance (i.e. Probation Officer, Federal Drug Task Force Agent), at the whim of a Prosecutor, it was never granted. As the Judge

delivered the sentence, he expressed his absolute dislike for the guidelines. He stated that the sentence was horrific and said that my brother was extremely rehabilitative. Unfortunately due to these Guidelines his hands were tied.

I am certainly not condoning what my brother did. As his sister and as a mother I am appalled at his conduct. I believe that we should be tough on crime. However, allowing 1 individual (i.e. a Federal Prosecutor) to be the prosecution as well as the "Judge" is just as appalling. I thought the idea of appointing or electing a judge to preside over criminal cases was to promote fairness and justice. Allowing an impartial individual not involved in the case, to make a fair and wise decision. These Federal Drug Guidelines do just the opposite. I would hope that when our LawMakers enacted these Guidelines that what happened to my brother was not the intended result. We found that the authority of the Federal Prosecutor's Office was misused and abused.

As I close this letter a sad thought comes to mind. My mother was told by a family acquaintance that after my brother's sentencing he overheard several of the Drug Task Force Agents say that they really got one over on my brother's attorney. It frightens me to think that personal vendetta's and egos motivated my brother's sentence and not justice.

I am requesting that you consider an amendment to the Federal Guidelines to reduce the sentence of individuals who have no previous criminal record and are considered "extremely rehabilitative" by the presiding judge. Additionally, I would like to see the power of the prosecution limited to ensure those personal feelings don't motivate sentencing. If you have any question or would like to speak with me I may be reached at (703)490-3964. Thank you for allowing me this opportunity to share my family's views on this matter.

Sincerely,

  
Robin A. Spires







I want to thank you for allowing me to speak today. I have come here to tell you about my brother's case. I think it illustrates a problem which the United States Sentencing Commission has devoted substantial attention to, namely, the use of the money laundering guidelines in cases where fraud charges and money laundering charges are included in the same indictment.

The introductory pages of the Federal Sentencing Guidelines Manual sets forth three goals the Congress had in mind when it enacted the Sentencing Reform Act of 1984: 1) honesty in sentencing, 2) uniformity in sentencing and 3) proportionality in sentencing. Use of the guidelines for the past ten years appear to have eliminated much of the disparity in sentencing that prevailed in the pre-guideline era. However, there is significant evidence that present use of money laundering charges and applications of the money laundering guidelines, rather than functioning to reduce disparity are, in fact, contributing to an increase in disparity especially in cases where fraud and money laundering charges are joined in the same indictment. In the hope that what I have to say about my brother's case will contribute to a better understanding of this problem let me describe his case.

My brother Michael was arrested in 1989. He was one of seven people accused of participating in a scheme to steal 38 million dollars from two banks by wire transferring the money to a foreign bank in the Cayman Islands. One of the defendants obtained information about certain bank accounts and banking procedures which made the scheme possible. The first case involved the transfer of 14 million dollars from the Irving Trust Company. The second case involved the transfer of 24 million dollars from Morgan Guaranty. In order to wire transfer money from a domestic bank to a foreign bank overseas it is necessary for the foreign bank to designate a correspondent bank here in the United States. Wire transfers move from the domestic bank to the correspondent bank and then on to the foreign bank.

Both schemes failed. In the Irving Trust case the bank learned of the fraud before any funds could be transferred. In the Morgan Guaranty case funds were wire transferred to the correspondent bank. Morgan Guaranty then discovered the transfer was unauthorized and immediately reversed the transfer. The banks did not lose any money. None of the defendants obtained any money.



My brother and one other person went to trial. The government presented a seven count indictment charging conspiracy to commit wire fraud, bank fraud and money laundering, two counts of attempted bank fraud, wire fraud, two counts of attempted money laundering under 18 USC 1956 (a)(2) and one count of attempted money laundering under 18 USC 1957 (a). The jury found him guilty on all counts. At sentencing on the attempted money laundering charge he requested a downward departure on the grounds that the conduct charged - attempted bank fraud - was outside the heartland of money laundering conduct. The court denied his request. The court imposed seven concurrent sentences of 210 months or 17½ years. Under Section 2S1.1 the court found a base level of 23 and added 11 levels for the amount of money bringing his total to level 34. Under category three (my brother had prior convictions for gambling offenses) his sentence range was 188 to 235 months. 210 months represented the middle of the sentencing range.

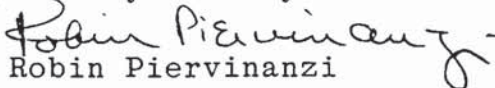
On appeal to the Second Circuit he argued that the evidence was insufficient to support a charge of money laundering or attempted money laundering. In an opinion reported as United States v. Piervinanzi, 23 F.3d 670 (2nd Cir. 1994) the Court rejected his argument and found that the attempted money laundering charge under 18 USC 1956 (a)(2) was established because "the attempted transfer of funds overseas was designed to promote the underlying crime of bank fraud". at page 679. The court dismissed the charge of attempted money laundering under 1957 (a) because "the funds transferred from Morgan Guaranty were not yet property derived from wire fraud and bank fraud and 1957 did not apply". The appeals court remanded the case for sentencing because the charges of conspiracy, attempted bank fraud and wire fraud carried a maximum penalty of five years. The trial court's sentence exceeded the 5 year maximum. On resentencing the court imposed four concurrent 60 month sentences on those charges. The court also reduced the sentence on the money laundering convictions from 17½ years to 15½ years.

I believe my brother's case represents an overly broad interpretation of money laundering activity. His crime was not connected to organized crime or drug trafficking activity. There was no intent to use the funds to promote additional criminal activity. Because his indictment contained money laundering charges in addition to the attempted bank fraud my brother is serving 10½ years more than he would

be serving for the same criminal activity if there were no money laundering charges. His was one of the first cases of money laundering to be tried in the Southern District of New York. The Second Circuit had to rely on decisions from other circuits to support their argument that money laundering charges had been proved. The Court cited three cases United States v. Cavalier, 17 F.3d 90, (5th Cir. 1994); United States v. Paramo, 998 F.2d 1212 (3rd Cir. 1993) and United States v. Montoya, 945 F.2d 1068 (9th Cir. 1991). The Sentencing Commission in its Sept 18, 1997 Report to Congress, cites the very same cases to highlight its concern that the application of the money laundering statutes to cases of fraud and bribery and other non-drug related activity is leading to disparity in sentencing. I note parenthetically that the opinion in my brother's case has never been cited as support for the proposition that fraud activity such as his also constitutes money laundering. The case is cited by other courts but for legal principals unrelated to the money laundering analysis.

In closing I wish to say that I agree with the Commission that changes in the guidelines are needed. I do not claim to know what these changes should be. But if the Commission could devise a more flexible guideline structure that would require courts to examine underlying criminal conduct and consider what connection and relationship such conduct has with money laundering charges in deciding what punishment should be imposed many of the problems giving rise to disparity would be significantly reduced.

Thank you for your consideration

  
Robin Piervinanzi



sentations to the plaintiff concerning the pending severance package." That count further alleges that both the discharge and the misrepresentations caused Mullins "great financial loss." The Fourth Count alleges that Pfizer breached express and/or implied contracts by constructive discharge and misrepresentations, and that Mullins suffered financial loss thereby. Similarly, the Fifth Count alleges that the same actions breached the implied covenant of good faith and fair dealing between Pfizer and Mullins and caused Mullins financial loss. Under the circumstances, the district court's reason for granting summary judgment on these claims was insufficient.

The judgment of the district court is affirmed as to the Second Count and reversed as to the First, Third, Fourth and Fifth Counts. The case is remanded for further proceedings consistent with this opinion.



UNITED STATES of America, Appellee,

v.

Michael PIERVINANZI, Daniel Tichio,  
John M. Bookhart, Jr., Defendants-  
Appellants.

Nos. 1021, 1133, Dockets 92-1473, 92-1474.

United States Court of Appeals,  
Second Circuit.

Argued June 18, 1993.

Decided May 2, 1994.

Defendants were convicted in the United States District Court for the Southern District of New York, Peter K. Leisure, J., of conspiracy, wire fraud, attempted bank fraud, money laundering, and attempted money laundering. Defendants appealed. The Court of Appeals, Mahoney, Circuit Judge, held that: (1) defendant was not guilty of money laundering under statute

governing engaging in monetary transactions in property derived from specified unlawful activity; (2) defendants' unauthorized attempted overseas transmissions of funds in bank wire transfers did not merge with underlying bank fraud so as to preclude independent liability of defendants under statute governing foreign money laundering; and (3) district court's refusal to apply diminished capacity sentencing guideline to defendant was proper.

Affirmed in part, vacated in part, and remanded for resentencing.

#### 1. Criminal Law ⇨1181.5(8)

Court of Appeals would vacate sentences, for conspiracy to commit wire fraud, bank fraud, money laundering, attempted bank fraud, wire fraud, and attempted bank fraud, that were in excess of statutory maximum authorized for those crimes, and would remand case for resentencing. 18 U.S.C.A. §§ 2, 371, 1343, 1344.

#### 2. United States ⇨34

Defendant was not guilty of money laundering under statute governing engaging in monetary transactions in property derived from specified unlawful activity, despite fact that defendant and his coconspirators succeeded in effecting unauthorized wire transfer of money from target bank to correspondent bank, where those funds never came into possession or under control of conspirators. 18 U.S.C.A. § 1957(a).

#### 3. Statutes ⇨188

First canon of statutory construction is that legislature says in statute what it means and means in statute what it says there.

#### 4. Statutes ⇨190

When words of statute are unambiguous, judicial inquiry as to construction of statute is complete.

#### 5. Statutes ⇨188

Unless otherwise defined, statutory words will be interpreted as taking their ordinary, contemporary, common meaning.

#### 6. United States ⇨3

Statute governing dering applied to wire physical conveyances § 1956(a)(2).

#### 7. United States ⇨3

Defendants' un overseas transmission transfers did not m bank fraud so as to liability of defendants ing foreign money la ferring funds overseas reach of United State to success of defend and attempted trans promote underlying U.S.S.G. § 2S1.1, co U.S.C.A.App.; 18 1956(a)(2).

#### 8. Criminal Law ⇨

Fact that Congr guage in defining vic cates that Congress create distinct offens

#### 9. United States ⇨

Statute governi dering can be satisf single offense of ba §§ 1344, 1956(a)(2).

#### 10. Administrative ⇨416.1

Department of forth in United Sta provide no substanti fendants.

#### 11. Criminal Law ⇨

While commenta lines is entitled to de of Guidelines, it is n and should not be co construction of crimi Guidelines are prem et seq., 18 U.S.C.A.

#### 12. Criminal Law ⇨

District court d protect defendant's tential conflict of int



6. United States  $\S$ 34

Statute governing foreign money laundering applied to wire transfers as well as physical conveyances of money. 18 U.S.C.A.  $\S$  1956(a)(2).

7. United States  $\S$ 34

Defendants' unauthorized attempted overseas transmissions of funds in bank wire transfers did not merge with underlying bank fraud so as to preclude independent liability of defendants under statute governing foreign money laundering, where transferring funds overseas and beyond perceived reach of United States officials was integral to success of defendants' fraudulent schemes, and attempted transfers were designed to promote underlying crime of bank fraud. U.S.S.G.  $\S$  2S1.1, comment. (backg'd.), 18 U.S.C.A.App.; 18 U.S.C.A.  $\S\S$  1344, 1956(a)(2).

8. Criminal Law  $\S$ 13(2)

Fact that Congress uses different language in defining violations in statute indicates that Congress intentionally sought to create distinct offenses.

9. United States  $\S$ 34

Statute governing foreign money laundering can be satisfied by carrying on of single offense of bank fraud. 18 U.S.C.A.  $\S\S$  1344, 1956(a)(2).

10. Administrative Law and Procedure  $\S$ 416.1

Department of Justice guidelines set forth in United States Attorneys' Manual provide no substantive rights to criminal defendants.

11. Criminal Law  $\S$ 1206.3(1)

While commentary to Sentencing Guidelines is entitled to deference as interpretation of Guidelines, it is not reviewed by Congress and should not be considered as authoritative construction of criminal statutes upon which Guidelines are premised. U.S.S.G.  $\S$  1B1.1 et seq., 18 U.S.C.A.App.

12. Criminal Law  $\S$ 641.5(.5)

District court did not violate its duty to protect defendant's interests respecting potential conflict of interest arising from reten-

tion of initial counsel for defendant by uncharged coconspirators so as to render defendant deprived of effective assistance of counsel, despite contention that initial counsel failed to advise defendant of possibility of cooperating with government, where government moved to disqualify initial counsel less than a month after court was arguably put on notice of situation, initial counsel withdrew as counsel thereafter, and defendant was not prejudiced. U.S.C.A. Const.Amend. 6.

13. Criminal Law  $\S$ 641.5(7)

When trial judge is made aware of apparent conflict of interest of defense counsel, duty of inquiry arises to protect represented defendant's interests. U.S.C.A. Const. Amend. 6.

14. Criminal Law  $\S$ 1237

District court's refusal to apply diminished capacity sentencing guideline to defendant was proper, despite court's statement allegedly showing that court applied incorrect standard of requiring that diminished capacity be sole cause of offense, where court inquired into element of causation and found it to be missing and accepted government's position that there was no connection between diminished capacity and criminal activity itself, and court's conclusion had adequate basis. U.S.S.G.  $\S$  5K2.13, p.s., 18 U.S.C.A.App.

15. Criminal Law  $\S$ 1299

Two elements are required for downward departure under diminished capacity sentencing guideline: reduced mental capacity, and causal link between that reduced capacity and commission of charged offense. U.S.S.G.  $\S$  5K2.13, p.s., 18 U.S.C.A.App.

16. Criminal Law  $\S$ 1134(3)

Court of Appeals lacked authority to consider defendant's contention that downward sentencing departure was improperly withheld from him, where district judge was clearly aware of his authority to grant downward departure, but declined to exercise it. U.S.S.G.  $\S$  2S1.1, 18 U.S.C.A.App.

CONTRABAND  
RETURN TO ALLENWOOD EDUC. DEPT.



## 17. Criminal Law ⇨1147

District court's exercise of judicial discretion not to grant downward sentencing departure is normally unappealable.

Bettina Schein, New York City, for defendant-appellant Piervinanzi.

Louis Freeman, New York City (Freeman, Nooter & Ginsberg, New York City, of counsel), for defendant-appellant Tichio.

Guy Petrillo, Asst. U.S. Atty. for the S.D. of New York, New York City (Roger S. Hayes, U.S. Atty. for the S.D. of New York, Paul G. Gardephe, Asst. U.S. Atty. for the S.D. of New York, New York City, of counsel), for appellee.

Before: CARDAMONE and MAHONEY, Circuit Judges, and CEDARBAUM, District Judge.\*

MAHONEY, Circuit Judge:

Michael Piervinanzi and Daniel Tichio<sup>1</sup> appeal from judgments of conviction entered July 31, 1992 in the United States District Court for the Southern District of New York. Peter K. Leisure, *Judge*, after an eleven-day jury trial. The jury found Piervinanzi and Tichio guilty of conspiracy, attempted bank fraud, and attempted money laundering charges arising from a scheme to fraudulently transfer funds overseas from an account at Irving Trust Company ("Irving Trust"). The jury also convicted Piervinanzi of wire fraud, attempted bank fraud, attempted money laundering, and money laundering charges stemming from a separate but related scheme targeting an account at Morgan Guaranty Trust Company ("Morgan Guaranty"). The district court sentenced Piervinanzi to concurrent terms of 210 months imprisonment on each of seven counts of conviction, imposed a five-year term of supervised release for one attempted money laundering

count and concurrent three-year terms of supervised release on the six other counts, and fined him \$10,000. The court sentenced Tichio to concurrent terms of 135 months imprisonment on each of his three counts of conviction, and to concurrent three-year terms of supervised release.

We vacate Piervinanzi's conviction for money laundering under 18 U.S.C. § 1957, and remand both cases to the district court for resentencing. We affirm the convictions in all other respects.

#### Background

This case involves two separate but related schemes to transfer funds electronically out of banks and overseas. The basic facts are not in dispute.

#### A. *The Irving Trust Scheme.*

From 1982 to 1988, Lorenzo DelGiudice was an auditor and computer operations specialist for Irving Trust. DelGiudice was responsible for monitoring and improving the security of the bank's wire transfer procedures to prevent unauthorized transfers. In March 1988, Anthony Marchese told DelGiudice that he and Piervinanzi were planning to rob an armored car. DelGiudice suggested a less violent alternative—an unauthorized wire transfer of funds from Irving Trust into an overseas account. DelGiudice explained that he could use his position at Irving Trust to obtain the information necessary to execute such a transfer. DelGiudice also explained that it would be necessary to obtain an overseas bank account for the scheme to succeed, because (1) United States banking regulations made the rapid movement of proceeds difficult, and (2) a domestic fraudulent transfer could, if detected, be readily reversed.

and was sentenced by Judge Leisure to fourteen months imprisonment. Bookhart appealed to this court, but his counsel filed a motion and brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), and we granted both counsel's motion to be relieved and the government's motion for summary affirmation of Bookhart's conviction.

Marchese then intruded on Tichio. After DelGiudice's transfer scheme to Tichio could provide a foreign bank with stolen funds. Tichio, with Dhaniram Rambali, decided to use Rambali's personal Home Bank in the Cayman Islands to transfer the stolen funds. Tichio decided that he would be able to access accounts in the Cayman Islands, sized that the strong bank would prevent tracing of the funds. Tichio told DelGiudice they were then planning to be repatriated in monthly

DelGiudice and Marchese's commitment to the scheme and feared for the view of the protracted Tichio had proposed. Tichio wanted Piervinanzi to be recruited for the operation; Tichio's ties to organized crime deterred Tichio from trusting Marchese and Tichio wanted Piervinanzi, who agreed to the scheme and ensure that Tichio would not be hurt." Piervinanzi told his brother, Robin Piervinanzi, to make the telephone call to Marchese. Piervinanzi would initiate the transfer of funds to the Cayman Islands. Piervinanzi's associates increased the amount of funds to steal from \$10 million to \$20 million, which DelGiudice and Marchese would receive \$4 million each. Piervinanzi would receive \$8 million.

Despite Piervinanzi's involvement, DelGiudice remained concerned and decided to "sabotage" the scheme. However, DelGiudice did not want to know that he was being deceived. He created the script that would be used when calling Irving Trust to obtain one necessary piece of information: the name of a bank in the Cayman Islands that would serve as the cover bank.

2. Under banking practice, funds were transferred overseas directly to the Cayman Islands.

\* The Honorable Miriam Goldman Cedarbaum, United States District Judge for the Southern District of New York, sitting by designation.

1. John M. Bookhart, Jr. was initially indicted as a codefendant for an unrelated scheme with Tichio to defraud Bank Leumi. The two counts regarding this scheme were severed prior to trial. Bookhart pled guilty to one count of bank fraud,



Marchese then introduced DelGiudice to Tichio. After DelGiudice explained the wire transfer scheme to Tichio, Tichio said that he could provide a foreign account to receive the stolen funds. Tichio made arrangements with Dhaniram Rambali, a business associate, to use Rambali's personal account at First Home Bank in the Cayman Islands to receive the stolen funds. Tichio then told DelGiudice that he would be able to provide access to accounts in the Cayman Islands, and emphasized that the strong bank secrecy laws there would prevent tracing of the purloined funds. Tichio told DelGiudice that the \$10 million they were then planning to steal could be repatriated in monthly amounts of \$200,000.

DelGiudice and Marchese distrusted Tichio's commitment to repatriate the money to them and feared for their safety, especially in view of the protracted payout schedule that Tichio had proposed. Marchese suggested that Piervinanzi be recruited to provide security for the operation; Piervinanzi's reputed ties to organized crime, he suggested, would deter Tichio from treachery or violence. Marchese and Tichio then met with Piervinanzi, who agreed to participate in the scheme and ensure that no one would "be hurt." Piervinanzi thereafter asked his brother, Robin Piervinanzi ("Robin"), to make the telephone call to Irving Trust that would initiate the transfer of funds to the Cayman Islands. Primarily in order to compensate Piervinanzi for his efforts, the conspirators increased the amount they planned to steal from \$10 million to \$14 million, of which DelGiudice and Marchese would receive \$4 million each, and Tichio and Piervinanzi would receive \$3 million each.

Despite Piervinanzi's participation, DelGiudice remained concerned about his safety, and decided to "sabotage [the] deal." However, DelGiudice did not want his coconspirators to know that he was intentionally frustrating their efforts. Accordingly, when he created the script that Robin would read when calling Irving Trust, DelGiudice left one necessary piece of information out of it: the name of a bank in the United States that would serve as the correspondent bank of

First Home Bank in the Cayman Islands.<sup>2</sup> DelGiudice knew that if this information was not provided by the caller, it was likely that the transaction would not be consummated.

On July 6, 1988, Robin called Irving Trust and identified himself as "Joseph Herhal," an officer at Beneficial Corporation ("Beneficial"), whose Irving Trust account had been selected by DelGiudice for the transfer. Robin instructed a clerk to wire \$14.2 million from the Beneficial account to Rambali's account at First Home Bank in the Cayman Islands. Reading from the script provided by DelGiudice, Robin supplied all required information except the identity of the correspondent bank. In the course of processing the transaction, the clerk contacted Beneficial to ask the identity of the American correspondent bank for First Home Bank. The clerk then learned that Beneficial had not requested the wire transfer, and halted the transaction. To deflect suspicion from himself, DelGiudice told Marchese that Irving Trust had stopped the transfer because First Home Bank was a "fly by night" operation.

#### B. *The Morgan Guaranty Scheme.*

In July 1988, in a move unrelated to the attempted bank fraud, DelGiudice left his job at Irving Trust and accepted a "better position" at Morgan Guaranty as audit manager. His first assignment at Morgan Guaranty was to perform an audit of the bank's wire transfer department. During the autumn of 1988, DelGiudice, Marchese, and Piervinanzi began planning a fraudulent wire transfer from Morgan Guaranty. DelGiudice agreed to acquire the necessary information for the transfer; Marchese and Piervinanzi took responsibility for arranging other aspects of the scheme, such as locating an overseas bank account to receive the stolen funds, recruiting a "caller" to initiate the wire transfer, and arranging for the distribution of the proceeds. They agreed that Tichio would not be involved in the Morgan Guaranty scheme.

Marchese and Piervinanzi contacted Philip Wesoke, a self-styled "financial consultant" who had previously invested (and lost) money

through a correspondent bank where the recipient offshore bank has an account.

2. Under banking practice, money cannot be transferred overseas directly, but must instead go

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for Piervinanzi. Marchese and Piervinanzi told Wesoke that they represented individuals who wanted to invest \$14 to \$20 million discreetly in a liquid, unregistered asset. Marchese and Piervinanzi told Wesoke that the investment could be "settled" overseas, and Piervinanzi mentioned the Cayman Islands, saying that he and Marchese had recently completed a transaction there. Having learned from the aborted Irving Trust scheme that correspondent bank information was necessary to transfer funds out of the country, Piervinanzi told Wesoke to provide the identity of a correspondent bank.

Wesoke recommended, and Piervinanzi and Marchese agreed, that they invest in diamonds. Wesoke accordingly arranged for a syndicate of Israeli diamond dealers to assemble a portfolio of diamonds for the conspirators. Wesoke also provided Piervinanzi with the necessary account and correspondent bank information for the planned recipient bank.

DelGiudice had selected an account of Shearson Lehman Hutton, Inc. ("Shearson") at Morgan Guaranty as his target, and compiled the necessary information for the transfer. Piervinanzi gave DelGiudice the information that Wesoke had provided concerning the recipient bank and its American correspondent bank. DelGiudice then met with Robin, who again was chosen to make the call that would trigger the fraudulent transfer. DelGiudice provided Robin with the appropriate Morgan Guaranty telephone number, dictated a script for him to use, and told him when to make the call.

On February 23, 1989, Robin telephoned Morgan Guaranty and, purporting to be Shearson employee William Cicio, directed a wire transfer of \$24 million to the selected account in London, with Bankers Trust Company in New York ("Bankers Trust") serving as the correspondent bank. Although Robin supplied all the information needed to complete the transfer, Morgan Guaranty's clerk became suspicious because she had spoken with Cicio previously, and discerned that the voice on the telephone was not Cicio's. The clerk processed the transfer, but reported her suspicions to a supervisor. Either the supervisor or the clerk then contacted Shear-

son and learned that the transaction had not been authorized. Although the \$24 million had already reached Bankers Trust, the wire transfer was stopped and reversed.

### C. *The Proceedings Below.*

#### 1. *Indictment and Trial.*

The FBI arrested Piervinanzi on March 2, 1989 for his participation in the Morgan Guaranty scheme. On March 20, 1989, the original indictment was filed in this case, charging Piervinanzi alone with one count of wire fraud in violation of 18 U.S.C. §§ 1343 and 2. A twenty-three count superseding indictment was filed on December 18, 1990. This indictment was redacted to seven counts at trial. Counts one through three involved the Irving Trust scheme, while counts four through seven involved the Morgan Guaranty scheme. Count one charged Piervinanzi and Tichio with conspiracy to commit wire fraud, bank fraud, and money laundering in violation of 18 U.S.C. § 371. Count two charged Piervinanzi and Tichio with attempted bank fraud in violation of 18 U.S.C. §§ 1344 and 2. Count three charged Piervinanzi and Tichio with attempted money laundering in violation of 18 U.S.C. § 1956(a)(2) and 2. Count four charged Piervinanzi with wire fraud in violation of 18 U.S.C. §§ 1343 and 2. Count five charged Piervinanzi with attempted bank fraud in violation of 18 U.S.C. §§ 1344 and 2. Count six charged Piervinanzi with attempted money laundering in violation of 18 U.S.C. §§ 1956(a)(2) and 2. Count seven charged Piervinanzi with money laundering in violation of 18 U.S.C. §§ 1957(a) and 2. Trial commenced on May 1, 1991 and concluded on May 17, 1991, when the jury returned a verdict convicting Piervinanzi and Tichio on all counts.

#### 2. *Sentencing of Piervinanzi.*

At sentencing, Piervinanzi requested a downward departure on several grounds, arguing principally that: (1) the conduct underlying his money laundering convictions fell outside the "heartland" of the money laundering Guideline, and was more properly sentenced as bank fraud; and (2) he was suffering from diminished mental capacity at

the time of the offense the conduct underlying convictions was more characterized as bank fraud. commentary to USSG § history of pertinent minutes, and this court's *States v. Skinner*, 946 Cir.1991), in which we court may depart downward underlying a money falls outside the "heartland" addressed by the mon. In denying the downward. Judge Leisure found the conduct, involving the attempted million in fraud proceeded "a heartland case for offense."

The court confronted professional opinion Piervinanzi's capacity. The claim stemmed from Piervinanzi had sustained. The defense's position that Piervinanzi suffered from a "major depressive disorder" as a result of which left Piervinanzi unable to function to a degree which might have enhanced his sentencing. A psychologist concluded that Piervinanzi's participation in the bank fraud was a significant function of the significant mental capacity that resulted in a diagnosis of Major Depressive Disorder.

The government's position was that: (1) letters submitted on behalf at sentencing were unable to function to a degree which might have enhanced his sentencing. (2) Piervinanzi had a history of treatment after the offense. His role in the Irving Trust Guaranty schemes involved laboration that "would have reduced his mental capacity due to mental illness." The government's psychiatrist concluded on no basis to conclude that Piervinanzi was suffering from diminished mental capacity at the time of the offense.

3. Section 1344 has since been amended to provide for a maximum sentence of 30 years. See Financial Institutions Reform, Recovery and Enforcement Act of 1989.



the time of the offense. In contending that the conduct underlying his money laundering convictions was more appropriately characterized as bank fraud, Piervinanzi cited the commentary to USSG § 2S1.1, the legislative history of pertinent money laundering statutes, and this court's opinion in *United States v. Skinner*, 946 F.2d 176, 179-80 (2d Cir.1991), in which we held that a sentencing court may depart downward if the conduct underlying a money laundering conviction falls outside the "heartland" of the conduct addressed by the money laundering statute. In denying the downward departure motion, Judge Leisure found that Piervinanzi's conduct, involving the attempted transfer of \$38 million in fraud proceeds overseas, constituted "a heartland case for a money laundering offense."

The court confronted diametrically opposed professional opinions concerning Piervinanzi's capacity. The diminished capacity claim stemmed from severe injuries that Piervinanzi had sustained in a 1984 car accident. The defense's psychologist concluded that Piervinanzi suffered from "post-traumatic stress disorder" as a result of the accident, which left Piervinanzi "vulnerable to any propositions that might offer him an opportunity to enhance his sense of self worth." The psychologist concluded that Piervinanzi's participation in the bank fraud schemes was "a function of the significantly diminished mental capacity that resulted from his Post-traumatic Stress Disorder."

The government's psychiatrist pointed out that: (1) letters submitted on Piervinanzi's behalf at sentencing indicated that he "was able to function to a large degree and had formed positive interpersonal relationships;" (2) Piervinanzi had sought no psychiatric treatment after the 1984 accident; and (3) his role in the Irving Trust and Morgan Guaranty schemes involved planning and collaboration that "would be difficult for one whose mental capacity was significantly reduced due to mental disease." The government's psychiatrist concluded that there was no basis to conclude that Piervinanzi "had a

significantly reduced mental capacity to evaluate his actions or the actions of those around him," or that there was any "connection between his ongoing actions at the time of the offenses and psychological symptoms."

The district court declined to grant Piervinanzi a downward departure for diminished mental capacity, concluding that Piervinanzi had not shown "that there was some impairment of his mental functioning which caused him unwittingly to be involved in this scheme," and that "his own conduct and actions and conversations belie that position." The court added that the government's position that there was "no connection between the [asserted] diminished capacity and the criminal activity itself" was "well-taken."

USSG § 2S1.1(a)(1) prescribes a base offense level of twenty-three for violations of § 1956(a)(2). The court increased the base by eleven levels to account for the amount of the potential loss, \$38 million dollars, *see id.*, § 2S1.1(b)(2)(L), for a total offense level of thirty-four. Given Piervinanzi's criminal history category of III, the applicable Guidelines range for the money laundering offenses (counts three, six, and seven) was 188-235 months. Although the applicable statutory maximum sentence for the conspiracy, wire fraud, and attempted bank fraud convictions (counts one, two, four, and five) was five years imprisonment, *see* 18 U.S.C. §§ 371, 1343, 1344,<sup>3</sup> the court sentenced Piervinanzi to concurrent terms of 210 months imprisonment on each of the seven counts of conviction.

### 3. Sentencing of Tichio.

Tichio also sought a downward departure on the basis that the Irving Trust scheme was "nothing more than a modern day bank robbery," and thus his conduct fell outside the heartland of the money laundering statute. Although recognizing his authority to grant a downward departure under applicable law, Judge Leisure declined to do so. Judge Leisure concluded that Tichio's con-

<sup>3</sup> § 961(k), 103 Stat. 183, 500; Crime Control Act of 1990, Pub.L. No. 101-647, § 2503(j), 104 Stat. 4789, 4861.

<sup>3</sup> Section 1344 has since been amended to provide for a maximum sentence of thirty years. *See* Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub.L. No. 101-73,

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duct fell within the heartland of the conduct prohibited by the money laundering guidelines, and that even if it were not within this heartland, he would not grant a downward departure. The court added nine levels to the base offense level of twenty-three to account for the potential loss attributable to the Irving Trust scheme, for a total offense level of thirty-two. See USSG § 2S1.1(a)(1), (b)(2)(J). Because Tichio had a criminal history category of I, the applicable Guidelines range for the attempted money laundering offense (count three) was 121-151 months. The court sentenced Tichio to 135 months imprisonment on counts one, two, and three, to run concurrently, although the statutory maxima for counts one (18 U.S.C. § 371) and two (18 U.S.C. § 1344, cf. supra note 3) were five years.

This appeal followed.

#### Discussion

On appeal, Piervinanzi argues that: (1) his conduct did not violate the federal money laundering statutes under which he was convicted, 18 U.S.C. §§ 1956(a)(2) & 1957(a); (2) the first of his four trial attorneys had a conflict of interest that resulted in the deprivation of his Sixth Amendment right to counsel; and (3) the district court incorrectly failed to grant him a downward departure for diminished capacity pursuant to USSG § 5K2.13. Tichio contends that his conduct did not come within the "heartland" of the money laundering guideline, and accordingly that he should have been accorded a downward departure and sentenced according to the guideline for his "real crime" of bank fraud. He also joins in Piervinanzi's arguments, see Fed.R.App.P. 28(i), thus associating himself with the claim that § 1956(a)(2) is inapplicable to the Irving Trust scheme.

[1] As an initial matter, we note that the district court imposed sentences for counts one, two, four, and five in excess of the statutory maxima authorized for the crimes

4. As initially enacted, section 1956(c)(7)(D) specifically listed "an offense under . . . section 1344 (relating to bank fraud)" as a "specified unlawful activity." See 18 U.S.C. § 1956(c)(7)(D) (1988). This listing was deleted in 1992 as redundant, see Housing and Community Development Act of

charged therein. Piervinanzi received concurrent sentences of 210 months imprisonment for counts one, two, four, and five, while Tichio received concurrent sentences of 135 months imprisonment for counts one and two. The maximum applicable sentence under 18 U.S.C. §§ 371, 1343, and 1344 (cf. supra note 3) is five years. We accordingly vacate the excessive sentences and remand for resentencing on these counts. See *United States v. Restrepo*, 986 F.2d 1462, 1462-63 (2d Cir.), cert. denied, — U.S. —, 114 S.Ct. 130, 126 L.Ed.2d 94 (1993).

We turn to the arguments presented on appeal by Piervinanzi and Tichio.

#### A. Money Laundering Conviction of Piervinanzi under § 1957(a).

Piervinanzi was convicted on count seven of the indictment of violating 18 U.S.C. § 1957(a) for his participation in the Morgan Guaranty scheme. This statute provides in relevant part:

(a) Whoever . . . knowingly engages or attempts to engage in a monetary transaction in criminally derived property that is of a value greater than \$10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).

(f) As used in this section—

(2) the term "criminally derived property" means any property constituting, or derived from, proceeds obtained from a criminal offense; and

(3) the term "specified unlawful activity" has the meaning given that term in section 1956 of this title.

As defined in § 1956, "specified unlawful activity" includes bank fraud. See § 1956(c)(7)(D).<sup>4</sup>

✓ [2] Count seven charged that Piervinanzi violated § 1957 by fraudulently causing the

1992, Pub.L. No. 102-550, § 1524(1), 106 Stat. 3672, 4064, presumably because bank fraud is comprehended in the reference in § 1956(c)(7)(A) to "any act or activity constituting an offense listed in section 1961(1) of [title 18]."

transfer of approximately \$1 million from Morgan Guaranty. Piervinanzi's interpretation of the language of the statute of transactions in which a defendant obtains "criminally derived property" engages in a monetary transaction. Because the funds from Morgan Guaranty were property derived from the wire transfer fraud scheme, Piervinanzi's contention did not come within the scope of § 1957. The government's interpretation of this reading of the statute, and Piervinanzi's request to vacate his conviction on this count.

[3-5] "[T]he starting point in interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Act v. GTE Sylvania*, 447 U.S. 10: 2051, 2056, 64 L.Ed.2d 766 (1980). The first canon of statutory construction is "a legislature says in a statute what it means in a statute what it means." *Connecticut Nat'l Bank v. GTE Sylvania*, 112 S.Ct. 1146, 1146: 391 (1992) (collecting cases). "[w]hen the words of a statute are unambiguous, . . . this first canon is to be applied." *Rubin v. United States*, 447 U.S. 101, 101 S.Ct. 698, 701, 66 L.Ed.2d 101 (1980). Finally, "[u]nless otherwise indicated, words will be interpreted in their ordinary, contemporary, common meaning." *Harris v. Sullivan*, 968 F.2d 1000, 1000: 444 U.S. 37, 42, 100 S.Ct. 1146, 1146: 199 (1979).

The language of § 1957(a) is unambiguous. Piervinanzi's interpretation of the statute is contrary to the ordinary meaning of the words. The statute prohibits possession of a thing in which a defendant obtains "criminally derived property" through a wire transfer fraud scheme. Similarly, the words "obtain" implies ownership, or the right to possess, enjoy, and dispose of the thing. The use of such language indicates a congressional intent that the proceeds of a crime be in the defendant's possession before he can attempt to transfer them in violation of § 1957(a). See *States v. Johnson*, 971 F.2d 1000, 1000: 199 (1992).



transfer of approximately \$24 million from Morgan Guaranty. Piervinanzi argues that the language of the statute only encompasses transactions in which a defendant first obtains "criminally derived property," and then engages in a monetary transaction with that property. Because the funds transferred from Morgan Guaranty were not yet property derived from the wire fraud and bank fraud scheme, Piervinanzi contends, his actions did not come within the purview of § 1957. The government does not dispute this reading of the statute, and joins Piervinanzi's request to vacate his conviction on this count.

[3-5] "[T]he starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980). Thus, the first canon of statutory construction is that "a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, — U.S. —, —, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391 (1992) (collecting cases). Indeed, "[w]hen the words of a statute are unambiguous, . . . this first canon is also the last: 'judicial inquiry is complete.'" *Id.* (quoting *Rubin v. United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 701, 66 L.Ed.2d 633 (1981)). Finally, "unless otherwise defined, [statutory] words will be interpreted as taking their ordinary, contemporary, common meaning." *Harris v. Sullivan*, '968 F.2d 263, 265 (2d Cir.1992) (quoting *Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311, 314, 62 L.Ed.2d 199 (1979)).

The language of § 1957 supports Piervinanzi's interpretation of that statute. The ordinary meaning of the word "obtained" entails possession of a thing. See Webster's Third New International Dictionary 1559 (1986). Similarly, the word "property" implies ownership, or the "exclusive right to possess, enjoy, and dispose of a thing." *Id.* at 1818. The use of such language demonstrates a congressional intent that the proceeds of a crime be in the defendant's possession before he can attempt to transfer those proceeds in violation of § 1957. See *United States v. Johnson*, 971 F.2d 562, 569 (10th

Cir.1992) ("both the plain language of § 1957 and the legislative history behind it suggest that Congress targeted only those transactions occurring after proceeds have been obtained from the underlying unlawful activity"); *United States v. Lovett*, 964 F.2d 1029, 1042 (10th Cir.) ("Congress intended [§ 1957] to separately punish a defendant for monetary transactions that follow in time the underlying specified unlawful activity that generated the criminally derived property in the first place.") (citing H.R.Rep. No. 855, 99th Cong., 2d Sess., pt. 1, at 7 (1986) (the "House Report")), *cert. denied*, — U.S. —, 113 S.Ct. 169, 121 L.Ed.2d 117 (1992).

Piervinanzi and his colleagues succeeded in transferring \$24 million from Morgan Guaranty to Bankers Trust, but these funds never came into the possession or under the control of the conspirators. Thus, Piervinanzi was improperly convicted of money laundering in violation of § 1957, and we reverse his conviction on count seven.

#### B. Money Laundering Convictions under § 1956(a)(2).

Piervinanzi contends that the proof at trial did not establish the elements of money laundering or attempted money laundering under 18 U.S.C. § 1956(a)(2), and therefore that his convictions under counts three and six of the indictment must be reversed. He argues that § 1956(a)(2) is not violated unless there is some "secondary laundering activity not previously made criminal by pre-existing criminal statutes." Accordingly, he contends, because the asserted criminal laundering activity, the overseas transfer of the bank funds, was simply a component of the bank frauds that the conspirators attempted to perpetrate against Irving Trust and Morgan Guaranty, there was no analytically distinct "secondary" activity, and thus no criminal laundering violative of § 1956(a)(2).

Before addressing this contention, however, we must consider a statutory issue that has not been raised by the parties, and pertains only to the Irving Trust scheme.

#### 1. Language of § 1956(a)(2) Applicable Only to Irving Trust Scheme.

At the time of the Irving Trust scheme (March–July 1988), § 1956(a)(2) read in pertinent part:

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(2) Whoever transports or attempts to transport a monetary instrument or funds from a place in the United States to or through a place outside the United States ...

(A) with the intent to promote the carrying on of specified unlawful activity, ... shall be sentenced to a fine ... or imprisonment for not more than twenty years, or both.

18 U.S.C. § 1956(a)(2) (Supp. V 1987) (emphasis added).

After the failure of the Irving Trust scheme, but prior to the execution of the Morgan Guaranty scheme in February 1989, Congress amended subsection (a)(2) of § 1956 to apply to

Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States....

18 U.S.C. § 1956(a)(2) (1988) (emphasis added); see Anti-Drug Abuse Act of 1988, Pub.L. 100-690, § 6471(b), 102 Stat. 4181, 4378 (enacted Nov. 18, 1988). Subsection (A) remained unchanged.<sup>5</sup>

Although the parties have not put the question before the court, we must consider whether § 1956 as it stood at the time of the Irving Trust scheme, prohibiting only "trans-

5. Section 1956(a)(2) has subsequently been amended in ways not germane to this litigation. See Crime Control Act of 1990, Pub.L. No. 101-647, § 108, 104 Stat. 4789, 4792; Housing and Community Development Act of 1992, Pub.L. No. 102-550, § 1531(a), 106 Stat. 3672, 4066.

6. Section 2314 was amended, as part of the same legislative enactment that similarly amended § 1956(a)(2), to apply to "[w]hoever transports, transmits, or transfers ... money." See Anti-Drug Abuse Act of 1988, Pub.L. 100-690, § 7057(a), 102 Stat. 4181, 4402 (1988). Senator Biden, chairman of the Senate Judiciary Committee (which considered and reported these amendments), commented that both amendments were meant to clarify Congress' original purpose in prohibiting both physical transportation and wire transfer of money. He stated that the amendment to § 1956(a)(2)

would clarify that the term "transports" in the money laundering statute was intended to include electronic and other forms of movement of funds other than physical transportation. 134 Cong.Rec. S17367 (statement of Sen. Biden).

port[ation]" of "funds" to an overseas destination, applied to wire transfers. The term "transport" is not defined in the statute. It could be argued that the ordinary meaning of the term, i.e., to "carry" or "convey" a thing from one place to another, see Webster's Third New International Dictionary 2430, denotes only the physical transportation of an object and does not encompass wire transfers. See G. Richard Strafer, *Money Laundering: The Crime of the '90's*, 27 Am.Crim.L.Rev. 149, 163 n. 86 (1989).

[6] We conclude, however, that the plain language of the statute applies to wire transfers as well as physical conveyances of money. The term "transports" must be considered in light of the objects to be transported, that is, "monetary instrument[s] or funds." As the Ninth Circuit has observed, "where money is concerned, a contemporary meaning of 'transport' would have to include a wire transfer, since funds are increasingly 'conveyed' electronically." *United States v. Monroe*, 943 F.2d 1007, 1015 (9th Cir.1991) (construing language of § 1956(a)(2) prior to its 1988 amendment), cert. denied, — U.S. —, 112 S.Ct. 1585, 118 L.Ed.2d 304 (1992). Similarly, this court has construed 18 U.S.C. § 2314, which then prohibited the "transport[ation] in foreign or interstate commerce [of] ... money," to include wire transfers,<sup>6</sup> as follows:

He also observed that the amendment to § 2314 was designed to codify appellate court holdings that 18 U.S.C. [§] 2314 is not limited to the physical transportation of stolen or fraudulently acquired money or property but also extends to the situation in which such proceeds are transmitted or transferred electronically in interstate or foreign commerce. Noting that ... in modern times banks seldom move funds physically but rather do so through electronic transfers, three courts of appeals have recently rejected contentions that section 2314 is limited—because of the use of the verb "transports"—to instances of physical asportation [sic] of money. *United States v. Gilboe*, 684 F.2d 235 (2d Cir.1982), cert. denied, 459 U.S. 1201, 103 S.Ct. 1185, 75 L.Ed.2d 432 (1983); *United States v. Wright*, 791 F.2d 133 (10th Cir.1986); *United States v. Goldberg*, 830 F.2d 459 (3d Cir.1987). No contrary ruling exists. Nevertheless, in order to clarify the statute and avoid further litigation, it seems appropriate to add verbs—"transmits" and "transfers"—that clearly reach acts of electronic movement of money.

The question whether electronic transfers of funds are one of first impression regard it as a difficult signals in this context which funds are transported we suspect that actual dealings between banks, particularly international transactions.

*United States v. Gilboe*, 684 F.2d 235 (2d Cir.1982), cert. denied, 459 U.S. 1201, 103 S.Ct. 1185, 75 L.Ed.2d 432 (1983).

As best we can ascertain, the court that has considered this question has reached the same conclusion. See *LaSpesa*, 956 F.2d 1027, 1031 (10th Cir.1992) (construing § 2314); *Moore*, 1015 F.2d 1015 (construing § 1956(a)(2) v. *Kroh*, 896 F.2d 1524 (10th Cir.1990) (construing § 2314), rehearing denied, 896 F.2d 1524 (8th Cir.), on rehearing, 896 F.2d 1524 (8th Cir.1990) (in banc); *Goldberg*, 830 F.2d 459, 464 (10th Cir.1992) (same); *United States v. Wright*, 791 F.2d 133, 136-37 (10th Cir.1986).

We accordingly turn to the question whether Piervinanzi's conduct provides a valid basis for his conviction under three and six of the indi-

## 2. Scope of Section 1956

Piervinanzi contends that § 1956(a)(2) (1988), its interpretation under pertinent case law, the United States Sentencing Guidelines, and the Guidelines commentary under the statute, and the Guidelines commentary under the statute, support the conclusion that this provision prohibits "laundering" activity that is distinct from the underlying crime that it promotes, and that wire transfers intended in this context fall within this statutory requirement. That follows, we reject § 1956(a)(2).

*Id.* at S17370.

7. Section 1956(a)(1) pro-



The question whether the section covers electronic transfers of funds appears to be one of first impression, but we do not regard it as a difficult one. Electronic signals in this context are the means by which funds are transported. . . . Indeed, we suspect that actual dollars rarely move between banks, particularly in international transactions.

*United States v. Gilboe*, 684 F.2d 235, 238 (2d Cir.1982), cert. denied, 459 U.S. 1201, 103 S.Ct. 1185, 75 L.Ed.2d 432 (1983).

As best we can ascertain, every other court that has considered this question has reached the same conclusion. See *United States v. LaSpesa*, 956 F.2d 1027, 1035 (11th Cir.1992) (construing § 2314); *Monroe*, 943 F.2d at 1015 (construing § 1956(a)(2)); *United States v. Kroh*, 896 F.2d 1524, 1528-29 (8th Cir.) (construing § 2314), rehearing granted, judgment vacated on other grounds, 904 F.2d 450 (8th Cir.), on rehearing, 915 F.2d 326 (8th Cir.1990) (in banc); *United States v. Goldberg*, 830 F.2d 459, 466-67 (3d Cir.1987) (same); *United States v. Wright*, 791 F.2d 133, 136-37 (10th Cir.1986) (same).

We accordingly turn to the argument made by Piervinanzi that § 1956(a)(2) does not provide a valid basis for his conviction on counts three and six of the indictment.

## 2. Scope of Section 1956(a)(2).

Piervinanzi contends that the language of § 1956(a)(2) (1988), its legislative history, pertinent case law, the United States Attorneys' Manual guidelines for prosecutions under the statute, and relevant Sentencing Guidelines commentary all support the conclusion that this provision proscribes only "laundering" activity that is analytically distinct from the underlying criminal activity that it promotes, and that the overseas fund transfers intended in this case do not satisfy this statutory requirement. For the reasons that follow, we reject his reading of § 1956(a)(2).

*Id.* at S17370.

7. Section 1956(a)(1) provides in relevant part:

### a. Statutory Language.

The statutory language at issue requires that there be a transmission of funds "with the intent to promote the carrying on of specified unlawful activity." § 1956(a)(2)(A). As previously noted, "specified unlawful activity" includes bank fraud. See *supra* note 4 and accompanying text. The counts (three and six) of the indictment that charge violations of § 1956(a)(2) both specify that the overseas fund transfers were designed to further "a fraudulent scheme in violation of 18 U.S.C. § 1344 [i.e., bank fraud]."

[7] Piervinanzi contends that in this case, the overseas transmission of funds "merges" with the underlying bank fraud, precluding independent liability under § 1956(a)(2). In our view, however, the conduct at issue in this case falls within the prohibition of the statute. The conspirators understood the use of overseas accounts to be integral to the success of both the Irving Trust and Morgan Guaranty schemes. DelGiudice explained to the other conspirators that use of foreign accounts would make the fraudulently obtained funds more difficult to trace. Tichio obtained access to Rambali's Cayman Islands bank account because he understood that bank secrecy laws there would hamper official efforts to recover the stolen funds. Similarly, Piervinanzi and Marchese told Wesoke that they wished to "settle[]" their transaction overseas. Because transferring the funds overseas (and beyond the perceived reach of U.S. officials) was integral to the success of both fraudulent schemes, it is undeniable that the attempted transfers were designed to "promote" the underlying crime of bank fraud. Contrary to Piervinanzi's assertion, this reading of the statute does not "merge" the underlying criminal activity and promotion through laundering into one. The act of attempting to fraudulently transfer funds out of the banks was analytically distinct from the attempted transmission of those funds overseas, and was itself independently illegal. See 18 U.S.C. § 1344.

Analysis of the overall structure of § 1956 confirms this interpretation. Section 1956(a)(1),<sup>7</sup> the domestic money laundering

Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity,

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Senate Report explains that § 1956(a)(1) "requires that the property involved in a transaction must in fact be proceeds of 'specified unlawful activity'...." *Id.* at 10.

Piervinanzi points out that a pertinent House report states in general terms that "[t]his bill ... will punish transactions that are undertaken with the proceeds of crimes or that are designed to launder the proceeds of crime." House Report at 7. However, the version of the statute upon which this report comments was substantially different from that ultimately enacted. Rather than prohibiting overseas transfers made "with the intent to promote the carrying on of specified illegal activity," as the enacted § 1956(a)(2) provides, the version of the bill discussed in the House Report would have applied to overseas transfers made "to conceal *criminally derived property* that is derived from a designated offense, or ... to disguise the source of ownership of, or control over, *criminally deprived property* that is derived from a designated offense." House Report at 2 (emphasis added). The House Report thus discusses a version of the money laundering bill too different from that enacted to be of any use in divining congressional intent with respect to the enacted provisions of § 1956. Indeed, the broader language that Congress ultimately adopted bespeaks an intention not to be constrained to punishing laundering activity involving separately derived criminal property.

### c. Case Law.

Nor do the precedents invoked by Piervinanzi sustain his position. He points, for example, to the following statement in *Stavroulakis*:

Section 1956 creates the crime of money laundering, and it takes dead aim at the attempt to launder dirty money. Why and how that money got dirty is defined in other statutes. *Section 1956 does not penalize the underlying unlawful activity from which the tainted money is derived.* 82 F.2d at 691 (emphasis added). In the context of this case, the emphasized language

states." We do not regard this amendment as altering the outcome in this case. The overseas transfers contemplated by the conspirators

is a truism that begs the question whether the intended overseas transfers should be considered as separate secondary "laundering" or a component of the underlying bank fraud.

Our opinion in *United States v. Skinner*, 946 F.2d 176 (2d Cir.1991), is considerably more relevant. Concededly, in that case we construed § 1956(a)(1), which requires that separate proceeds be utilized in a financial transaction. *See supra* note 7. Our focus in *Skinner*, however, was upon the statutory requirement, identical in this respect to § 1956(a)(2)(A), that a financial transaction be undertaken "with the intent to promote the carrying on of specified unlawful activity." § 1956(a)(1)(A)(i). We concluded that this language applied to the transportation of money orders to pay for purchases of cocaine. Although the transactions "in reality represented only the completion of the sale" of cocaine, 946 F.2d at 179, we concluded that they were made to facilitate the sale of cocaine and thus were made "with the intent to promote the carrying on of specified unlawful activity." *See id.* at 178.

A number of cases from other circuits support this view. In *United States v. Cavalier*, 17 F.3d 90 (5th Cir.1994), the Fifth Circuit ruled that the transfer of a single check to complete a mail fraud "promote[d] the carrying on" of that fraud within the meaning of § 1956(a)(1)(A)(i). *See id.* at 91. The Ninth Circuit ruled similarly with respect to the deposit of a single check to complete a violation of the Hobbs Act. *See United States v. Montoya*, 945 F.2d 1068, 1076 (9th Cir.1991). And the Third Circuit held that the cashing of government checks to complete mail frauds perpetrated against the Internal Revenue Service constituted a § 1956(a)(1) violation, although the proceeds of the fraud were concededly spent for personal purposes and not "plowed back" into the criminal venture. *See United States v. Paramo*, 998 F.2d 1212, 1216-18 (3d Cir. 1993), *cert. denied*, — U.S. —, 114 S.Ct. 1076, 127 L.Ed.2d 393 (1994).

would clearly have both facilitated and promoted the underlying bank fraud that they hoped to achieve.

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Similarly, we are not persuaded by Piervinanzi's references to *United States v. Jackson*, 935 F.2d 832 (7th Cir.1991), and *United States v. Hamilton*, 931 F.2d 1046 (5th Cir. 1991). *Jackson* comments that § 1956(a)(1)(A)(i) is "aimed at . . . the practice of plowing back proceeds of 'specified unlawful activity' to promote that activity." 935 F.2d at 842. *Hamilton* states that § 1956(a)(2) is meant to criminalize the transfer of funds "that would contribute to the growth and capitalization of the drug trade or other unlawful activities." 931 F.2d at 1052. In both cases, the same statutory language ("promote the carrying on of specified unlawful activity," § 1956(a)(1)(A)(i) and (a)(2)(A)) is construed.

The *Jackson* comment faithfully reflects the facts of that case, in which a violation of § 1956(a)(1) was premised upon the use of proceeds from drug sales to purchase beepers for use by participants in the criminal drug enterprise. See 935 F.2d at 841. We agree with *Paramo*, however, that *Jackson* did not intend "either to delineate the universe of conduct prohibited under section 1956(a)(1)(A)(i), or to decide whether a defendant could violate that section other than by plowing back the proceeds of unlawful activity." *Paramo*, 998 F.2d at 1218. The focus in *Hamilton* was upon the violation of § 1956(a)(2) involved in a hypothetical transfer of legitimately derived funds from a foreign source to the United States to capitalize a domestic drug enterprise. See 931 F.2d at 1052.

Neither case establishes that a defendant may be deemed to "promote the carrying on of specified unlawful activity" only when the laundering would promote subsequent criminal activity. As previously discussed, such a reading would not accord with the plain meaning of the statute. Further, *Hamilton* involved a scheme similar to that in *Skinner*, in which the proceeds of drug sales were sent through the mails to pay for a drug purchase. See 931 F.2d at 1051. As in *Skinner*, the defendant was convicted of violating § 1956(a)(1), although there was no indication that the transferred proceeds were to be invested in subsequent illegal activities. See 931 F.2d at 1051-52.

d. *United States Attorneys' Manual Guidelines*.

Piervinanzi argues that Department of Justice guidelines set forth in the United States Attorneys' Manual ("USAM") support a narrower reading of the statute. A memorandum supplementing USAM 9-105.000 requires that United States Attorneys consult with the Department of Justice before bringing money laundering charges

[i]n any case where the conduct to be charged as "specified unlawful activity" under §§ 1956 and 1957 consists primarily of one or more financial or fraud offenses, and where the financial and money laundering offenses are so closely connected with each other that there is no clear delineation between the underlying financial crime and the money laundering offense.

United States Department of Justice, United States Attorneys' Manual Staff, Memorandum re Money Laundering Prosecutions and Forfeitures, Oct. 1, 1992, at 5 ("USAM Memorandum").

[10] These guidelines, however, provide no substantive rights to criminal defendants. In addressing a similar Department of Justice directive, the First Circuit ruled that "the internal guidelines of a federal agency, that are not mandated by statute or the constitution, do not confer substantive rights on any party." *United States v. Craveiro*, 907 F.2d 260, 264 (1st Cir.), cert. denied, 498 U.S. 1015, 111 S.Ct. 558, 112 L.Ed.2d 593 (1990); see also *United States v. Ivic*, 700 F.2d 51, 64 (2d Cir.1983) ("non-compliance with internal [Justice Department] guidelines is not, of itself, a ground of which defendants can complain") (citing *United States v. Caceres*, 440 U.S. 741, 99 S.Ct. 1465, 59 L.Ed.2d 733 (1979); *United States v. Myers*, 692 F.2d 823, 846 (2d Cir.1982), cert. denied, 461 U.S. 961, 103 S.Ct. 2437, 77 L.Ed.2d 1322 (1993)); USAM 1-1.100 (Oct. 1, 1988) (USAM "is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal"); cf. *Crandon v. United States*, 494 U.S. 152, 177, 110 S.Ct. 997, 1011, 108 L.Ed.2d 132 (1990) (Scalia, J.,

concurring) (because crime "not administered by any courts," the "interpretation with prosecuting criminal entitled to deference). Guidelines reflect executive comments about the desirability of prosecutions and are not the language of the statute.

In any case, these guidelines equivocally support Piervinanzi. They merely establish that USAM Memorandum at 5 purport to preclude in all charges in cases in which the underlying offense is closely related to financial crime. Guidelines do not provide a bar to prosecution. Rather, they merely require Attorneys to consult with the Department of Justice before bringing prosecutions that fall within the guidelines.

e. *Sentencing Guidelines*

Finally, Piervinanzi concurring commentary to the Guidelines line applicable to money laundering. His position: "A higher bar is specified if the defendant is charged with 18 U.S.C. § 1956(a)(1)(a)(3)(A) because those statutes apply to defendants who encourage commission of further offenses." § 2S1.1, comment. (background)

[11] The phrase "further" in the commentary is most plausible when referring to the "specified unlawful activity" in which reference is made to (a)(2)(A), and (a)(3)(A), the language in which the proscribed language must in each instance "promote the carrying on of" the activity. The commentary simply reiterates the terms of these statutes, without casting significant light on how they should be construed. In any event, the commentary is entitled to deference because of the attention of the Guidelines, see *United States v. ...*, 1913, 1917-20, 123 L.Ed.2d ... not reviewed by Congress in 1913, 1917-20, and 1920.



concurring) (because criminal statutes are "not administered by any agency but by the courts," the "interpretation of those charged with prosecuting criminal statutes" is not entitled to deference). Further, these guidelines reflect executive branch policy judgments about the desirability of certain types of prosecutions and are not guided solely by the language of the statute.

In any case, these guidelines do not unequivocally support Piervinanzi's position. They merely establish a "general rule," USAM Memorandum at 5, and thus do not purport to preclude in all cases the filing of charges in cases in which the money laundering offense is closely related to the underlying financial crime. Indeed, the guidelines do not provide a bar to any prosecutions. Rather, they merely require United States Attorneys to consult with the Department of Justice before bringing money laundering prosecutions that fall within the terms of the guidelines.

e. *Sentencing Guidelines Commentary.*

Finally, Piervinanzi contends that the following commentary to the sentencing guideline applicable to money laundering supports his position: "A higher base offense level is specified if the defendant is convicted under 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A), because those subsections apply to defendants who encouraged or facilitated the commission of further crimes." USSG § 2S1.1, comment. (backg'd).

[11] The phrase "further crimes" in this commentary is most plausibly read as referring to the "specified unlawful activity" to which reference is made in § 1956(a)(1)(A), (a)(2)(A), and (a)(3)(A), the "carrying on" of which the proscribed laundering activity must in each instance "promote." Thus, this commentary simply reiterates the essential terms of these statutes, without casting any significant light on how they should be construed. In any event, while such commentary is entitled to deference as an interpretation of the Guidelines, *see Stinson v. United States*, — U.S. —, —, —, 113 S.Ct. 1913, 1917–20, 123 L.Ed.2d 598 (1993), it is not reviewed by Congress, *see id.* at —, 113 S.Ct. at 1919, and should not be consid-

ered an authoritative construction of the criminal statutes upon which the Guidelines are premised.

C. *Piervinanzi's Conflict of Interest Claim.*

Shortly after Piervinanzi's arrest on March 2, 1989, Marchese arranged for attorney Jack Goldberg to represent Piervinanzi. Marchese delivered a \$5,000 retainer to Goldberg towards a \$20,000 pretrial legal fee for Piervinanzi's representation: DelGiudice paid another \$7,000. Marchese told DelGiudice that if he didn't help pay for the retainer, Piervinanzi would "rat" on him. Marchese and DelGiudice met with Goldberg and told Goldberg "to keep [them] out of it." Speaking with his girlfriend on the telephone while in the Metropolitan Correctional Center prior to being released on bail, Piervinanzi repeatedly expressed concern that Goldberg might have divided loyalties.

The initial indictment, filed March 20, 1989, charged Piervinanzi with one count of mail fraud. A superseding indictment was filed on May 24, 1989 that added several counts and alleged that coconspirators of Piervinanzi had retained an attorney to represent him. The government then advised Goldberg that it intended to move to disqualify him, and made the motion on June 20, 1989. Goldberg withdrew as Piervinanzi's counsel on July 27, 1989.

On August 11, 1989, the grand jury returned a superseding indictment that named Piervinanzi and one coconspirator, Marchese. On September 6, 1989, Piervinanzi was arraigned on the superseding indictment, and attorney Lawrence Vogelmann entered an appearance on his behalf. On February 6, 1990, DelGiudice signed a cooperation agreement with the government. DelGiudice testified at trial pursuant to that agreement, pled guilty to one count of wire fraud, and was sentenced to probation.

[12] Although he did not raise the issue below, Piervinanzi now claims that: (1) Goldberg had a conflict of interest, and because of that conflict, deliberately failed to advise Piervinanzi of the possibility of cooperating with the government during the pretrial period; (2) the district court was on

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extensive argument of counsel. Although Piervinanzi presented some evidence that would have supported his claim, Judge Leisure, as the finder of fact, was in the best position to evaluate this information. His conclusion was not clearly erroneous, and we therefore decline to upset it on appeal. See *United States v. Sutton*, 13 F.3d 595, 599 (2d Cir.1994).

E. *Application of Money Laundering Guideline.*

[16] Tichio moved before the district court "for a downward departure from the Money Laundering guideline level of 32 to the Bank Fraud Level of 23 on the grounds that the typical conduct described in Section 2S1.1 of the Sentencing Guidelines was not the conduct for which [he] was convicted." The district court recognized its authority to grant a downward departure, but declined to do so.<sup>10</sup> Tichio renews this contention on appeal.

[17] A district court's exercise of judicial discretion not to grant a downward departure is normally unappealable. *United States v. Ritchey*, 949 F.2d 61, 63 (2d Cir. 1991) (per curiam) (collecting cases). We have recognized an exception to this general rule when a sentencing court mistakenly concludes that it lacks the legal authority to grant a downward departure. See *id.*; *Prescott*, 920 F.2d at 145-46 (collecting cases); cf. *Skinner*, 946 F.2d at 179-80 (remanding for resentencing upon concluding that "appellants' conduct was both atypical of the conduct described by the Sentencing Guidelines [i.e., USSG § 2S1.1] and inadequately considered by the Sentencing Commission, thus empowering the district court to consider a downward departure"). In this case, however, Judge Leisure was clearly aware of his authority to grant a downward departure, but declined to exercise it. See *supra* note 10 and accompanying text. Thus, we are without authority to consider Tichio's contention that a departure was improperly withheld from him.

10. In the course of the colloquy at Tichio's sentencing, the court also made clear that it had recognized, but declined to exercise, its depart-

Conclusion

We reverse Piervinanzi's conviction on count seven pursuant to 18 U.S.C. § 1957, vacate the sentences of Piervinanzi and Tichio, affirm in all other respects, and remand for resentencing.



Michael D. O'NEILL, Plaintiff-Appellant,

v.

CITY OF AUBURN; Guy Cosentino, Mayor of the City of Auburn; James E. Malone, City Manager for the City of Auburn; James Hutchinson, Ann Bunker, Councilors of the Auburn City Council; Andrew V. LaLonde, as Corporation Counsel for the City of Auburn and Other Unknown and Unnamed Participants In The Complained of Acts. Defendants-Appellees.

No. 1108, Docket 93-7909.

United States Court of Appeals,  
Second Circuit.

Argued Feb. 25, 1994.

Decided May 3, 1994.

Former city engineer-superintendent of public works brought § 1983 action against city and its officials alleging that his termination violated due process clause. The United States District Court for the Northern District of New York, Neal P. McCurn, J., granted summary judgment for city and officials, and engineer appealed. The Court of Appeals, Leval, Circuit Judge, held that: (1) engineer was "independent officer" not covered by New York statute protecting civil service employees, and, thus, did not have constitutionally protected property interest

in authority in sentencing Piervinanzi that same day.

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**Statement of**

**Kathleen M. Williams  
Federal Public Defender  
Southern District of Florida**

**on behalf of**

**Federal Public and Community Defenders**

**concerning the**

**Proposed Guideline Amendments**

**before the**

**United States Sentencing Commission  
Washington, D.C.  
March 5, 1998**

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Federal Public and Community Defender Organizations exist to provide criminal defense and related services in federal court to persons financially unable to afford counsel. Defender organizations are established under the authority of 18 U.S.C. § 3006A and operate in some 60 federal judicial districts. Defender personnel appear before magistrate-judges, United States District Courts, United States Courts of Appeals, and the United States Supreme Court.

Federal Public and Community Defenders represent the vast majority of criminal defendants in federal court. We represent persons charged with frequently-prosecuted federal crimes, like drug trafficking, and with infrequently-prosecuted federal crimes, like murder. We represent persons charged with street crime, like assault and robbery, and with suite crime, like fraud and embezzlement.

Congress, in 28 U.S.C. § 994(o), has directed Federal Public and Community Defenders to "submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful." In addition, Congress has directed us to submit, at least annually, written comments on the guidelines and suggestions for changes in the guidelines.

We are pleased to comment upon the proposed amendments published by the Commission in the Federal Register on January 6, 1998. Before taking up the amendments seriatim, we have some general observations. First, the Commission has made significant strides toward greater openness in the amendment process. We commend the Commission for that progress. There is still a way to go, however. Closed meetings of the Commission to discuss guideline-related matters are not essential to the functioning of the Commission and generate uncertainty and suspicion -- especially because an interested party, the Department of Justice, through the Attorney General's representative on the Commission, participates in the closed

meetings. We hope that the Commission will soon begin conducting all of its guideline-related business in public.

The main item on the Commission's agenda this cycle is the proposed revision of the theft and fraud loss tables and the tax table. The purpose of the proposed revision is to impose harsher punishment on persons who commit theft, fraud, and tax offenses. The Commission has twice increased the punishment for such offenses, and we see no need for yet a third increase. There has been no showing that present levels of punishment are inadequate.

The Commission, in promulgating the initial set of guidelines, intentionally chose to increase the punishment for white-collar offenses over pre-guidelines punishment levels.<sup>1</sup> Two years later, the Commission again increased the punishment for white-collar offenses by amending the loss tables of the theft and fraud guidelines and the tax table of the tax guideline. The Commission's purpose was "to increase the offense levels for larger losses to provide additional deterrence and better reflect the seriousness of the conduct."<sup>2</sup>

Given this history, it should not be surprising that federal judges sentence white-collar offenders at the bottom of the applicable guideline range and depart downward (for other than substantial assistance) more frequently than upward.<sup>3</sup> In embezzlement cases, for example, courts sentence at the bottom of the range nearly twenty times as often as they sentence at the top

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<sup>1</sup>See U.S. Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 18 (June 18, 1987).

<sup>2</sup>U.S.S.G. App. C, amend. 99 (amending § 2B1.1). See also *id.* at amends. 154 (similar justification for amending § 2F1.1), 237 (similar justification for amending § 2T4.1).

<sup>3</sup>See U.S. Sentencing Commission, *1996 Sourcebook of Federal Sentencing Statistics*, at table 27.



of the range. The situation with fraud cases is not as dramatic; courts sentence at the bottom of the range about seven times as often as they do at the top of the range. Courts depart downward in fraud cases, for other than substantial assistance, about six-and-a-half times as often as they depart upward.<sup>4</sup>

This data is not derived from opinions offered in response to hypothetical questions, but from judicial behavior, from what federal judges actually do when confronted with the question of how long to send a real person to prison. Federal judges are not softies. They do not go out of their way to avoid imposing appropriate levels of punishment. If the facts and circumstances of the cases had called for greater punishment, there can be no doubt that federal judges would have imposed greater punishment. That the sentences were not greater suggests that the current guidelines call for levels of punishment that are appropriate, if not too high.

We believe that there is no need to make the theft, fraud, and tax guidelines harsher. If you do, the most likely result is that judges will continue to sentence at the bottom of the range and depart downward more often than upward. The difference will be that aggregate punishment will increase because the judges will be sentencing at the bottom of higher ranges and departing downward from a higher guideline sentence. There is nothing to be gained from further overcrowding federal prisons.

**Amendment 1**  
**Theft, Fraud, and Tax Loss Tables**  
**(§§ 2B1.1, 2F1.1, 2T4.1)**

Proposed amendment 1 sets forth two options for revising the loss tables of §§ 2B1.1 and 2F1.1 and the tax table of § 2T4.1. Both options would delete the more-than-minimal-planning

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<sup>4</sup>*Id.*

enhancements of the theft and fraud guidelines and incorporate that enhancement into the loss tables one level at a time. Option 1 would incorporate the first level at \$10,000 and the second level at \$20,000. Option 2 would incorporate the first level at \$2,000 and the second level at \$5,000. Both options also would amend the tables to increase the enhancement for loss amounts over the enhancement currently provided. Option 1 would begin these severity increases at \$40,000, while option 2 would begin them at \$12,500.

We support neither option. As indicated in our general remarks, there is no need to make the theft, fraud, and tax guidelines harsher. We do support Commission action to make the definition of the term "loss" more comprehensive and easier to apply and to clarify the term "more-than-minimal planning." We believe that the Commission should act on both of these definitional matters regardless of whether the Commission decides to adjust the loss tables.<sup>5</sup> If the Commission decides to go forward with revising the loss tables, it is essential that the Commission first decide what is to be included in loss.

Proposed amendment 1 also sets forth an issue for comment concerning whether the Commission should prohibit downward departures based upon minimal planning and upward departures based upon more-than-minimal planning. We discuss the question of what should constitute the heartland of the guideline in our comments on proposed amendments 5(B) and (C). We think it unwise to limit a sentencing court's discretion to depart unless the Commission adopts the specific offense characteristic set forth in proposed amendment 5(B) and adopts, with modification, the specific offense characteristic set forth in proposed amendment 5(C).

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<sup>5</sup>Amendment 1(B) solicits comments about whether to add commentary addressing departures when the planning is minimal and more than minimal. We address that matter in our comments on proposed amendment 5(B).



**Amendment 2**  
**Guidelines that Refer to Theft and Fraud Loss Tables**  
**(Chapter Two)**

Proposed amendment 2 address chapter two guidelines that have enhancements based upon the loss tables of the fraud or theft guidelines. Proposed amendment 2 is premised upon adoption of one of the new loss tables. If the Commission decides not to adopt new loss tables -- the action we believe to be called for -- then the Commission need not address amendment 2 at all.

Proposed amendment 2(A) adds a new guideline, § 2X6.1 ("Reference Monetary Table"), that contain two tables that parallel the options in amendment 1, with a modification. The tables in amendment 2(A) do not build in the more-than-minimal-planning increases. If the Commission decides to adopt new loss tables, then we recommend that the reference monetary table be the loss table in the current fraud guideline. If the Commission adopts the option in amendment 2(A) corresponding to the option of amendment 1 that the Commission adopts, the Commission will be raising penalties for a number of offenses, and there has been no showing that the penalties for those offenses need to be increased.

Proposed amendment 2(B) would amend several guidelines that have more-than-minimal planning included in the base offense level or as a specific offense characteristic. Use of a reference monetary table set forth in proposed amendment 2(A) will increase the punishment for the offenses covered by those guidelines, even though there is nothing to suggest that those offenses currently are underpunished. For example, the first guideline set forth in amendment 2(B) is § 2B5.1 (offenses involving counterfeit bearer obligations of the United States).

Commission data indicates that judges sentence at the bottom of the applicable guideline range

over half the time (52.6%) and sentence at the top of the range 11.4% of the time.<sup>6</sup> The situation is more dramatic with regard to § 2Q2.1 (offenses involving fish, wildlife, and plants), another guideline that would be affected by changing the table. Judges in environmental and wildlife cases sentence at the bottom of the applicable range 72.4% of the time and sentence at the top of the range in 1.0% of the time.<sup>7</sup> We recommend that the guidelines amended by proposed amendment 2(B) continue to use the loss table of the current fraud guideline.

Proposed amendment 2(C) sets forth three options for dealing with obscenity offenses that contain enhancements "if the offense involved distribution." The enhancement is based upon the retail value of the material, using the loss table in the fraud guideline, but in no event can be less than five levels. Option 1 would amend those guidelines to use the new guideline setting forth the reference monetary table. Option 2 would use the new loss table in the fraud guideline, thereby incorporating the increase for more-than-minimal planning. Option 3 would provide for a five-level enhancement for distribution and add to the commentary language suggesting an upward departure for large-scale commercial undertakings.<sup>8</sup>

If the Commission decides to revise the loss table in the fraud guideline, we recommend that the reference money table be the loss table in the current fraud guideline. Commission data

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<sup>6</sup>See U.S. Sentencing Commission, *1996 Sourcebook of Federal Sentencing Statistics*, at table 27.

<sup>7</sup>*Id.*

<sup>8</sup>The Commission has bracketed "five" in option 3, and the synopsis suggests that if the Commission adopts a new loss table the Commission will use the number of levels that correspond to a \$40,000 loss. Under option 1 of proposed amendment 1, the enhancement would be eight levels. Option 2 of proposed amendment 1 does not have a category starting at \$40,000. There is an eight-level enhancement under option 2 if the loss is more than \$30,000 but not more than \$70,000.



does not support a need for increasing punishment, especially the double increase that option 2 would bring about. Judges in obscenity and prostitution cases sentence at the bottom of the applicable guideline range nearly four times as often as at the top of the range (41.1% vs. 10.9%), and they depart downward for other than substantial assistance more than twice as often as they depart upward (16.6% vs. 6.9%).<sup>9</sup>

Amendment 2(D) sets forth four options for dealing with copyright infringement offenses, which are covered by § 2B5.3, and structuring offenses, which are covered by § 2S1.3. Amendment 2(D) is premised upon the Commission adopting new loss tables. Options 1, 1A, and 2 would rely upon the table in the new reference monetary table guideline, and options 3, 3A, and 4 would rely upon the fraud guideline. As indicated earlier, we believe that no action is required or appropriate. Commission data indicates that in money laundering cases courts sentence at the bottom of the applicable guideline range nearly five times as often as the bottom (37% vs. 7.8%) and that downward departures for other than substantial assistance occur ten times as often as upward departures (13.6% vs. 1.2%).<sup>10</sup> If the Commission decides to revise the loss table in the fraud guideline, we recommend that the guidelines amended by proposed amendment 2(D) continue to use the loss table in the current fraud guideline.

Amendment 2(E) sets forth four options for amending the trespass guideline, which was amended last cycle to use the fraud table to enhance if the offense involved "invasion of a protected computer resulting in a loss . . . ." That amendment has not been in effect long enough

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<sup>9</sup>See U.S. Sentencing Commission, *1996 Sourcebook of Federal Sentencing Statistics*, at table 27.

<sup>10</sup>*Id.*

to determine its impact, but there is nothing to indicate that the current level of punishment for such offenses is inadequate. If the Commission decides to revise the loss table of the current fraud guideline, we recommend that the trespass guideline continue to use the loss table in the current fraud guideline.

Amendment 2(F) would consolidate the theft and property destruction guidelines, § 2B1.1 and § 2B1.3. The purpose is to "mitigat[e] the necessity for reference to the proposed alternative monetary table." If the Commission adopts a new loss table for the theft guideline, the result of the consolidation will be to increase the penalty levels for property destruction offenses, even though there is nothing to suggest that current levels are inadequate. If the Commission decides to revise the loss table of the current theft guideline, we recommend that the property destruction guideline continue to use the loss table in the current theft guideline.

Amendment 2(G) would consolidate § 2C1.2 and § 2C1.6, "thereby mitigating the necessity for reference to the proposed alternative monetary table." We do not oppose the consolidation of §§ 2C1.2 and 2C1.6. Both have the same base offense level (seven) and both enhance the base offense level on the basis of the value of the gratuity. We do not believe that the consolidated guideline should use the loss table of the fraud guideline if the Commission revises that loss table. The result of using a new loss table would be to increase punishment when there is no evidence to suggest that current levels of punishment are inadequate.

The Commission has not reported data for gratuity offenses separately from bribery offenses, but has lumped together the data from both kinds of offenses.<sup>11</sup> A bribery offense is

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<sup>11</sup>See *id.* at A-8 (defining the primary offense category of bribery, which is used in compiling data set forth in table 27).



more aggravated than a gratuity offense because the unlawful payment in a bribery case is made for a *quid pro quo*, so the Commission's data might be skewed toward the high end.

Nevertheless, the Commission's data for bribery cases indicates that sentences occur at the bottom of the applicable range nearly ten times as often as at the top (44.2% vs. 4.6%) and that downward departures for other than substantial assistance occur nearly ten times as often as upward departures (8.8% vs. 0.9%). If the guidelines are consolidated, we recommend that the consolidated guideline, like the guidelines it will replace, use the loss table of the current fraud guideline.

**Amendment 3**  
**Consolidation of Theft, Property Destruction, and Fraud Guidelines**  
**(§§ 2B1.1, 2B1.3, 2F1.1)**

Proposed amendment 3 indicates that "the Commission is considering and invites comment on" a proposal to create a single guideline for theft, property destruction, and fraud offenses. We believe that it would be unwise to consolidate the guidelines if the Commission, at the same time, is making substantive changes in the loss tables.

Like the Commission, we are concerned about prosecutors' charging decisions. Those charging decisions can have an impact now because the definition of loss in the theft and fraud guidelines is not the same. If the loss is the same, however, the problem is resolved because the theft and fraud guidelines otherwise are coordinated. Thus, although the base offense level for theft is lower than for fraud, the theft table calls for a greater enhancement for loss, so that the two guidelines produce the same offense level for the same loss.<sup>12</sup> Because of that, the

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<sup>12</sup>Assume, for example, an offense involving more-than-minimal planning that caused a loss of \$50,000. Under § 2B1.1, the base offense level is four, there is a seven-level enhancement under subsection (b)(1) for the loss, and there is a two-level enhancement under

Commission, by clarifying the definition of loss and applying that definition to both the theft and fraud guidelines, will eliminate opportunity for prosecutorial abuse.<sup>13</sup>

**Amendment 4**  
**Definition of Loss**  
**(§§ 2B1.1 and 2F1.1)**

Proposed amendment 4, as published, would amend both the text of, and the commentary to, the theft and fraud guidelines. The amendment to the text adds a new specific offense characteristic that covers matters presently covered by commentary inviting upward departure. The amendment to the commentary sets forth two options for defining the term "loss" for the purposes of the theft and fraud guidelines. Both options are premised upon using a single definition for both guidelines. Since publication of the proposed amendments, we have received a revised version of that part of option 2 that defines loss. We will refer to that document as option 3.

I. New Specific Offense Characteristic.

We oppose the proposed new specific offense characteristic which provides for a two-level and a four-level enhancement for factors that the Commission currently deals with by

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subsection (b)(4)(A) for the planning. The offense level under § 2B1.1 totals 13. Under § 2F1.1, the base offense level is six, there is a five-level enhancement under subsection (b)(1) for the loss, and there is a two-level enhancement under subsection (b)(2)(A) for the planning. The total offense level under § 2F1.1 is also 13.

<sup>13</sup>If the Commission clarifies the definition of loss, applying the definition to both the theft and fraud guidelines is a simple drafting matter. For example, the definition could be put in the commentary to the theft guideline, and the commentary to the fraud guideline could be amended to state that "for the purposes of this guideline [§ 2F1.1], the term 'loss' has the meaning set forth in application note \_ to § 2B1.1." Alternatively, the commentary to § 1B1.1 could be amended to add a new application note setting forth a definition of loss for the purposes of §§ 2B1.1 and 2F1.1 (and for any other guideline for which the Commission determines the definition to be appropriate).



inviting upward departure. Upward departures occur infrequently in theft and fraud cases. Commission data indicates that in fiscal year 1996 the upward departure rate for theft and fraud was 1.4% and 1.3%, respectively.<sup>14</sup> The factors involved, therefore, either occur rarely or, when they do occur, nearly always are not significant enough to require a sentence above the applicable guideline range. In either case, it would be inappropriate to make those departure factors into specific offense characteristics.

When promulgating the initial set of guidelines, the Commission pointed out that its ability to craft the guidelines was limited by the data then available, but that "experience with the guidelines will lead to additional information and provide a firm empirical basis for consideration of revisions." We do not find the requisite empirical basis for the proposed new specific offense characteristic.

## II. Definition of loss.

A. Introduction. We are pleased that the Commission has responded to the comments last cycle and has taken seriously the need to define comprehensively what the term loss means. The Commission has indicated that the concept of loss is being used to measure two factors, harm to the victim and the defendant's culpability.<sup>15</sup> The theft and fraud guidelines contain

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<sup>14</sup>U.S. Sentencing Commission, *1996 Sourcebook of Federal Sentencing Statistics*, at table 27.

<sup>15</sup>"The value of the property stolen plays an important role in determining sentences for theft and other offenses involving stolen property because it is an indicator of both the harm to the victim and the gain to the defendant." U.S.S.G. § 2B1.1, comment. (backg'd). One of the changes to the commentary common to both options 1 and 2 of proposed amendment 7 (but not addressed by option 3, which is limited to the definition of loss) is to add to the background commentary this sentence: "Along with other relevant factors under the guidelines, loss serves as a measure of the seriousness of the offense and the defendant's relative culpability."

provisions that are victim-harm oriented, like the enhancements for substantially jeopardizing the safety and soundness of a financial institution, §§ 2B1.1(6)(A) and 2F1.1(b)(6)(A), as well as provisions that are culpability-oriented, like the enhancement for misrepresentation of acting on behalf of a charity or a government agency, § 2F1.1(b)(3)(A), or for violating a judicial order, § 2F1.1(b)(3)(B).

Because of the dual purpose being served by the concept of loss, the loss calculation, for purposes of the theft and fraud guidelines, is not intended to produce a definitive calculation of the financial impact of the offense. Loss calculation under the fraud and theft guidelines is not an accounting exercise. Not every conceivable item of financial damage to the victim need be included because the goal is not a final accounting but a determination of the relative harm caused by the offense and the relative culpability of the defendant.

An important consideration in clarifying the concept of loss is the need for a definition that is straight forward and that will not complicate the determination of the guideline sentence. Another important consideration is the need for a definition, which will apply both to fraud and theft cases, that will not produce inconsistent results. The loss should be the same if the defendant steals the property or obtains the property by fraud.

B. Option 1. Option 1, in the words of the synopsis, "provides a dramatically simplified and shortened definition of loss." The adoption of option 1 will guarantee needless litigation by unsettling matters believed to be settled. It will be necessary to litigate whether the Commission's deletion of language expresses an intent to change policy. Why, after all, would the Commission delete language if the Commission did not want a change in policy -- or if the Commission did not intend that the courts decide for themselves what the policy should be? The



adoption of option 1 would pass up an opportunity to provide uniformity among the circuits about matters where there are differences. Option 1, in our opinion, would be an abdication of the Commission's responsibility to define a concept that the Commission has developed for gauging the severity of theft and fraud offenses.

C. Options 2 and 3. (1) Introduction. We support the approach taken in options 2 and 3. We have some comments and suggestions about how those options deal with various issues, however.

(2) "Harm" vs. "economic harm." Options 2 and 3 both define "actual loss" to be the reasonably foreseeable harm resulting from defendant's relevant conduct. They define "intended loss" to be the harm intended to be caused by defendant and others for whose conduct the defendant is accountable under the relevant conduct rules. Option 3 uses the term "harm" in the definitions, while option 2 indicated an alternative formulation of "economic harm." We believe that the term "economic harm" is better. The loss table is constructed to provide an enhancement based upon dollar amounts. Because the definitions are used to derive a dollar amount to use in conjunction with that table, the harm must be quantifiable in dollars. The use of "economic harm" differentiates financial harm from other kinds of harm that an offense might cause and emphasizes that the harm must be able to be stated in dollar terms.

(3) "Reasonably foreseeable." The definition of actual loss requires that the harm be reasonably foreseeable. Reasonable foreseeability is an appropriate standard but can include consequential damages. We believe that the Commission should exclude consequential damages. As the Seventh Circuit has stated, excluding consequential damages "prevent[s] the

sentencing hearing from turning into a tort or contract suit.”<sup>16</sup> Consequential damages are often highly speculative in nature. The determination of the amount of consequential damages can unduly protract the sentencing process.

(4) Time at which loss is measured. Option 2 measures actual loss at the time the offense is detected; option 3 measures loss at the time of sentencing. We believe that the appropriate time is the completion of the offense. The criminal law assumes that a theft or fraud offense is complete when the defendant has completed all of the elements of the offense. When that occurs, the victim has been deprived of property, and it would logically follow that the loss should be the value of the property at the time of the completion of the offense.

Using the date of sentencing makes little sense. Events that occur after detection of the offense, over which the defendant has no control, may increase or decrease the amount of loss. Because automobiles depreciate in value over time, a date-of-sentencing rule would mean that the longer a car thief keeps a car, the lower the loss. If the defendant’s conduct causes a reduction in the worth of the property after the offense has been completed, the sentencing court, as option 2 provides, can appropriately include that additional damage as part of loss, for the reduction in the worth of the property reflects heightened culpability of the defendant.

(5) Intended loss. Option 3 defines intended loss to include harm that “would have been unlikely or impossible to accomplish . . . .” We believe that the standard should be, as suggested in option 2, harm that realistically could have occurred. While a defendant’s intention is a component of the defendant’s culpability, that intention should bear some relationship to reality.

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<sup>16</sup>United States v. Marlatt, 24 F.3d 1005, 1007 (7th Cir. 1994) (holding that current definition of loss does not include consequential damages).



Defendant A, who submits an \$11,000 insurance claim on an automobile whose fair market value is \$4,000, may be more culpable than defendant B, who files a claim for \$4,000 on a \$4,000 automobile, but defendant A is less culpable than defendant C, who files an \$11,000 claim on an automobile worth \$11,000. To treat defendants A and C the same would be inappropriate, especially because, as indicated above, there is no need to increase punishment. We believe that the guideline ranges are sufficiently wide to account for defendant A's inflated intention by sentencing defendant A at the top of the applicable guideline range determined by limiting the loss to what realistically could have occurred.<sup>17</sup> We urge the Commission to add the realistic-intention requirement set forth in brackets in option 2.<sup>18</sup>

(6) Fair market value. Both options 2 and 3 call for the use of the fair market value of the property that is unlawfully taken, appropriated, or damaged, but neither specifies what market is to be used. We recommend that the Commission specify that fair market value be determined by looking to the market in which the victim operates. If a truckload of electronic equipment is stolen from a retailer, the harm to the victim ordinarily is what it costs to replace that equipment in the market in which the victim customarily operates, the wholesale market. The loss, therefore, should be what it costs the retailer to get replacement equipment from a wholesaler,

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<sup>17</sup>While it could be argued that the loss attributable to defendant A should be set at \$11,000, with the court sentencing at the bottom of the range to account for defendant A's inflated intention, that presumes that the sentences for defendants like defendant C fall at the top of the range. Commission data cited above indicates that most sentences in fraud and theft fall at the bottom of the range. Combining the data for theft and fraud offenses shows that 51% of the sentences fall at the bottom of the applicable guideline range. See U.S. Sentencing Commission, *1996 Sourcebook of Federal Sentencing Statistics*, at table 27.

<sup>18</sup>If the Commission decides against such a limitation, we believe that the Commission should include commentary that states that there is a basis for departure if the loss includes amounts that the defendant could not realistically have obtained.

*i.e.*, the wholesale price. The loss should not be determined by looking to the value of that electronic equipment on the retail market.

(7) Gain. Option 3 provides that gain to defendant (and others for whose conduct the defendant is accountable under the relevant conduct rules) can be used if the gain is greater than the loss or if loss is difficult or impossible to determine. We believe that this standard is too broad and that gain should be used only if loss is difficult or impossible to ascertain. For those relatively-infrequent situations where gain is greater than loss, the sentencing court can depart upward.

(8) Interest/opportunity costs. We support the first alternative (subdivision (D), entitled “Opportunity costs”) in option 3, which excludes interest, anticipated profits, and other opportunity costs, but which invites an upward departure if the loss determined without those opportunity costs “substantially understate[s] the seriousness of the offense or the culpability of the defendant.” Opportunity costs are often highly speculative and do not represent out-of-pocket loss to the victim. The victim has not lost anything tangible but has lost an opportunity. The opportunity, however, might not have worked out to the victim’s financial benefit. The stock in which the victim would have invested, for example, might have declined in value or increased in value. Including opportunity costs as an element of loss will complicate the sentencing process and require something akin to speculation on the part of the sentencing court.

Bargained-for interest is a form of opportunity cost, although the opportunity lost -- the bargained-for interest -- is not as speculative as other forms of opportunity costs. Although the opportunity cost is not as difficult to calculate when dealing with bargained-for interest, the inclusion of bargained-for interest means that punishment is based, to some extent, upon the kind



of deal that has been negotiated, even though there is no difference in what the victims' out-of-pocket loss is. Should there be a difference in punishment between a defendant who defrauds another of \$19,000 on a promise to repay that amount at 5% interest and a defendant who does the same thing but who promises repayment at 10%? If a defendant unlawfully takes property worth \$19,000 from another, should it matter that the property taken was an automobile worth \$19,000 (which then becomes the amount of the loss) or was taken by falsely obtaining a loan of \$19,000 upon the promise to repay that amount at 8% interest?<sup>19</sup>

(9) Upward departures. We believe that the proposed commentary in option 3, entitled "Upward Departure Considerations," sets forth appropriate bases for upward departure. We suggest, however, that subdivision (F)(vii) be modified to account for §§ 2B1.1(b)(6)(A) and 2F1.1(b)(6)(A), which enhance if the offense substantially jeopardized the safety and soundness of a financial institution.

(10) Downward. We believe that the proposed commentary in option 3, entitled "Downward Departure Considerations," generally sets forth appropriate bases for downward departure. Subdivision (G)(iii) is confusing, however, because it appears to conflict with the earlier provision in option 3 that credits a defendant with economic benefits conferred upon the victim before the defendant knew or had reason to believe that the offense had been detected. The situation described in subdivision (G)(iii) is exactly that and therefore should not be a basis

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<sup>19</sup>If the Commission decides to adopt the alternative that we support, then the Commission will have to modify the discussion of credits to indicate that interest payments are not to be credited when calculating loss. If interest is not a part of loss, then interest payments should not be used to reduce the amount of loss.

for departure.<sup>20</sup>

(11) Appropriate deference. Options 2 and 3 include a provision that “the [sentencing] court’s loss determination is entitled to appropriate deference,” a self-evident proposition that begs the question of what kind of deference. Congress has prescribed the standards of review that apply on appeal. Inclusion of this provision not only is unnecessary but is potentially harmful. Including such a statement with regard to determinations of loss under the fraud and theft guidelines implies that the Commission does not consider such deference due to other types of factual determinations by the sentencing court.

**Amendment 5**  
**Issues Related to Revision of Loss Tables**  
**(§§ 2B1.1, 2F1.1, and 2T4.1)**

Proposed amendment 5 “address[es] issues related and subsidiary to the revisions of the theft, fraud, and tax loss tables that increase penalties and build in the more-than-minimal-planning (MMP) enhancement.” As indicated earlier, we oppose proposed amendment 1 because there is no need to increase penalties for theft and fraud offenses. The Commission has to take up proposed amendment 5 only if the Commission decides to revise the loss table. If the Commission does not adopt new loss tables, there is no need for the Commission to act on this proposed amendment.

Proposed amendment 5(A) would delete the more-than-minimal planning enhancement. If the Commission decides to adopt new loss tables, then the Commission has no choice but to adopt proposed amendment 5(A).

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<sup>20</sup>It may be that the phrase “prior to detection of the offense” should be “after detection of the offense and before sentencing.”



Proposed amendment 5(B) would add a specific offense characteristic that would reduce the offense level by two levels if the offense involved limited or insignificant planning. The Commission's review of preguidelines sentencing practices led the Commission to conclude that one of the two most important factors determining punishment was "whether the offense was an isolated crime of opportunity or was sophisticated or repeated."<sup>21</sup> That conclusion led to the more-than-minimal-planning enhancement. The heartland of the theft and fraud guidelines currently is a minimal amount of planning, so those guidelines enhance if the planning exceeds minimal. If the Commission were simply to eliminate the more-than-minimal-planning enhancement, the question would be what is the new heartland of the guideline. To say that an offense with minimal planning should be treated the same as an offense with considerable planning would be to contradict the empirical findings of the Commission that the extent of the planning was one of the two most important factors in determining punishment. We believe that the Commission should provide that an offenses in which the planning is limited or inconsequential results in a two-level reduction or is a basis for a downward departure.

Proposed amendment 5(C) would add an enhancement of two levels if the offense involves sophisticated concealment. The commentary discussing "sophisticated concealment" needs to be revised somewhat. The basic definition of "sophisticated concealment" in the first sentence of the proposed commentary is not consistent with the ordinary meaning of the term "sophisticated." The dictionary defines "sophisticated" as "*very* complex or complicated."<sup>22</sup> The term "very" should be inserted before the term "complex" in the first sentence of the proposed

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<sup>21</sup>See U.S.S.G. § 2F1.1, comment. (backg'd).

<sup>22</sup>The American Heritage Dictionary 1166 (2d college ed. 1991) (emphasis added).

commentary.

The second sentence of the proposed commentary creates confusion and does not accurately describe the definition in the first sentence or the example in the third sentence of the proposed commentary. The second sentence reads, "This enhancement applies to conduct in which deliberate steps are taken to hide assets or transactions, or both, or otherwise make the offense, or its extent, difficult to detect." Making the offense difficult to detect, whether by deliberately hiding assets, transactions, or both or by some other action, is going to occur in virtually every offense. The goal, after all, is not to be caught. The question is whether those efforts were complex or intricate. We recommend deletion of the second sentence of the proposed commentary.

Proposed amendments 5(B) and 5(C) should be acted on as a package and either adopted together or rejected together. If an enhancement is to be added to recognize offense conduct that goes beyond the norm, then there should be a reduction for offense conduct that does not rise to the norm. The Commission may not want to treat these two factors as specific offense characteristics and may wish instead to add commentary indicating that sophisticated concealment is a ground for upward departure and limited or insignificant planning is a ground for downward departure. We support that as an alternative to making those factors specific offense characteristics.

**Amendment 6**  
**Telemarketing Fraud**  
**Issues for Comment**

Proposed amendment 6 invites comment upon whether the guidelines provide adequate punishment for telemarketing offenses. Proposed amendment 6(A) seeks comment on whether



telemarketing fraud offenses should be treated differently from other fraud offenses and specifically whether § 2F1.1 should be amended to provide an increase of [2-8] levels "to correspond to the application of the statutory enhancement in 18 U.S.C. § 2326." Proposed amendment 6(B) seeks comment on whether the fraud guidelines adequately address offenses with multiple victims. Proposed amendment 6(C) seeks comment on "revictimization" offenses and whether § 3A1.1 should be amended to include as a "vulnerable victim" an "individual susceptible to the offense because of prior victimization." Proposed amendment 6(C) also seeks comment on whether to add specific offense characteristics to § 2F1.1 to address revictimization. Proposed amendment 6(D) seeks comment on whether to amend § 2F1.1 by replacing the encouraged departure in application note 10 with specific offense characteristics to address instances where "monetary loss inadequately measures the harm and seriousness of fraudulent conduct."<sup>23</sup> Proposed amendment 6(D) also seeks comment on whether certain specified grounds for departure in chapter 5, part K should be converted into specific offense characteristics. Proposed amendment 6(E), in response to the Senate version of pending telemarketing fraud legislation, seeks comment on whether to amend the guidelines to provide an enhancement for "sophisticated means." Proposed amendment 6(F) seeks comment on whether there are additional factors relating to telemarketing offenses that should be addressed by amending the guidelines.

The heartland of the fraud guideline is that the defendant has taken advantage of a victim by appealing to the victim's self interest, the desire to make money or increase wealth. Thus, §

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<sup>23</sup>We have commented upon the matters covered by proposed amendment 6(D) in our comments on proposed amendment 4.

2F1.1(b)(3)(A) requires a two-level enhancement if the defendant did not appeal to the victim's self-interest but instead misrepresented that he or she was acting on behalf of a charity or a government agency. Commentary to the fraud guideline states that "[u]se of false pretenses involving charitable causes and government agencies enhances the sentences of defendants who take advantage of victims' trust in government or law enforcement agencies or their generosity and charitable motives."<sup>24</sup> The commentary then goes on to make clear that appealing to a victim's desire to make money or increase wealth is the heartland of the guideline, stating that "[t]aking advantage of a victim's self-interest does not mitigate the seriousness of fraudulent conduct."<sup>25</sup>

As the testimony at the Commission's hearing illustrated, telemarketers do not appeal to the charitable impulse or trust in the institutions of government of the people they call. Telemarketers appeal to the self interest of the people they call – the heartland conduct of the fraud guideline. An enhancement based upon the fraud being a telemarketing offense would be inconsistent with the premise of the fraud guideline. Unless there is a factor that occurs in telemarketing cases that is not already accounted for in the guidelines, there is no basis for treating telemarketing fraud differently from other types of fraud offenses.

We recommend that the Commission defer action on telemarketing fraud. The Commission's hearing on the matter, at which the Department of Justice, the National Association of Attorneys General, and the American Association of Retired Persons testified,

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<sup>24</sup>§ 2F1.1, comment. (backg'd).

<sup>25</sup>*Id.*



failed to demonstrate that there is a basis for amending the fraud guidelines to treat telemarketing fraud differently from other types of fraud. The guidelines already adequately account for the factors that the witnesses at that hearing identified as characteristic of telemarketing fraud.

One of the factors identified was the practice of reloading, contacting persons who previously had been victimized. If a person who previously has been victimized is thereby vulnerable, however, the vulnerable victim adjustment of § 3A1.1 applies.<sup>26</sup> Another factor identified was the large number of victims involved. A large number of victims, however, not only increases the amount of the loss, but also gives the sentencing court a basis for departing upward.<sup>27</sup>

A third factor identified at the hearing as characteristic of telemarketing fraud is the targeting of older victims. There is no good reason why age alone should be used to enhance the offense level. Age alone does not make a person unusually vulnerable, as the American Association of Retired Persons pointed out at the hearing. A person who is 60 years old can be just as capable as of protecting him- or herself from victimization as a person who is 30 years old. There must be something more than age involved, such as an impaired capacity to handle personal affairs, and to the extent that there is something more the vulnerable victim adjustment

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<sup>26</sup>While it seems just as likely that a person who has been victimized will be more vigilant and less vulnerable when solicited a second time, there are undoubtedly persons who, in desperation, will seize at anything to get out of a financial hole and thus are unusually vulnerable within the meaning of § 3A1.1.

<sup>27</sup>A telemarketing fraud will invariably involve more-than-minimal planning as well as large numbers of victims. Under § 2F1.1(b)(1), either of those factors alone calls for a two-level enhancement. Application note 1 to the fraud guideline states that the presence of both factors is a basis for an upward departure.

applies.

We do not think it necessary or appropriate to add enhancements based upon factors in 18 U.S.C. § 2326. Two of those factors turn upon the age of the victims, and as indicated above we do not believe that age alone is an appropriate basis upon which to enhance the offense level. The other factor in 18 U.S.C. § 2326 is that the offense was telemarketing fraud. To enhance simply because the fraud was telemarketing fraud, as we stated above, would be inconsistent with the heartland of the guideline.

Finally, we believe it unwise for the Commission to anticipate the enactment of a law by amending the guidelines on the basis that one House of Congress has passed a bill directing the amendment of the guidelines. The Commission should evaluate the proposal on its merits, not on the basis that Congress may sometime in the future enact the legislation. The bill that has passed one House, in this instance, would direct that the Commission add an enhancement for an offense that "involved sophisticated means, including but not limited to sophisticated concealment efforts, such as perpetuating the offense from outside the United States." This directive will be complied with if the Commission adopts proposed amendment 5(C) in the form of a specific offense characteristic. If the Commission believes that proposed amendment 5(C) should be a departure ground instead of a specific offense characteristic, we would urge the Commission to add commentary indicating that the factor is a basis for departure and to work with the appropriate persons on the Hill to convince Congress that a specific offense characteristic makes more sense. In candor, though, we do not believe that the telemarketing offenses described at the Commission's hearing can fairly be called sophisticated. Telephone calls were made to persons, who then were persuaded to send money to the telemarketers in the



expectation that they, the victims, would make big money. To call that sophisticated does not comport with the ordinary meaning of the term "sophisticated."<sup>28</sup>

In short, we believe that the most effective way to combat telemarketing fraud is with educational programs like that being carried out by the American Association of Retired Persons.

### **Amendment 7 Circuit Conflicts**

Amendment 7 seeks to resolve what the Commission has identified as nine circuit conflicts.

#### **Part A – Aberrant Behavior**

Chapter one, part A(4)(d) of the *Guidelines Manual* states that "[t]he Commission, of course, has not dealt with single acts of aberrant behavior that still may justify probation at higher offense levels through departures." Without guidance as to what the Commission contemplated as "single acts of aberrant behavior," the courts have come up with differing interpretations of that phrase. Proposed amendment 7(A) seeks to resolve the differences by deleting the above sentence and adding a new policy statement in chapter five, part K. The new policy statement would define "single acts of aberrant behavior" very narrowly to be a "spontaneous and thoughtless act." The definition would specifically exclude "a course of conduct composed of multiple planned criminal acts, even if the defendant is a first-time offender." We oppose the amendment because it is too restrictive and incompatible with the approach to departures in *Koon v. United States*, 116 S.Ct. 2035 (1996).

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<sup>28</sup>The American Heritage Dictionary 1166 (2d college ed. 1991) defines "sophisticated" to mean "very complex or complicated."

The proposed definition describes conduct that does not get prosecuted in federal court and deprives aberrant behavior of any real-world meaning. The defendant who, on the way out of a restaurant, sees an unattended purse and steals it, may get prosecuted in state court, but not in federal court. There are no reported cases using the narrow definition that have upheld a downward departure based on aberrant behavior.

The Commission must have intended more than empty words when it stated that a single act of aberrant behavior was a basis for departure. We believe that the totality of the circumstances approach taken by the First, Ninth, and Tenth Circuits gives substance to the Commission's statement on aberrant behavior.<sup>29</sup>

We think the Commission intended the word "single" to refer to the crime committed and not to the various acts involved. As a result, we read the Guidelines' reference to "single acts of aberrant behavior" to include multiple acts leading up to the commission of a crime. Any other reading would produce an absurd result. District courts would be reduced to counting the number of acts involved in the commission of a crime to determine whether a departure is warranted. Moreover, the practical effect of such an interpretation would be to make aberrant behavior departures virtually unavailable to most defendants because almost every crime involves a series of criminal acts.<sup>30</sup>

Unless the Commission intends to foreclose departure based on aberrant behavior by means of an unrealistic definition, the most appropriate test is that used by the First, Ninth, and Tenth Circuits. We support providing a more realistic framework for determining whether a departure for aberrant behavior is warranted. Thus, rather than focus on whether the offense

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<sup>29</sup>See *United States v. Grandmaison*, 77 F.3d 355 (1<sup>st</sup> Cir. 1996); *United States v. Takai*, 941 F.2d 738 (9<sup>th</sup> Cir. 1991); *United States v. Pena*, 930 F.2d 1486 (10<sup>th</sup> Cir. 1991).

<sup>30</sup>*Grandmaison*, 77 F.3d at 563 (citation omitted).



involved a spontaneous, single act, the court should determine whether, looking at all of the circumstances, including the nature of the crime, the lack of substantial planning, and the motivation of the defendant, the defendant's offense resulted from truly aberrant behavior. The totality of circumstances test "achieves the uniformity in sentencing and district court discretion the Guidelines were intended to strike."<sup>31</sup>

This totality of the circumstances test parallels the Supreme Court's approach to departures in *Koon*. After pointing out that the Sentencing Reform Act of 1984 left district courts with much of their traditional sentencing discretion, 116 S.Ct. at 2046, the Supreme Court stated that "[a] district court's decision to depart from the Guidelines . . . embodies the traditional exercise of discretion by a sentencing court."<sup>23</sup> The Court went on to state that

[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue. We do not understand it to have been the congressional purpose to withdraw all sentencing discretion from the United States District Judge.<sup>24</sup>

The obvious concern about a broad definition is whether the definition is used as a way to depart for any first-time offender. Routine aberrant-behavior departures have not occurred in those jurisdictions in which the broader definition is used. We see no reason why they will occur if the Commission adopts the broader definition.<sup>25</sup>

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<sup>31</sup>*Id.*

<sup>23</sup>*Koon*, 116 S.Ct. at 2046.

<sup>24</sup>*Id.* at 2053.

<sup>25</sup>If the Commission adopts the broader definition, the Commission, out of caution, might want to include in the commentary a statement that the simple fact that the defendant is a first-time offender does not, in and of itself, qualify the defendant for a departure for aberrant

## Part B - Misrepresentation with respect to Charitable Organizations

Section 2F1.1(b)(3)(A) calls for a two-level enhancement if the offense involved "a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency . . . ." The enhancement recognizes the increased culpability of a defendant who takes advantage of a person's charitable impulse or faith in the institutions of government.

Use of false pretenses involving charitable causes and government agencies enhances the sentences of defendants who take advantage of victims' trust in government or law enforcement agencies or their generosity and charitable motives. . . . defendants who exploit victims' charitable impulses or trust in government create particular social harm.<sup>26</sup>

Proposed amendment 7(B) would revise § 2F1.1(b)(3) to call for an enhancement if the defendant (1) is an employee of a charitable, religious, or political organization or a government agency and uses that position "under false pretenses" to victimize an individual who is not an employee of the organization or agency; or (2) misrepresents that he or she is an employee or authorized agent of such an organization or agency. We oppose proposed amendment 7(B).

The Commission has cited two cases to illustrate the perceived conflict in the circuits. Not only are the cases not inconsistent, but the proposed amendment would not change the outcome in either.

In *United States v. Marcum*, 16 F.3d 599 (4th Cir. 1994), the defendant was the president of a charitable organization and had been convicted of mail fraud for skimming money from the

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behavior. We would not oppose such action by the Commission.

<sup>26</sup>U.S.S.G. § 2F1.1, comment. (backg'd).



gross proceeds of a bingo game meant to raise funds for the charity. He received a two-level enhancement under § 2F1.1(b)(3) because he "misrepresented to the public that he was conducting the bingo games wholly on behalf of LCDSA, a charitable organization. . . . Without his position of trust, he would not have had the opportunity to commit the crime for which he stands convicted." Because the enhancement was appropriate under present § 2F1.1(b)(3)(A), it would also be appropriate under the version in proposed amendment 7(B).

In *United States v. Frazier*, 53 F.3d 1105 (10th Cir. 1995), the defendant, who was president of a nonprofit corporation, had been convicted of intentionally misapplying property and making false statements to a government agency. The defendant, on behalf of the corporation, received Department of Labor funding for job training for participants in the United Tribe Service Center. Instead of using the funds to provide job training, the defendant used the money to buy computers for the organization. The Tenth Circuit found that the enhancement in § 2F1.1(b)(3)(A) did not apply because "at no time during commission of the offense did Defendant appeal to the generosity and charitable or trusting impulses of his victim by falsely declaring that he had authority to act on behalf of an educational organization." This is the appropriate result under the present enhancement because the defendant did not "create particular social harm" by "exploit[ing] victims' charitable impulses or trust in government."<sup>27</sup> The new version of § 2F1.1(b)(3)(A) in proposed amendment 7(B) would not change the outcome because the victim of the offense was a government agency, not an individual.

The proposed amendment is unnecessary and is likely to result in confusion and

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<sup>27</sup>*Id.*

unnecessary litigation. We oppose proposed amendment 7(B).

#### Part C - Violation of Judicial Process

Section 2F1.1(b)(3)(B) calls for a two-level enhancement if the offense involved "violation of any judicial or administrative order, injunction, degree, or process not addressed elsewhere in the guidelines . . . ." The enhancement recognizes the increased culpability of a defendant who persists in wrongful conduct after having been told by a judicial or administrative body to desist in the conduct. As the commentary states, "A defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punishment for not conforming with the requirements of judicial process or orders issued by federal, state, or local administrative agencies."<sup>28</sup>

Proposed amendment 7(C) presents two options to address a circuit conflict over whether filing fraudulent forms with a bankruptcy or probate court calls for an enhancement under § 2F1.1(b)(3)(B) for violation of a judicial order or process. Option 1(a) would revise the commentary in § 2F1.1 to state explicitly that the enhancement applies "if the offense involves a violation of a special judicial process, such as a bankruptcy or probate proceeding." Option 1(b) sets forth an alternative approach that adds commentary indicating that there is a basis for an upward departure if the offense involved violation of a "special judicial process, such as a bankruptcy or probate proceeding." Option 2(a) would limit the enhancement to conduct that involved "a fraud in contravention of a prior official judicial or administrative warning, in the

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<sup>28</sup>*Id.*



form of an order, injunction, decree, or process, to take or not to take a specified action." Option 2(b), as an alternative, would treat a violation of a judicial order as a ground for departure. We believe that the Commission should adopt one of the alternatives in option 2.

The background commentary to the fraud guideline quoted above indicates that the enhancement of § 2F1.1(b)(3)(B) reflects the increased culpability of a defendant who disobeys a judicial or administrative order to stop engaging in certain conduct. This is underscored by application note 5 to the fraud guideline. The example used in that note to illustrate the application of the enhancement is of a defendant whose business had been enjoined from selling a dangerous product but who engaged in fraudulent conduct to sell the product.

The courts applying the enhancement to filing false forms in bankruptcy court have expanded the scope of the enhancement far beyond what the Commission originally intended. The appropriate course of action for the Commission, therefore, is to reiterate what the background commentary and application note 2 were intended to indicate -- that the enhancement applies to scofflaws, defendants who, in committing a federal offense, disobey a prior judicial or administrative-agency order not to engage in the kind of conduct that got them convicted of the federal offense.

It is not clear to us why bankruptcy and probate courts should be singled out for special consideration. One consequence of such a policy, as the First Circuit has pointed out, would be to increase the offense level in all bankruptcy frauds.<sup>29</sup> There is no evidence, however, that bankruptcy fraud is at present punished inadequately. The rationale for applying the

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<sup>29</sup> See *United States v. Shaddock*, 112 F.3d 523, 530 (1st Cir. 1997).

enhancement to filing false forms in bankruptcy proceedings, as expressed in the cases, is that there is a standing order to fill out forms truthfully. Why should bankruptcy and probate courts be treated differently from other government agencies? Why does submitting a false form to a bankruptcy court deserve enhancement but submission of a false form (completed under penalty of perjury) to the NLRB or the FCC – or to a district court or court of appeals – does not?

We believe that the enhancement should be reserved for those defendants who, in the words of the First Circuit, "have demonstrated a heightened *mens rea* by violating a prior 'judicial or administrative order, decree, injunction or process.'"<sup>30</sup> We recommend that the Commission adopt either alternative in option 2.

#### Part D - Grouping Failure to Appear Count with Underlying Offense

Under 18 U.S.C. § 3146(b), a sentence of imprisonment imposed for a failure to appear must run consecutively to the sentence imposed for any other offense. Section 3146(b) does not require a sentence of imprisonment. Section 3146(b) does require, however, that any sentence of imprisonment that is imposed must run consecutively to any other sentence of imprisonment to which the defendant is subject.

Application note 3 to § 2J1.6 states that a conviction of failure to appear (other than for service of sentence) is to be treated under § 3C1.1 as a willful obstruction of the underlying offense (the offense for which the defendant failed to appear). If that occurs, the failure-to-appear count must be grouped under § 3D1.2(c) with the underlying offense because the conduct in the failure-to-appear count is used to adjust the offense level for the underlying offense.

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<sup>30</sup>*Id.*



Application note 3 indicates that in such a situation, the court must sentence within the applicable guideline range -- which encompasses both the failure-to-appear count and the underlying offense -- but that a portion of any term of imprisonment must be assigned to the failure-to-appear count and run consecutively to the remainder of the term of imprisonment.<sup>31</sup>

The Fifth Circuit, in effect, has invalidated that methodology in that circuit, holding that the methodology conflicts with 18 U.S.C. § 3146(b).<sup>32</sup> "The guideline treatment of section 3146(b) would defeat the statutory intent that a failure to appear offense be considered separate and distinct from the underlying offenses, warranting a separate and distinct penalty."<sup>33</sup> What the Fifth Circuit seemed not to recognize was that the Commission *had* provided "a separate and distinct penalty" -- the two-level adjustment under § 3C1.1 for willful obstruction of justice. The consequence of the Fifth Circuit's decision is that a defendant can be penalized twice for the same conduct, once when the willful-obstruction adjustment is added to the offense level for the underlying offense and once when the court imposes a separate sentence for the failure-to-appear count.<sup>34</sup>

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<sup>31</sup>The example in application note 3 is of a defendant subject to a guideline range of 30-37 months. The court decides that 36 months is the appropriate sentence. "[A] sentence of thirty months for the underlying offense plus a consecutive six months sentence for the failure to appear count would satisfy" the requirements of the guidelines and 18 U.S.C. § 3146(b). U.S.S.G. § 2J1.6, comment. (n.3).

<sup>32</sup>*United States v. Packer*, 70 F.3d 357 (5th Cir. 1995).

<sup>33</sup>*Id.* at 360.

<sup>34</sup>The district court in *Packer* had grouped together seven fraud offenses and calculated an offense level of 16, which with the defendant's criminal history category yielded a guideline range of 21-27 months. (The Fifth Circuit's opinion does not indicate if the district court added the two-level adjustment for willful obstruction, but there would seem to be no basis for the district court to have declined to do so.) The district court sentenced the defendant to a prison

Proposed amendment 7(D) would amend commentary to explain that the Commission's methodology complies with statutory requirements. We support that part of proposed amendment 7(D). Proposed amendment 7(D) would also amend commentary to indicate that there is a basis for an upward departure if there were acts of obstruction other than the failure to appear. We oppose that part of the proposed amendment as unnecessary. There is no basis for treating an obstruction for failure to appear any differently from another kind of willful obstruction.

#### Part E - Imposters and the Abuse of Trust Adjustment

Section 3B1.3 provides for a two-level increase in the offense level "if the defendant abused a position of public or private trust . . . ." Proposed amendment 7(E) would revise the commentary in § 3B1.3 to expand the scope of the adjustment. The new commentary would state that the enhancement for abuse of a position of trust applies to defendants "who provide sufficient indicia to the victim that they legitimately hold a position of public or private trust when, in fact, they do not." Proposed amendment 7(E) also invites comment on whether § 3B1.3 should be amended to state that the adjustment does not apply to an "individual who poses as an individual in a position of public or private trust."

The essence of a fraud offense is deception of the victim. This deception is accounted for

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term of 27 months on the fraud offenses. The district court determined the offense level for the failure-to-appear count separately from the offense level for the fraud counts. That offense level, 12, combined with the defendant's criminal history category yielded a guideline range of 10-16 months. The district court imposed a prison term of 16 months on the failure-to-appear count, to run consecutively to the prison term on the fraud counts. The aggregate prison term, therefore, was 43 months, 16 months above the top of the applicable guideline range that the Commission intended apply to all eight counts (the seven fraud counts and the failure-to-appear count).



in the base offense level for fraud, but the fraud guideline also identifies certain kinds of deception -- purporting to act on behalf of a charity or on behalf of a government agency -- that "create particular social harm."<sup>35</sup> Because they create particular social harm, those kinds of deception receive a two-level enhancement under the fraud guideline. Section 3B1.3, the abuse of trust guideline, identifies another category of deception that is deserving of enhancement, that practiced by persons who hold positions that ordinarily are subjected to less supervision than persons whose responsibilities are nondiscretionary in nature.<sup>36</sup>

Proposed amendment 7(E) would expand the scope of the adjustment. The adjustment now applies to persons who are more culpable because their insulated position gives them a relatively-secure way to commit the offense. As revised by proposed amendment 7(E), the adjustment would apply to any person who deceives a victim by misrepresenting his or her position -- conduct that is a part of the heartland of the fraud guideline. We oppose proposed amendment 7(E).

#### Part F - Instant Offense and Obstruction of Justice

Section 3C1.1 provides for a two-level increase "if the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense." Proposed amendment 7(F) "addresses the circuit conflict regarding whether the term 'instant offense', as used in the obstruction of justice guideline, § 3C1.1, includes obstructions that occur in cases closely related

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<sup>35</sup>U.S.S.G. § 2F1.1, comment. (backg'd).

<sup>36</sup>U.S.S.G. § 3B1.3, comment. (n.1).

to the defendant's case or only those specifically related to the 'offense of conviction.'

Proposed amendment 7(F) presents three options to amend § 3C1.1. Option 1(a) would adopt a broad definition by defining "instant offense" to mean the "offense of which the defendant is convicted and any state or federal offense committed by the defendant or another person that is closely related to the offense of conviction." Option 1(b) would amend the guideline to provide that the adjustment applies if (A) the defendant's obstructive conduct took place during the investigation, prosecution, or sentencing of the defendant's instant offense of conviction, and (B) the defendant's obstructive conduct related to the defendant's instant offense of conviction or a closely related offense. Option 2 would amend the commentary to state that the adjustment applies to obstructive conduct that "(A) occurred during the investigation, prosecution, or sentencing of the defendant's instant offense of conviction, and (B) related solely to the defendant's instant offense of conviction." We do not believe that the obstruction enhancement should be a vehicle for sanctioning conduct as far removed from the offense that the defendant has been found guilty beyond a reasonable doubt of committing. We support option 2.

We believe that the Commission has already resolved the split in the circuits. The Commission last amendment cycle promulgated amendment 546, which revised the commentary to § 1B1.1 to define the term "instant offense."

The term "instant" is used in connection with "offense," "federal offense," or "offense of conviction," as the case may be, to distinguish the violation for which the defendant is being sentenced from a prior or subsequent offense, or from an offense before another court (e.g., an offense before a state court involving the same underlying conduct).

Section 3C1.1 is not ambiguous and literally requires that the defendant's conduct obstruct the



investigation, prosecution, or sentencing of "the violation for which the defendant is being sentenced . . . ." This is sound policy and the Commission should stand by it.

#### Part G - Failure to Admit Drug Use While on Pretrial Release

Proposed amendment 7(G) responds to a circuit conflict over whether the two-level adjustment for obstruction of justice applies if the defendant refuses to admit to using drugs while on pretrial release. The amendment would revise the commentary in § 3C1.1 to state specifically that "lying to a probation or pretrial services officer about drug use while on pretrial release" ordinarily does not warrant the adjustment, "although such conduct may be a factor in determining whether to reduce the defendant's sentence under § 3E1.1 (Acceptance of Responsibility)." We support that part of the amendment which would state that an adjustment for obstruction of justice is ordinarily not warranted for a false exculpatory statement about drug use to a probation officer while on pretrial release. We oppose that part of the amendment that says that such conduct may provide grounds for denying an adjustment for acceptance of responsibility.

A false denial of drug use while on pretrial release should be no more material to sentencing than a false denial of guilt. Application note 1 to § 3C1.1 provides that "[a] defendant's denial of guilt (other than a denial of guilt under oath that constitutes perjury), refusal to admit guilt or provide information to a probation officer, or refusal to enter a plea of guilty is not a basis for application of this provision." As the Seventh Circuit has stated, "[w]e see no basis for distinguishing between statements made to probation officers and those made to

pretrial service officers . . . ."<sup>37</sup>

The proposed amendment will maintain the spirit of the enhancement to ensure that a defendant is not penalized with an obstruction enhancement for incriminating statements that would not qualify as relevant conduct when such statements have no relation to the offense for which the defendant is being sentenced. Indeed, to allow punishment for denying drug use would only foster disparity. Material obstructive conduct, such as perjury, threatening witnesses, and hiding evidence, is hardly equivalent to lying about being a drug user. Finally, defendants on bail are routinely tested for drug use, and a positive test will often result in revocation of bail – whether or not the defendant admits to using drugs.

For these same reasons we oppose that part of the amendment that would amend the commentary to state that a false statement about drug use to a probation or pretrial service officer "may be a factor in determining whether to reduce the defendant's sentence under § 3E1.1 (Acceptance of Responsibility)." Such an instruction would also conflict with commentary in § 3E1.1 that states that

truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility.<sup>38</sup>

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<sup>37</sup>United States v. Thompson, 944 F.2d 1331, 1348 (7th Cir. 1991).

<sup>38</sup>U.S.S.G. § 3E1.1, comment. (n.1(a)) (emphasis added).



#### Part H - Meaning of "Incarceration" for Computing Criminal History

Proposed amendment 7(H) presents two options to address whether the term "incarceration," as used in chapter four to determine a defendant's criminal history score, includes confinement in a community treatment center or halfway house following revocation of parole, probation, or supervised release. Option 1 would include as "incarceration" a revocation sentence of home detention, halfway house, or community treatment center. Option 2 would exclude nonprison sentences. We support option 2.

A defendant's placement in a community treatment center or halfway house can occur for a number of reasons. The defendant may recognize that he or she has a need for alcohol or drug counseling and consent to such placement to get help. The defendant may have no home to go to and be placed in a community treatment center or halfway house for that reason. Treating such a placement as imprisonment for purposes of calculating the criminal history score would be unfair and a disincentive to seek substance-abuse treatment.

Further, equating "incarceration" with home detention or confinement in a halfway house or community treatment center would erase distinctions otherwise important in the guidelines. As noted in *United States v. Latimer*, 991 F.2d 1509, 1511-1517 (9th Cir. 1993), the Commission "repeatedly draws a sharp distinction between confinement in a community treatment center or halfway house and confinement in a conventional prison facility." Thus, §§ 4A1.1, 2P1.1, and 5C1.1 consider nonprison sentences as intermediate sanctions. To maintain this consistency, the Commission should adopt the proposed amendment in option 2.

#### Part I - Diminished Capacity

Section 5K2.13, p.s. states that there is a basis for a downward departure "if the defendant

committed a non-violent offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants . . . provided that the defendant's criminal history does not indicate a need for incarceration to protect the public." Proposed amendment 7(I) presents four alternatives in response to a circuit conflict on whether a defendant who commits a "crime of violence," as defined in § 4B1.2, is ineligible to receive a downward departure under § 5K2.13, p.s. for diminished capacity.

Option 1 would amend § 5K2.13, p.s. to restrict the departure for diminished capacity to a defendant whose offense was not a "crime of violence" as defined in § 4B1.2. Option 2 would revise § 5K2.13, p.s. to state that the determination of whether an offense is nonviolent should be based on the totality of the facts and circumstances of the offense. Option 3 would authorize a downward departure for diminished capacity for any offense unless

(1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; or (3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public.

Option 4 eliminates the restriction in § 5K2.13 that limits a diminished capacity departure to nonviolent offenses. We support option 4.

The sentencing court, consistent with *Koon*, should be able to look at all of the facts and circumstances to decide if a departure is warranted. The premise behind the current limitation to a conviction of a nonviolent offense is that every defendant convicted of a violent offense presents a serious threat to the safety of others. Not every defendant convicted of a violent offense, however, will present such a threat. We believe that federal judges are capable of determining if a defendant convicted of a violent offense but suffering from diminished capacity



presents a serious threat to public safety. Federal judges are aware of the need to protect the public from dangerous individuals and can be trusted to exercise this discretion appropriately.

**Amendment 7(A)  
Grounds for Departure  
(§ 5K2.0)**

Proposed amendment 7(A) seeks comment on whether to amend § 5K2.0 to "incorporate the analysis and holding" of the decision in *Koon v. United States*, \_\_ U.S. \_\_, 116 S.Ct. 2035 (1996). We do not believe that it is necessary to amend § 5K2.0, p.s. to provide a digest of the Supreme Court's decision in *Koon*. The decision should speak for itself. We think that it would be appropriate to point out the decision and suggest adding the following as the final paragraph of the commentary to § 5K2.0, p.s.: "The Supreme Court has addressed the departure standard and review of departures in *Koon v. United States*, \_\_ U.S. \_\_, 116 S.Ct. 2035 (1996)."

**Amendment 8  
Homicide  
(Chapter 2, Part A)**

Proposed amendment 8 invites comment on whether and how to amend the guidelines applicable to homicide offenses. Proposed amendment 8(A) asks whether to amend § 2A1.2 (second degree murder) by increasing the offense level or adding specific offense characteristics. Proposed amendment 8(B) invites comment on whether § 2A1.3 (voluntary manslaughter) should be amended. Proposed amendment 8(C) invites comment on whether § 2A1.4 (involuntary manslaughter) should be amended. Proposed amendment 8(D) asks whether other related guidelines such as § 2A1.5 (conspiracy to commit murder) should be amended to ensure proportionality with any changes made to the other homicide guidelines.

Homicide offenses occur relatively infrequently within federal jurisdiction, and when

they do the majority of them occur in Indian country.<sup>39</sup> Any Commission action to increase penalty levels for homicide offense will have a disproportionate impact upon Native Americans.

The Commission's data on manslaughter offenses indicates that although sentences fall at the bottom of the applicable range as often as at the top of the applicable range, downward departures (other than for substantial assistance) occur about three-and-a-half times as often as upward departures. Sentences for murder fall at the top of the applicable range more frequently than at the bottom of the range (18.9% vs. 11.3%), but downward departures (other than for substantial assistance) occur two-and-a-half times as often as upward departures. The mixed picture for murder offenses may result from the way in which certain murder offenses are scored.<sup>40</sup>

We believe that the Commission should defer action on proposed amendment 8 until the

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<sup>39</sup>The term "Indian country" is defined in 18 U.S.C. § 1151. *See also* 18 U.S.C. § 1162 ("State jurisdiction over offenses committed by or against Indians in the Indian country") (giving certain states jurisdiction "over offenses committed by or against Indians in the areas of Indian country listed opposite the State" in a table). Two offenses in the chapter of title 18 entitled "Indians," 18 U.S.C. ch. 53, modify the definition of Indian country for the purposes of those offenses. *See* 18 U.S.C. §§ 1154(c), 1156.

<sup>40</sup>Sentences for murder include sentences imposed for first-degree murder, second degree murder, and conspiracy to murder with death resulting. U.S. Sentencing Commission, *1996 Sourcebook of Federal Sentencing Statistics* A-11.

It is not clear how the Commission treated sentences under 18 U.S.C. § 1111, which mandates a sentence of life imprisonment, and for which U.S.S.G. § 2A1.1 calls for an offense level of 43. If the defendant gets a three-level credit for acceptance of responsibility, the life sentence mandated by section 1111 can be at the top of the applicable range (if the defendant's criminal history category is III or higher) or an upward departure (if the defendant's criminal history category is I or II). If the defendant does not get credit for acceptance of responsibility or for another adjustment that reduces the offense level, the defendant's guideline range, regardless of the defendant's criminal history category, is life. The *1996 Sourcebook* does not indicate whether a life sentence in such a situation was categorized as a sentence at the bottom or the top of the applicable range – or whether the sentence was disregarded.



next amendment cycle. The distribution of the within-the-guideline sentences in manslaughter and murder cases, as well as the significant rate of downward departure (for other than substantial assistance) suggests that there might be factors affecting sentence severity that could be captured by specific offense characteristics. We believe that it would be helpful if the Commission were to visit districts in which there are a significant number of prosecutions, to learn first-hand about these cases. Federal Public and Community Defenders in those districts would be happy to assist the Commission in any way possible.

**Amendment 9**  
**Electronic Copyright Infringement**  
**(§ 2B5.3)**

Proposed amendment 9 seeks comment on how to amend the guidelines in response to a Congressional directive in the No Electronic Theft Act, Pub. L. 105-147. The amendment presents a proposal by the Department of Justice to revise § 2B5.3 (criminal infringement of copyright or trademark) to include in the determination of the loss to the copyright or trademark owner "lost profits, the value of the infringed upon items, the value of the infringing items, the injury to the copyright or trademark owner's reputation, and other associate harms."

The copyright and trademark infringement guideline, § 2B5.3, currently enhances the base offense level of six based upon the "retail value of the infringing items." The Justice Department's proposal is to change that standard to the "loss to the copyright or trademark owner." The loss to the copyright or trademark owner generally should be less than the retail value of the infringing items if the copyright or trademark owner is not directly involved in the retail market. With prerecorded tapes, for example, where the copyright owner does not sell directly to the public, the loss to the copyright owner in a tape-pirating case would be what the

copyright owner would have derived from the sale of legitimate tapes to distributors, a wholesale price.

We do not oppose the amendment.

**Amendment 10**  
**Property Offenses at National Cemeteries**  
**(§ 2B1.1, § 2B1.3, § 2K1.4)**

Proposed amendment 10 responds to the Veteran's Cemetery Protection Act of 1997, which directs the Commission to provide an enhancement of not less than two levels for any offense directed against the property of a national cemetery. The amendment would revise §§ 2B1.1, 2B1.3, and 2K1.4 to provide a two-level enhancement if the offense occurred in a national cemetery. We do not oppose the amendment.

**Amendment 11**  
**Prohibited Persons in Firearms Guideline**  
**(§ 2K2.1)**

Proposed amendment 11 consists of two parts. Proposed amendment 11(A) responds to section 658 of the Treasury, Postal Service, and General Government Appropriations Act of 1997, which amended 18 U.S.C. § 922(d) to include in the definition of a prohibited person an individual who has been convicted of a misdemeanor crime of domestic violence. We do not oppose proposed amendment 11(A). The guideline definition of "prohibited person" should be consistent with the statutory definition.

Proposed amendment 11(B) responds to juvenile justice legislation reported by the Senate Judiciary Committee and currently pending before the Senate. That legislation directs the Commission to increase the offense level for firearms offenses to ensure that a person who transfers a firearm to a prohibited person receives the same base offense level as the transferee.



We oppose proposed amendment 11(B). The Commission should not short-circuit the legislative process and amend the guidelines simply because a committee of Congress has reported legislation. The Commission was established to exercise independent judgment about sentencing policy. We believe that the Commission should defer action on this amendment so that the proposal can be studied further.

**Amendment 12**  
**Conditions of Probation and Supervised Release**  
**(§ 5B1.3, § 5D1.3)**

Proposed amendment 12 would revise the guidelines applicable to conditions of probation and supervised release. Proposed amendment 12(A) responds to section 374 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which amended 18 U.S.C. § 3563(b) to include as a discretionary condition of probation an order of deportation. Proposed amendment 12(B) would amend § 5D1.3 to remove the reference to "just punishment" as a consideration in imposing a curfew. Proposed amendment 12(C) would amend §§ 5B1.3 and 5D1.3 to indicate that the list of discretionary conditions of probation and supervised release are policy statements. We support the amendment.







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**PREPARED STATEMENT OF**  
**SHARI STEELE**  
**STAFF ATTORNEY, ELECTRONIC FRONTIER FOUNDATION**  
**ON THE**  
**PROPOSED AMENDMENTS TO GUIDELINE § 2B5.3**  
**BEFORE THE**  
**UNITED STATES SENTENCING COMMISSION**  
**MARCH 12, 1998 PUBLIC HEARING**



## Introduction

I would like to begin by thanking the Commission for the opportunity to appear here today on behalf of the Electronic Frontier Foundation (EFF) to comment on what we believe to be an extremely important issue. First, I should say a brief few words about who we are. The Electronic Frontier Foundation is a national non-profit civil liberties organization working to safeguard rights and promote responsibility in the rapidly developing online world. Since 1990, we have been working to protect free expression, individual privacy, and open access to information in cyberspace, and we continue to represent the public interest in issues that touch upon the fabric of the new information society. We are very pleased to appear before the Commission to provide our perspective on some key proposals in this year's guideline amendments.

The subject of our testimony is Guideline § 2B5.3, the governing provision for criminal infringement of copyright or trademark, and the various proposals to revise it. These proposals break down into two main initiatives. First, there is the Department of Justice (DoJ) -sponsored initiative to amend § 2B5.3 pursuant to legislative changes enacted in the No Electronic Theft Act of 1997. Second, there are the Commission's own revisions proposed as part of its broader rethinking of the theft, fraud, and tax loss tables. The bulk of our comments will be directed toward the DoJ proposal and related issues; I would then like to close with our brief views on the various options pertaining to loss table cross-referencing.

## The NET Act and the Sentencing Guidelines

Last year, Congress enacted the No Electronic Theft, or “NET,” Act, which for the first time extended criminal penalties to willful copyright infringement undertaken without commercial purpose. Congress refused to extend criminal penalties to the acts of software piracy that it has deemed least serious (i.e., those involving dollar amounts of less than \$1,000) and set out broad misdemeanor and felony categories for those acts that it declared *do* rise to the standard of criminality. However, within the broad sweep of these criminal categories persist many different degrees of culpability to which the leniency or severity of punishment need to be calibrated.

For example, the home user who makes an unauthorized copy of legitimately purchased software and the professional software pirate who makes a business out of selling bootleg software at a fraction of its retail value are very different people in very different circumstances. While they both may have technically violated one or more of an author’s exclusive rights under federal copyright law, no reasonable person would argue that these disparate transgressions should be treated identically. Certain kinds of software copyright infringement are clearly more deserving of punishment than others. In the statute, Congress provided some minimal guidance—a starting point, if you will—as to how this challenge can be equitably met, but the greater part of this delicate task remains to be done.



## EFF's Proposal for a Downward "Noncommercial Infringer" Adjustment

Under the Copyright Act as amended by the NET Act, criminal penalties for copyright infringement may be triggered in one of two ways. The first is contained in § 506(a)(1) and is an expanded version of the old criminal provision covering willful infringement for "purposes of commercial advantage or private financial gain." The NET Act broadened the definition of "financial gain" to include "receipt, or expectation or receipt, of anything of value, including the receipt of other copyrighted works." This effectively brought "bartering" transactions within the reach of this first provision.

The second trigger for criminal punishment is entirely new. Governed by § 506(a)(2) of the Copyright Act, this provision sets a bright-line retail value threshold of \$1,000. Any unauthorized copying of software—even the production of a single copy—that exceeds that amount is a criminal act, regardless of the absence of commercial or trade purpose.

These two provisions define three distinguishable types of copyright criminals. First, there is the commercial software pirate, who illegally copies software and sells the resulting bootlegged copies to others at cut-rate prices. He is not only violating the copyright holder's exclusive right of reproduction, but has taken the further step of elevating his violation into a profit-making enterprise.

Second, there is the hobbyist-collector, who is known in the jargon as a "warez trader." A warez trader is one who deals in illicit software over the Internet but does not accept any money in exchange. Instead, he barterers one illegal copy for another, with the primary goal of expanding his collection of illegal "wares." This individual has also gone beyond the mere violation of the

right of reproduction; he encourages further piracy by organizing and participating in in-kind transactions where the currency is more bootlegged software.

Third, there is the individual who is guilty of noncommercial software copying. While he technically may have violated the exclusive right of reproduction conferred upon the copyright holder by federal law, unlike the previous two, he has taken no additional step beyond that violation. The noncommercial infringer generally does not seek out others engaged in infringement in order to initiate sales or trades on a mass scale. Predictably, this tends to lead to a somewhat lower volume of infringing activity.

There are fundamental differences between the first two acts of infringement and the third. Commercial or trade piracy tends to be a more organized, sophisticated activity involving large underground networks, high levels of activity, and large amounts of illicit data. Noncommercial infringement, on the other hand, takes no more than a single individual making a single unauthorized copy. Commercial or trade piracy involves a second step that magnifies the harm of the first infringement and tends to facilitate or encourage more piracy. The harm from noncommercial infringement tends to be limited to the underlying violation only. All commercial or trade piracy is criminal. Noncommercial infringement straddles the boundary between civil liability and criminal wrong, depending entirely on the price tag of the software copied. Whereas commercial and trade piracy dominate one end of the severity scale, noncommercial infringement sits on the other. Noncommercial infringement under § 506(a)(2) should be treated more leniently than commercial or trade piracy under § 506(a)(1).

Yet, under the current law, an offender who has committed a much less serious offense could potentially receive the same sentence as an offender guilty of a much more serious offense.



For instance, consider the individual who copies two high-end applications retailing for \$1500 in order to install them on his home computer so that he can bring some of his work home with him. He shares the software with no one else, uses it only in connection with work, and makes no further copies. Now consider a commercial offender, a software bootlegger who produces a CD containing an illegal copy of one of the newest and most popular games that retails for \$50. The bootlegger markets and sells 30 copies of this CD to people all over the world. The \$1500 noncommercial infringement and the \$1500 commercial piracy could be treated exactly alike.

EFF believes that a new specific offense characteristic in Guideline § 2B5.3 should be adopted to reflect the varying levels of culpability in the offenses that are now reached under the provisions of the NET Act. The effect of this specific offense characteristic would be to grant a one-level decrease in offense level for any infringement not committed for purposes of commercial advantage or private financial gain. Such an adjustment is based on a recognition that the act of distributing illicit software either through sale or trade is proportionally a more serious offense than the simple act of making copies of software worth more than a statutorily fixed amount. Since the existing penalties had been calibrated to punish the more serious crime—that is, infringement “for financial gain”—the new crime of noncommercial copyright infringement should draw a lighter sentence relative to that established baseline. We believe that a one-level decrease would justly reflect these differing levels of culpability for these very different acts, while maintaining adequate deterrent effect pursuant to the statutory directive.

## The DoJ's Proposal for a Revised Adjustment Standard

Currently, § 2B5.3 contains a single “specific offense characteristic” provision, which directs an upward adjustment to the offense level based upon the “retail value of the infringing items.” The magnitude of that adjustment is determined by reference to the loss table in guideline § 2F1.1, which governs fraud and deceit. Under the present guideline, for example, a software pirate convicted of producing bootleg software worth \$6,000 would—by reference to the dollar value in the loss table—be subject to a +2 level increase to the base offense level.

In its directive to the Sentencing Commission, the NET Act instructed that the applicable sentencing guideline should do two things: first, ensure that penalties were sufficiently stringent to deter, and second, take into account the “retail value and quantity” of the infringed upon items. In spite of this, the DoJ argues for the replacement of the “retail value of the infringing item” standard with a “loss to the copyright or trademark [owner]” standard, justifying this change on the grounds that “when copyrighted materials are infringed upon by electronic means, there is no ‘infringing item’, as would be the case with counterfeited goods.” Furthermore, the DoJ proposes language that would specifically permit a court to consider (1) lost profits, (2) value of infringed items, (3) value of infringing items, and (4) injury to the copyright owner’s reputation, in addition to any similar harms associated with the four named factors.

We must disagree with the DoJ’s analysis. Even in the realm of electronic infringement, the illegitimate reproduction of a protected work results in the production of an illegitimate copy, which is an “infringing item.” The DoJ’s broad notion of “loss to copyright or trademark owner” is unacceptably vague, incorporating factors not contemplated by the statute and introducing a



vagueness that hinders the effectiveness of the guideline itself. We urge the Commission to adopt a narrower standard that, like the DoJ proposal, looks to the value of the *infringed* item, but unlike the DoJ proposal, confines itself to a clear and unambiguous figure derived from retail value alone.

None of the four factors specified by the DoJ, except for the second, does anything to fulfill the congressional directive. Lost profits, value of infringing items (which, according to the DoJ, do not even exist in the electronic context), and injury to reputation clearly have nothing to do with the retail value of the infringed-upon works, the second prong of the directive. In order to follow from the congressional directive, therefore, they must be attached to the remaining prong—that is, they must do something to deter the underlying crime. But it is far from clear how any of these considerations serve to particularly enhance deterrence.

It is our belief that lost profits, value of infringing items, and injury to reputation are especially unsuitable factors given the nature of the loss table in which they will be used. The loss table in § 2F1.1 is calibrated to match specific upward adjustments with particular dollar amounts unlawfully taken as a result of fraud. Any additional consequential injury (such as reputational harm) that results from a fraudulent act is not factored into the loss table. It therefore makes little sense to include such factors in cases of copyright infringement—which use exactly the same adjustment schedule—as that threatens to distort the careful balance of harm and punishment contained in the loss table.

## The DoJ's Proposal for Guidance Pertaining to Upward Departures

We move now from specific offense characteristics to guideline commentary. In recognition of the unique circumstances that often attend incidents of software piracy, the DoJ has proposed language that would provide guidance to courts considering a guideline departure under § 5K. Specifically, the DoJ proposes an Application Note suggesting the consideration of an upward departure in circumstances where “the calculable loss to the victim understates the true harm caused by the offense.” The example it gives is where the offender uploads software to a publicly accessible server, where it then is copied an indeterminate number of times by an indeterminate number of people. Since the loss is not “calculable” for reasons of incomplete data and presumably would not be incorporated into the adjustment for specific offense characteristic, the commentary suggests that “an upward departure may be warranted.”

EFF believes that the Commission should substitute the language “retail value of the infringing items” for “calculable loss to the victim” and “severity of the offense” for “true harm caused by the offense.” We would like to emphasize that this language is not intended to suggest an upward departure option in *every* case where retail value does not square with every possible calculation of severity, but only in cases where the difference is very significant and the consequences of strictly adhering to retail value are plainly inequitable.

We are aware that the insertion of this Application Note reintroduces some of the judicial discretion that we criticized in our earlier discussion of the revised adjustment standard. However, the determinative difference, from our perspective, is that the exercise of judicial discretion here is governed by the departure provisions of § 5K, which was specifically designed



to accommodate broad discretion under unique circumstances. What is inappropriately vague for a guideline rule may be perfectly well suited for departure commentary.

#### EFF's Proposal for Corresponding Guidance Pertaining to Downward Departures

However, we regard the DoJ's suggestion to insert departure commentary as somewhat unfinished. In addition to an "upward departure" comment, we propose corresponding guidance that would advise the consideration of a *downward departure* under specific circumstances. Just as retail value may understate the severity of the offense in certain situations, it may overstate it in others.

One example would be a situation in which the infringing act clearly did not result in the loss of a sale to the copyright owner, thus reducing the utility of "retail value" as a measure of offense severity. For example, a father might give his old computer to his college-bound daughter with software preloaded on it while he retains the original software diskettes for himself. When he loads that software onto his new computer, he has technically violated the criminal provisions of the Copyright Act. But his daughter might not ever access the preloaded software and certainly would not have purchased it on her own. The software producer did not lose a sale as a result of this transaction, and a downward departure would probably be appropriate.

Another special situation that might justify consideration of a downward departure would be where the retail price for a particular software package is so high that the infringer is boosted into an offense level clearly out of proportion to the underlying offense. An example might be a single illicit reproduction of a high-end software application; that single infringement could lead to

more severe penalties than would be levied upon an offender who trafficked in much larger amounts of cheaper software.

In most cases, we anticipate that retail value will be a fair measure of the severity of an offense. However, because different offenders have different motivations for copyright infringement, we can certainly envision cases in which the retail value of the programs copied bears little on the relative culpability of the offender. In these special situations, we believe that sentencing courts, in their discretion, should be allowed to consider a downward departure. We believe that it is inequitable to specifically provide for departures only in cases where the result would be a harsher sentence. Consequently, we urge the Commission to adopt a second comment, on downward departures, to complement the first, upward departure, comment.

#### A Brief Comment on the § 2B5.3 Loss Table Revision Options

Finally, EFF would like to comment very briefly on the various amendment options to § 2B5.3 being considered in connection with the proposed revision to the fraud loss table. These options would cross-reference the copyright infringement guideline to either a revised fraud loss table or an alternative monetary table, with various additional options for fine-tuning the schedule of loss adjustments. We have three very brief comments to make.

First, we support a cross-reference to the alternative monetary table rather than to any revised fraud loss table. Referencing the new fraud loss table, which has the “more-than-minimal planning” (MMP) enhancement built-in, would have the effect of indirectly incorporating the MMP enhancement into § 2B5.3 as well. We feel that this would be a mistake. The MMP



enhancement was a fraud-specific provision that never was a part of the copyright infringement guideline, and it is not at all clear why such an enhancement would be appropriate now. For this reason, we urge the Commission to reject Options 3, 3A, and 4.

Second, we support a \$5,000 threshold sum for any table that is adopted. The next lower level is \$2,000, which falls within the misdemeanor range of the criminal copyright section. We do not believe that any upward adjustment is appropriate at that level of wrongdoing. Furthermore, we feel that the tables with an opening threshold of \$2,000 include upward adjustments that are too high for their corresponding dollar values at amounts under \$1,200,000. Therefore, we urge the Commission to reject Option 2.

Third and finally, we are opposed to Option 1A's offense-specific +1 adjustment at levels above \$2,000 that would have the effect of lowering the table's \$5,000 threshold amount to \$2,000. Again, \$2,000 only represents a misdemeanor under the statute, and we are of the opinion that an upward adjustment—whether a result of a loss table or a specific-offense-characteristic provision—would not be warranted at this level.

We believe that the loss table that is ultimately chosen should appropriately combine relatively small adjustments at the lower dollar values with greater adjustments at the higher dollar values, in order to provide lesser penalties for less serious offenders while retaining a rough consistency with the fraud loss table and its new high-value loss step-up. Consequently, we strongly urge the Commission to adopt Option 1 as the appropriate loss table amendment to § 2B5.3, which would cross-reference the guideline to an unmodified alternative monetary table with a threshold sum of \$5,000.

## Conclusion

In order to avoid inequities in sentencing, the EFF strongly encourages the Commission to do five things with respect to the criminal copyright infringement guideline:

- (1) adopt a one-level downward adjustment in offense level for noncommercial infringements under § 506(a)(2);
- (2) adopt a loss table adjustment standard based on a clear and unambiguous measure of retail value;
- (3) insert a version of the DoJ's proposed guidance on upward departures, slightly modified for consistency with our other proposals;
- (4) include corresponding guidance on downward departures; and
- (5) adopt Option 1 of the loss table revisions to Guideline § 2B5.3.

By amending sentencing guideline § 2B5.3 in these five ways, we believe that the Commission will have crafted a sentencing solution to the software copyright infringement problem that is far more effective and fair than the DoJ proposal.



I would like once again to thank the Commission for the opportunity to be here today on behalf of the Electronic Frontier Foundation. I hope that our testimony will prove useful to you.

Thank you.







TESTIMONY OF CHRISTOPHER P.T. FLEMING

United States Citizen , Former New Jersey State Mobile Intensive Care Paramedic  
and Victim of a Drunk Driver

March 12, 1998

On April 30, 1997 Virginia Fleming while driving her brand new Harley Davidson motorcycle was struck head-on by Willette Thompson Whiteskunk driving her extended cab pick-up truck. In an instant I , my family and friends became victims of violent crime, alcohol related vehicular homicide. Seconds after my weeping sister delivered the message, " That mom was killed by a drunk driver riding her motorcycle " purpose supplanted the indescribable loss. Two days later I would begin a relationship with the federal authorities involved in the case without the slightest knowledge of the Federal Criminal Justice System. To date I have never met more dedicated professionals, and in a time when often the sentiment towards federal authorities is less desirable I am otherwise opinioned. Throughout the 1980's I was employed as a staff paramedic by a large urban hospital , University of Medicine and Dentistry Hospital , Newark New Jersey. My employment was not limited to the urban/industrial setting in the Newark area. I also worked in suburban and rural settings. Motor vehicle crashes occurred in each of these setting exposing me to a host of crash situations to numerous to reiterate or remember . Alcohol was frequently a contributing factor in the crashes I responded to. Suffice to say I am well aware of the consequences when drivers drink.

Within this testimony I will try to address areas relevant to alcohol consumption and drunk driving as they apply to the commissions considerations with regard to DWI/DUI fatalities. I am hopeful that the commission will find reason to draft a DWI/DUI law setting standards that far exceed the host of compromised state DWI/DUI laws and provide the Citizens of these United States protection from others who act without regard for life and limb



Pre-Columbian peoples of both North and South America were well adept at identifying vegetation with psychoactive properties . They were also proficient in ways of administering psychoactive substrates made from vegetation , which included chewing, smoking , nasal insufflation and rectal clysis . Their knowledge was not limited to vegetative engineering as such but also included wine made by fermentation of cactus fruit . Papago and Piman peoples consumed cactus wine in ceremonial settings as did Aztec people. The “ Century “ plant or “ Maguey” served the Chichimeca people as a source of food and later was discovered to have psychoactive properties through fermentation of it’s sap. The alcoholic beverage produced from the sap was called “ octli “ or “ pulque”. In fact this discovery was subsequently attributed to a goddess and associated deities were incorporated into complex mythologies to serve as example for benevolent beings responding to mans gloomy disposition. These deities were not immune to the effects this alcoholic beverage and their difficulties were to serve as examples and reasons to formulate codes of behavior and proper contexts in which to consume the alcoholic beverage. The rules of octli drinking also came about through tribal and personal experiences. Abuse of the drink was not uncommon and it is a sobering fact of similarity when comparing behavior of a people who predate the European arrival to these America’s and modern man. Drinking octli made people happy . It is said to have made them sing and dance also. Unfortunately accounts of people stumbling about, neglecting their personal hygiene, employing defiant and profane language and trading their loincloths for a drink. Scarcely a difference can be found between the kind of behaviors then and now, excluding particular avenues employed in acting out these age old behaviors. Aztecs realized the threat of unbridled drinking of octli both for a nation of people and the individual. They responded by enacting tough , conceivably cruel , punishments for illegal consumption of the drink. Consumption of the drink was strictly limited to specific ceremonial occasions such as a birth, marriage or human sacrifice to the gods. Amounts were also strictly controlled. Consumption of the drink was a group matter in large, only elders were allowed to drink independently and did so with measure seldom becoming intoxicated . Breech of the octli consumption codes invited

certain punitive measures, for example: drinking more than five gourds of octli was considered excessive and a violation, as too were "being observed intoxicated in public, lying down in the walkways, singing, possessing octli or in the company of other drunkards". Punitive measures for a first offender were having ones head shaven and exposure to public ridicule. A second offense invited being beaten to death with wooden canes. The deceased's body was then put on display in public. If the first offender was a nobleman he was executed privately, away from the public eye. In cases where discretion was exercised by the nobleman, with respect to his violation, he was stripped of his rank and privileges. Alcohol and associated behaviors had been an significant part of the Indian people's society well before the European arrival.

The use and consumption of alcohol among Native American people was to be, perhaps, influenced in significant ways once they were exposed to Europeans. Where, among Native Americans, alcohol consumption was a group activity, a collective decision and associated with ceremonial practices and governed by severe rules it was not for the European. In stark contrast to Native Americans the European consumed alcohol by individual choice (male orientated) and not group choice, outside of any religious / ceremonial context and being often associated with bravado or aggression. European behavior is believed to have infiltrated the Native American lifestyle. In response to economic influences alcohol became a popular source of trade note and status measurement for the male Native American. Native American men invested more and more energy into securing scores of alcohol. By doing so their expertise in hunting and gathering surely must have suffered. Such reliance and attraction to alcohol would not serve the Native American well in the future.

Native American's severe problems with alcohol consumption became widely known by the early 1800's. Federal prohibition making it illegal to sell alcohol to Native Americans is said to have contributed to lethal change in drinking behaviors. For an Native American who was caught with alcohol the punitive consequences were arrest and imprisonment. Inconclusive data suggests the behavioral response to federal prohibition was to quickly consume their store of alcohol before they could be caught with it. In



combination with continuous encroachment into their resources for sustenance, land and its fruits and the illegality of their major trade route, adopted through European exposure, few avenues to survive would be possible. The suggestion that excessive alcohol consumption, so called "Indian Drinking" developed as a protest response to prohibition offers additional negative consequences for the Native Americans, despite uncertainty such behavior really occurred. Yet the idea of drinking excessively out of anger, guilt, sorrow and a myriad of causes is universal among all people for as long as alcohol has been part of human society, a review of Table 1. Will shed some light on the commonality of behavioral indicators as universals among different types of people around the world. The reader will also recall previously mentioned evidence of alcohol abuse and dependency characteristics of the Aztec people.

Alcohol and its relation to violence and crime cannot be effectively considered without historical and ethnic perspectives. Levy and Kunitz, over several decades, observed no fluctuation in the homicide rate among one tribe during which the availability of alcohol went from rare to high. The same tribe's homicide rate is linked to alcohol today. This and other findings should continue to spur investigator's to consider other contributing factors to violence and crime among Native American's in spite of the intense focus and valuable data on alcohol and violence. Paramount as part of a revealing nature of alcohol and violence are consideration of ethnic diversities as a way to uncover differences between people and their unique attributes with addressing issues of communal concern. As an indicator to this concept the United States recognizes 556 distinctive Native American and Alaskan Native American tribes within the Union's borders. Among these many tribes at least 17 different culture areas have been identified, surely within this vast array of cultural perspectives potentials for success exist. According to the Clinton administration Native Americans receive less than half the police protection that other rural communities have. Conflict among Native American tribes over whether improvements in law enforcement would come as a result of the BIA relinquishing law enforcement control over to the Justice Department remains to be determined, but thing that all police officers and criminals know is that nothing can deter a potential criminal act better than a cops presence. In this simple way one would conclude Native Americans need more police officers working in their communities. Additionally these police officers would benefit the

community by being well trained in the elements of alcohol and drug intervention and detection . Jurisdictional conflicts , such as “ Concurring Jurisdiction” , which take away arresting authority from law enforcement agencies such as state and county police serves to significantly reduce the combined effectiveness of law enforcement. In light of the current need for more police officers on reservations such cooperation and equal arresting powers would effectively provide better law enforcement for Native Americans. The current separation of powers fosters lax law enforcement, especially in light of an 87% increase in homicides among Native Americans over the last five years. Whereas homicide has dropped 22% among the general population in the U.S.

Among many differences between Native Americans and the general population is the extent to which alcohol effects their health and overall society. Native Americans suffer , and are understood to have suffered, proportionally more. Current and prevailing data tell of sustained economic,cultural and health issue's among Native Americans. With respect to health and alcohol Mason and colleagues, using DSM 3 criteria and the Diagnostic Interview Schedule , observed among 197 Native Americans, sampled from one tribe from The Plains, The Southwest and the Northwest, that 53% of the subjects met criteria for alcohol diagnosis ( 21% were abusers and 30% were dependent ). Alcohol diagnosis by gender was distributed, 81% men and 40% women. Greater mortality was observed among subjects with alcohol diagnosis. Other studies cite significant life long and current alcohol disorders among Native Americans ,men 77% life long and 37% current disorders , and women 39% life long and 7% current disorders, Shore, Kinzie and co-workers . As recent as a decade ago cirrhosis was the fourth leading cause of death among Native Americans, comparatively it was the eighth leading cause of death among non-Native Americans. Christian and co-workers report Native American discharge rates are three times that of non - Native Americans in Indian Health Services facilities.

Violent death pose's a serious and significant health threat for Native Americans and the general population. Vehicular crashes resulting in death occur 5.5 times more than non-Native Americans, Homicide 2.8 and Suicide 2.3 times more respectively . Acknowledgment that for Native Americans , for



all ages . risk of death by automobile crashes exceeds the comparative risk for any other ethnic group. alcohol - related being the majority of automobile crashes. Compounding this disproportionate risk those dying as a result of such crashes are between 15 and 45 years of age . Nationally car crashes are the leading cause of death for people between the ages of 1 and 34, nearly half of these crashes are alcohol related. The disturbing reality that most Americans are not aware of what the legal blood alcohol levels are for their respective states , nor the laws and penalties for driving while intoxicated , how to estimate their alcohol consumption limits and moreover what blood alcohol levels represent " impairment " is a serious concern and perhaps evidenced by the continuing high number of alcohol related driving fatalities per year, .01-.09 BAC 3,361 fatalities and .10+ BAC 11,773 fatalities based on Highest Driver BAC in the crash, N.H.T.S.A. 1996. Total " alcohol related " deaths for 1996 were 15,403. " Alcohol Related " includes other categories such as pedestrians and cyclists.

As a matter of empirical note and future consideration for the U.S.S.C. is the relationship between personal wealth, education and employment opportunities for Native American Tribal members who receive stipends from gaming profits. As has been conveyed to me, but not confirmed , a Southern Colorado Native American Tribe who has a casino operation provides stipends and jobs to tribal members. Upon a tribal members 21<sup>st</sup> birthday he or she receives a lump sum of money and thereafter a quarterly or otherwise scheduled stipend. For purpose's of illustration imagine an inexperienced licensed driver who upon his or her 21<sup>st</sup> birthday receives enough money to purchase an automobile and is legally of age to drink. Add to this equation opportunity in the form of idle time because there is not enough local employment opportunity or the individual chooses not to work or is undereducated/underqualified for area employment opportunities. And yet where one would think education , economic advantages and employment are enjoyed the likelihood of drinking and driving would be less. However " Binge Drinking " is prevalent among higher education students, as much as 44% of a subject pool admitted such behavior . For these college students intoxication was often the goal. Their alcohol drinking patterns were often established in high school and being Caucasian , involved with athletics , a resident of a

fraternity or sorority increased the likelihood of alcohol abuse/binge drinking. Binge drinking is defined as having five or more drinks in a row for men and four or more in a row for women.

Of concern is the lack of social awareness among American drivers. Most do not know the current DWI/DUI laws for their area's. Neither are most drivers able to estimate their limit of alcohol, nor are they knowledgeable of when driver impairment begins, for example: 1 drink for men weighing between 100 and 240lbs., and 1 drink for women weighing between 90 and 240lbs. (based on 1.25oz. of 80 proof liquor, 12 Oz. of beer, or 5oz. of table wine at 40 minute intervals - 1 drink for a 100lb. Man = .04% BAO and for a 200lb. Man = .02%BAO) Impairment begins at .02% BAO, SAMHSA.

While public intolerance appears on the rise regarding Drunk Driving and other lethal driving behaviors, empirically speaking, drivers themselves are not doing their individual part to reduce the incidences of such dangerous behaviors. Many drivers speed excessively (drive 15mph + above the speed limit), engage in careless and often reckless driving. Such increases in incivility on the roadways has resulted in new definitions and or categories of dangerous drivers, Aggressive and Road Rage. Probably most of us would be shocked at our driving behaviors if evaluated, it is a sobering thought and possibility.

Between 1982 and 1996 290,695 lives have been extinguished by the egregious behaviors of drunk drivers. Of the nearly three hundred thousand lives lost in those 14 years 63,460 were lost because of drivers with BAO's between .01-.09%, roughly 4000 lives a year are lost within this range. Given the pending federal legislation to establish a federal blood alcohol limit at .08% and its estimates to save approximately 600 lives a year one has to wonder where is the reasoning behind accepting the death of approximately 3,400 lives a year for our enjoyment of alcohol? As a comparison Title 49, Subtitle VI, Part B, Chapter 313 Section 31310 (a) sets a commercial motor vehicle operator BAO limit at .04%. All motor vehicle operators should be subject to the same BAO limit, the consequences are essentially the same, risk, injury, death, property and economic losses. Level of responsibility should be the burden of the driver, 80,000lbs. or 2,000lbs. a vehicle dangerously operated is a serious threat to many.



Studies among the general population indicate significant prevalence of alcohol abuse and or dependence in as many as 26% of U.S. community hospital patients. Lifetime prevalence of alcohol abuse and or dependency among outpatient settings varies between 16% and 36%. Yet with this high rate of alcohol diagnosis less than half of these patients are identified by their doctors. In another study only 24% of patients diagnosed with alcohol problems were offered treatment. However patients who are identified as being at risk, abusing or dependent in alcohol use by their primary physician responded well and significantly improved their habits and health. With regards to Native Americans and other ethnic groups evidence supports culture sensitive preventative and maintenance measures. In fact such locally tailored programs are already deemed the most promising, they are also the most cost effective.

The current Federal Involuntary Manslaughter code, 18 U.S.C. 1112, falls woefully short in its ability to reflect Alcohol Related Vehicular Homicide. As with the case U.S. vs. Whiteskunk the defendants behavior was repeatedly and wantonly defiant of the law and of known risk to others. The duration of the defendants conduct irregardless of initial police conduct and subsequent warnings, nearly striking a motorist head-on 30 minutes prior to colliding into Virginia Fleming killing her instantly. The court found the defendants conduct "exceeded reckless behavior and therefore, exceeded the guidelines" The defendant was sentenced to 24 months incarceration and 3 years supervised release. I cannot speak for the court but in following the case closely it is my impression the court was restricted from calculating an adequate criminal history score due to the nature of the defendants prior DUI Tribal Conviction and realistically reflecting relevance to the defendant's conducts leading up to and producing the death of V. Fleming.

As it was we the victims of Willette Thompson Whiteskunks crime fought tooth and nail for an upward departure that still fell short of what we felt would be reflective of the crime. W. Whiteskunk should never be allowed to drive again, she is the benefactor of a law that has yet to meet the mandates Congress gave the U.S.S.C.

Drafting a federal DWI/DUI law that encompasses minor violations to the serious with purpose to identify, prevent, deter, incapacitate and offer effective rehabilitation would satisfy the needs for the current "Heartland" issue of Involuntary Manslaughter. Below is a sketch of some components for a federal DWI/DUI law.

Federal DWI/DUI Law: by BAO Level Legal Limit = .01%; simple DWI/DUI Stop, no injury, loss of life or property damage unless noted.

.01-.02% = 2 points on drivers license and \$60.00 Fine

.03%-04% = 4 points on drivers license and \$ 120.00 Fine, mandatory evaluation for alcohol and drug risk, abuse or dependence, and driver re-education program.

.05%-06% = 6 points to drivers license, \$240.00 fine, immediate drivers license suspension for 90 days, mandatory evaluation for alcohol and drug risk, abuse or dependence (paid for by defendant), driver education program (100% pass grade) 20 hrs. community service.

.07%-08% = 8 points to drivers license, \$ 500.00 to \$1000.00 fine and or 30 days incarceration, immediate drivers license suspension for 6 months, mandatory alcohol and drug, risk, abuse/dependence evaluation /treatment( paid by defendant) driver education (100% pass grade) 80 hrs community service.

.09%-10% = 10 points to drivers license, \$ 1000.00 to \$2000.00 fine, immediate drivers license suspension for 1 year, mandatory alcohol and drug, risk, abuse/dependent evaluation/treatment (paid by defendant) driver education program (100% pass grade) and 120hrs community service.



Injury of a person resulting from driving under the influence would take into account aggravating and mitigating factors, including, amount and extent of injury, past driver history, leaving the scene of the accident, speed... such specific factors would influence the penalty and rehabilitation. As an example injury would raise the likelihood of increased level of incarceration and license suspension and or life time revocation.

Death of a person or persons resulting from driving while under the influence would take into account aggravating and mitigating factors as stated and specify severe incarceration penalties in terms of years to life with the opportunity for rehabilitation.

In conclusion the wealth of historical information regarding Alcohol and Native Americans provides important insight and prompts inquiry into past practices for the benefit of people today. Recognition of cultural diversities among Native American tribes and the general population empowers local groups and individuals in their efforts to identify and combat alcohol and drug abuse. Much effort and success can be achieved through early intervention. Diligent enforcement of the propose law and associated penalties will deter and reduce significantly the current degree of drunk driving. This law will realistically clarify risk level and potential harms inherent with driving under the influence, by simplifying the acceptable standard of a drivers BAO at ZERO, and in concert identify/treat those at risk for alcohol abuse and or dependence long before they commit a serious crime of bodily injury and or death.

I am deeply appreciative for this opportunity and thank the United States Sentencing Commission for considering this law.

Sincerely,



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Four Criminal History, 2/98.

## TESTIMONY OF CHRISTOPHER P.I. FLEMING

United States Citizen . Former New Jersey State Mobile Intensive Care Paramedic

and Victim of a Drunk Driver

March 12, 1998

**TABLE 1. Characteristics of syncretic frontier-potlatch drinking**

1. Early appearance of drunkenness with small doses of alcohol.
2. Binge drinking over many hours or several days, separated by periods of abstinence lasting weeks or months.
3. Peer-group drinking, often involving only one gender (i.e., males only or females only).
4. Continued purchase of alcohol until financial reserves are exhausted.
5. Sharing of alcohol such that each individual has equal access to the same amount.
6. "Time out" from normal roles and social responsibility, so that misbehavior is blamed on the drink rather than on the drinker.

## Alcoholism Among New World Peoples

### *A Critique of History, Methods, and Findings*

Joseph Westermeyer, M.D., M.P.H., Ph.D.

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Received January 18, 1995; accepted June 13, 1995. From the University of Minnesota Medical Center and the Minneapolis VA Medical Center. Address correspondence to Dr. Westermeyer, University of Minnesota Medical Center, 1 Veterans Dr., Minneapolis, MN 55417.  
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U.S. Sentencing Commission  
1 Columbus Circle NE  
Suite 2-500 South Lobby  
Washington, D.C.  
March 3, 1998

Commissioners:

April 30, 1997, Ginny Fleming, Age 69  
July 13, 1997, John Mahaffey, Age 16  
August 8, 1997, Emory Greysinger, Age 14  
August 8, 1997, Alvina Mitchell, Age 19  
September 27, 1997, Meredith Watts, Age 22  
October 18, 1997, Kenneth Black, Age 23  
October 18, 1997, Christopher Lopez, Age 22  
October 29, 1997, Rosita Olibia Melrose, Age 32  
November 14, 1997, Randy Baker, Age 22  
November 14, 1997, Rick Baker, Age 19  
November 14, 1997, Clayton Baker, Age 17  
November 14, 1997, Ben Velasquez, Age 19

During an eight month period, in La Plata County, a small community in Southwest Colorado, twelve lives were lost in traffic crashes. Of these twelve, eight lives, more than 66%, were lost as a direct result of drivers' operating a vehicle while under the influence of alcohol.

The number of traffic deaths within a small community in such a small period of time is staggering in its own right, the number of traffic deaths related to the abuse/misuse of alcohol is more than difficult to comprehend.

In our attempt to address this national epidemic, experts, professionals, lay people, and survivors seek for clues and answers in a variety of areas: socio-economics, employment status, availability of alcohol, lack of education and boredom. While some of the findings may point to the basis of the dilemma, these findings do not give one the license to kill by getting behind the wheel of a lethal weapon and wielding it while under the influence of alcohol. It does not justify the all too lenient federal sentences available at the present time. There is a profound lack of social conscience in regards to drinking and driving. There is a complete lack of personal responsibility. We, as a people, have closed our eyes and donned blinders to this national crisis. We exchange the rights of the innocent, the rights of those now dead, for the rights of others to act with total disregard for the sanctity of human life.

Coming before this commission presented a daunting challenge. How does one impart to you the breadth and depth of the effect such tragedies has on

the survivors and the community? What can I possibly have to say that would effect change in the Federal Sentencing Guidelines? Perhaps in testimony based in emotions rather than facts, figures, and results of study, after study, after study. Facts and figures that grow in alarming numbers with each passing day but seem to do little to effect real change.

On April 30, 1997, while returning home from a motorcycle ride with her husband of 48 years, Ginny Fleming was hit head on by a drunk driver at approximately 2:00 pm. She was killed instantly, every bone in her body broken, very major organ lacerated. Her new Harley Davidson motorcycle demolished. Her husband left with a haunting vision of senseless destruction for the remainder of his life.

Ginny's family and friends would soon suffer additional heartache when the knowledge of the inadequate charges and sentences available to the prosecutor came to light. Ginny was killed on a stretch of roadway that falls within the Southern Ute Indian Reservation. An overwhelming sense of injustice enveloped the community and remains ever present to this day.

I choose to share with you some of the words and thoughts submitted as impact statements, from the community, family, and friends in response to the death of my mother, Ginny Fleming.

"No words can explain the loss that occurred when a truck crossed the double yellow line; took dead aim on my wife and killed her. In that moment, I lost more than a wife; I lost my buddy, my lover, my best friend."

"As my mother she taught me many things but one of the most important, if not the most important of these lessons is that each person is responsible for the choices he or she makes. Good or bad, we must answer for our choices and subsequent actions. Again and again she advised me to make conscious decisions, to rejoice in the good ones and be prepared to answer for the bad ones."

"I hope what emerges from our tragedy is justice reflective of the crime thus evidence of the courts regard for what human life means whether it be Virginia, Ginny, Fleming or another innocent human being."

"Her brutal death was a tremendous loss to us. How can we live in peace knowing that at her last second she knew she was going to die? She tried to avoid the incoming, completely uncontrolled vehicle. What pain, a woman that has spent so much time educating people about motorcycle safety and the dangers of drunk driving."



"I'm angry that our family has lost a wife, a mother, a sister, a sister in law, an aunt, a cousin...all because a drunk woman chose to get behind the wheel of her motor vehicle and turn it into a murder weapon. Virginia Fleming will not be forgotten by those who love her."

"The penalty in this case does not fit the crime. I think about a victim killed by gunfire, the bullet enters and exits the body, usually striking a major organ or blood vessel and resulting in death. Ginny's death was not nearly so simple. Every major organ was lacerated and every bone was fractured. She did not go easily into the night. The shooter intends to kill when he discharges his weapon. Likewise, the defendant's decision to operate a motor vehicle while drunk showed her disregard for Ginny's life and the lives of others. Her motor vehicle was an instrument of death just as certainly as a firearm. There is no excuse. There is just senseless loss."

"As a child and adult Ginny was always there to guide me through everything from the basics of swimming to the toughest lessons in life. For all my 52 years she was not only my sister but my friend. I'm sure she would still be here for me now if she could. But Ginny can not be here for me because her life was taken by a drunk driver. Nothing can bring back my sister but perhaps justice that fits the crime could be served, maybe stricter punishment would deter another fatal act. Don't you think it may be worth a try, even if it only saved one life?"

"I have not only lost my mother, she was also my teacher, student, soul mate, guide, favorite travel partner, my heart and full inspiration. You see, I owe my life to this woman, because she was a survivor of a family of alcoholism. She inspired me to remove alcoholism from my life. Too many times she was the one who pulled me up when I was slipping away. She gave me life and then gave it back to me again. Then she showed me how to help others. In a way she saved me and then showed me how to be of some real use. I know that for my mom it is very important to take full advantage of this tragedy and put the message out that to be careless as to drink and drive a motor vehicle and to cause bodily harm and death is not acceptable. And that the law makers and also the people have to change their view on acceptable drinking behavior in our communities. and so in the future this will never happen again."

"After almost 40 years in Law Enforcement I can not believe that a driver with a blood alcohol reading of .21 and a prior conviction would only receive a year or so in jail. And in this case, it is the death of my sister. I pray that, in Ginny's, name you prevent the next tragedy."



"Ginny saw how alcohol could damage, her father was an alcoholic. She worked hard to raise her five children armed about the dangers of alcohol. She might have turned to it her self in trying times but rose above it, and taught us to rise above the temptation. How ironic that a drunk driver would cause her death. She lived by the rules, a quiet woman doing what she knew to be right, asking no recognition for herself."

"When I first learned of Ginny's death I was at a loss for words and feelings, like someone stripped them from me! As time passed I began to heal and I realized that this senseless hurt and killing must stop! We as individuals, families, communities, towns, cities, states and this country must say enough! We must be held responsible for our own actions and suffer the consequences. Our judicial system must also assist us in correcting the problem of alcoholism and drinking and driving. We have the knowledge, we have the technology, but we lack the "tough love" to do what we know is correct."

"Ginny was a constant advocate of the cause of prevention of individuals who disregard the laws of driving under the influence of alcohol. Her free spirit personality led her to believe that there should be justice for all under the law. Ginny had always expressed her concerns for those individuals who were lapsed in their responsibility in their use of alcohol. She was always disturbed when reading or hearing about innocent individuals who suffered as the result of a drunk driver. I sincerely believe that if another member of our family had died under the same circumstances as she did, Ginny would be the first person to take a stand, and become the family's supporter for seeking justice for their unruly death."

"I will never quite forget her image and hear her voice. I know Ginny is looking over all of us. She lives in my heart everyday. I constantly ask myself one thing -- why?"

"Hearing the news of Ginny's death in such a tragic, senseless and avoidable manner made me angry knowing what an impact she had in my life and I am sure in the lives of countless others she had become involved with throughout her active life. I then became more angry thinking of how the drink drivers in cases like these often 'get off easy', not only adding further grief to the victim's families and friends, but also soon back out there on the roads, possibly heading-on for their next victim."

"Yes, it is true. It takes an act of will and the first act of will for all of us that is required is an act of faith. One must believe in the potentiality of the law before it can be changed. Ginny Fleming had a vision to



create a safe passage for drivers and to educate the public with her message not to drink and drive. Rise to the higher and wiser state of being and always, please, stop to think before you act. It is our duty to complete Ginny's vision. We must not surrender to this careless behavior. Because surrendering is a negative virtue, only to taken as an act of defeat. Ginny would not be defeated had she still been with us to fight...let her lessons live on."

"I believe that no one allowed to drive is unaware of the impact driving while intoxicated and potentially loss as a result, and I believe that this knowledge makes the defendant guilty of the grossest sort of negligence and irresponsibility. Ginny's life will resonate in the live of the people she touched, as will her death. The positive impact she had on so many of us will remain but it is tainted by the violent and senseless way in which she was taken from us."

"In 1974 my own brother was killed by a drunk driver. Twenty three years later my family still suffers from his loss. Back in those days drunk driving was not a public issue and there was never a trial for my brother's killer. Twenty three years later it saddens me to see that we still have no effective deterrent for driving in a violently drunken state and killing another human being."

"I had the distinct pleasure of meeting Ginny Fleming once, I now have the distinctly sad requirement of driving by the place of her death daily."

"We feel like we're in a very powerful energy as the Harleys climb and sound their unique mufflers. We are truly free and feeling happy -- except Ginny isn't with us today. She was killed by a drunk as she rode her new Harley Fat Boy for the first time. You are the only hope we all have of effecting change in society. Criminals do what they do because they can so easily get away with it. Lenient penalties allow them to continue irresponsible behavior."

"At night when I close my eyes and I think of the condition your bike was in it takes every ounce of concentration and will power not to picture what you must have looked like. Your daughters had to see that and I know it will haunt them for the rest of their lives. I know in my heart that she will pay for what she has done and for her lack of remorse or concern for other spirits. All I ask is for some earthly protection for the next person who has the misfortune of being on the same road with her after she has chosen to drink herself into oblivion."



"There is a big void where her dignity, beauty, pride and power existed. Her death, her "killing", is a senseless loss. In a place where dire consequences are an absolute requirement, those same consequences cannot atone for the loss. The available consequences are insufficient. There are hundreds of victims in our community suffering the aftermath of Ginny's death."

"I could go on and on about my experiences with Ginny. But to me the most important thing is not what I had in the past with her, but what I will never have in the future. Ginny's passing must stand for something. The world is a better place because Ginny Fleming lived here. And now that she is gone...it is somehow incomplete."

"We ask that you reach a judgment that reflects not vengeance, but awareness of the "wreckage strewn" nature of this case. Not just the wreckage on the highway where Ginny Fleming met her death, but the emotional wreckage her death has left behind. The emotional wreckage of family and friends and relationships torn asunder in a deadly split second, people whose healing depends to a great extent on the recognition of the circumstances and severity of the loss and on the sending of a clear message that such tragedies will not be taken lightly and should not happen again."

"Anyone who drinks to excess, drives an automobile and consequently causes a fatal accident, is as guilty of that death as if they had taken a gun to the victim's head. Such a person obviously sees no worth in their own life and not, by inference, in the life of any other person."

Finally, from Robert T. Kennedy, Assistant U.S. Attorney; "It is indeed unfortunate that the sentencing guidelines as presently structured seem to focus upon the final acts of the defendant that constitute the crime of involuntary manslaughter where a defendant, under the influence of alcohol, may be in such a drunken stupor as to be unable to form what it is commonly called a specific or general intent to commit a crime. However, the defendant in this case had made at least several apparently conscious and deliberate decisions to drink and drive during the 24 hours immediately preceding the collision that took the life of another. The relatively lenient sentencing parameters within which the Court must sentence the defendant offer no genuine opportunity for societal justice."

And while I know some may argue the validity of testimony based primarily on emotion, should we not remember that what sets us, you and me, apart from the rest of the animal kingdom is our ability to recognize the difference between right and wrong, to make choices based on experience and knowledge, and, most importantly, to feel compassion. Perhaps the time is



now and the opportunity is ours today to acknowledge the emotions, the passions put forth by those I have quoted and the many other survivors who have not been heard.

I ask that you heed the quiet voice of a once private woman, Virginia 'Ginny' Fleming, in urging Congress to revise the Federal Sentencing Guidelines as regards to Involuntary Manslaughter, Voluntary Manslaughter and Vehicular Homicide resulting from drunk driving, to better fit the crime and to exact a more palatable and appropriate societal justice.

Thank you for your time and consideration.

Respectfully,

Mary Jo Rakowski  
104 E 6th Ave  
Durango, CO 81301







## Comments for the United States Sentencing Commission Concerning Proposed Amendments for 1998

I want to thank the Commissioners for allowing the Internal Revenue Service, Criminal Investigation, to appear today. The prosecution and imprisonment of tax offenders is our primary reason for existence, and we are grateful for the opportunity to let you know why it is essential that the sentencing table for tax crimes be reformed as soon as possible. Every year that the Commission delays has the potential to further erode compliance with tax laws, thereby costing the government billions of dollars in lost revenue.

Federal criminal income tax prosecutions are complex, take a long time to investigate, and involve a substantial commitment of time and money from the Internal Revenue Service, the Department of Justice, and the Federal Judiciary. They are also quite rare. Convictions for tax offenses involving legal source income (income unrelated to illegal activities such as narcotics or organized crime) only number approximately 1,500 per year nationwide. Of these, less than 1,000 result in a sentence with true imprisonment.

When one considers that over 115,000,000 individual tax returns are filed per year, and there are millions of illegal non-filers, this situation is clearly intolerable. Tax evaders realize that their chances of being punished for their crimes are minuscule. As a result, honest taxpayers are being forced to pay an ever greater share of the burden. The estimated "tax gap" continues to grow to the point that it now exceeds \$100,000,000,000 (\$100 billion) per year. Without the effective deterrence of meaningful prison sentences for tax evaders this trend will continue, and the entire system of tax compliance will be in danger of collapse.

We are not asking for unduly harsh or severe sentences. We are asking for sentences that provide a reason for honest taxpayers to remain honest, and for dishonest taxpayers to fear detection. If tax criminals, most of whom are otherwise law-abiding businesspersons, knew that their chances of being prosecuted and imprisoned were greater, compliance would increase proportionately.

Since its inception, the Sentencing Commission has professed to believe that tax evasion is a serious matter. Adopting Option 2 would be a chance to deliver this message in a meaningful way.

3/11/98



The Internal Revenue Service is in favor of any modification to the Federal Sentencing Guidelines which would increase the likelihood that convicted tax criminals would be imprisoned. The deterrent effect for each tax criminal sentenced to imprisonment ranges far beyond the individual sentenced. It extends to the entire surrounding community, the profession, industry, coworkers and business associates of the individual, and in notorious cases, to the entire nation. Conversely, news of tax criminals who are not imprisoned tend to undermine voluntary compliance and weaken enforcement efforts.

The current Sentencing Table does not require imprisonment for offenses in Zone A or B, which includes Offense Levels 1 through 10. Therefore, a minimum Offense Level of 11 must be attained to ensure some incarceration. Since the two level acceptance of responsibility reduction is virtually automatic in all guilty pleas, this means that a Tax Loss in the Offense Level 13 range (Over \$40,000 to \$70,000) is necessary to be assured of obtaining any imprisonment at all. This tends to exclude all but high income individuals from prosecution.

We must have a balanced enforcement program, which requires that tax evaders from most segments of the income spectrum be prosecuted. If only the wealthiest taxpayers face criminal sanctions, there is no real incentive for the overwhelming majority of the population to comply.

By way of illustration, 96% of all individual returns report adjusted gross incomes of less than \$100,000. The average tax on returns with adjusted gross incomes between \$75,000 and \$100,000 is \$12,625. Therefore, for these taxpayers even three years of evading all tax owed would not achieve the \$40,000 threshold for 96% of the public.

Therefore, we urge the Sentencing Commission to adopt Option 2 (for revising the Tax Loss Table) contained within Proposed Amendment Number 1, as listed in the January 6, 1998 Federal Register (Vol. 63, No. 3, Part II).

As for Proposed Amendment Number 5(C), concerning "sophisticated means," we agree with raising the base offense level to 12 which is contained in both options. We also are in favor of resolving the circuit conflict so that the element of sophistication is offense specific rather than offender specific, since this goes to the heart of deterrence.

However, we do not see any need to introduce the new terminology of "sophisticated concealment," nor do we approve of the dilution of language relating to the use of foreign bank accounts and financial transactions, and the use of corporate shells and fictitious entities. I believe that these changes will lead only to needless confusion and points of contention. I believe that the existing language is sufficiently clear, especially as it has been interpreted over the ten years that the guidelines have been in existence.

Thank you.



Internal Revenue Service

memorandum

CC:EL:CT

MFKlotz

MAR - 5 1998

date:

to: Assistant Commissioner (Criminal Investigation) CP:CI

from: Assistant Chief Counsel (Criminal Tax) CC:EL:CT

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subject: Proposed 1998 Sentencing Guideline Amendments

The purpose of this memorandum is to apprise you of our views on the 1998 proposed amendments to the sentencing guidelines to the extent they relate to offenses involving taxation. As an overview, we wish to point out our perspective when examining sentencing issues relating to federal criminal tax statutes.

#### Background

On January 6, 1998, the United States Sentencing Commission set forth six proposed amendments which it may submit to Congress no later than May 1, 1998. The proposed amendments appeared in the Federal Register, (Vol. 63, No.3, Part II) and the United States Sentencing Commission's Proposed Guideline Amendments for Public Comment (January 14, 1998). Written public comment should be received no later than March 12, 1998, by Mr. Michael Courlander, Public Information Specialist, at the United States Sentencing Commission, One Columbus Circle, N.E., Suite 2-500 Washington, D.C. 20002-8002. The Commission has scheduled a public hearing on the proposed amendments for March 12, 1998, at the Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E., Washington, D.C. An additional hearing focusing primarily on proposed amendments to the theft, fraud and tax guidelines is scheduled for March 5, 1998, at the Parc Fifty-Five Hotel in San Francisco, California, in conjunction with the American Bar Association's 1998 National Institute on White Collar Crime.

Notwithstanding that the Internal Revenue Service's current philosophy of tax administration focuses on taxpayer education and relies on the compliance of the educated taxpayer, it is, nevertheless, important that there is an adequate sentencing mechanism which effectively addresses noncompliance. Although the Service is continually increasing its efforts to foster taxpayer compliance rather than relying solely on after the fact enforcement, some segments of the population will continue to refuse to comply voluntarily. Accordingly, the focused use of enforcement tools and sanctions



against intentional noncompliance remains essential. To this end, substantial but fair sentencing guidelines permit courts to send the message that tax offenses are serious and intentional violators will be punished seriously. With this concept as our matrix, we offer our comments on the following proposed amendments.

### Discussion

#### Proposed Amendment 1 - Fraud, Theft, and Tax Loss Tables (§§2B1.1, 2F1.1, 2T4.1)

Proposed Amendment 1, inter alia, "presents two options for revising the tax loss table to raise penalties for . . . [offenses involving taxation] . . . that have medium to high dollar losses in order to achieve better proportionality with guideline penalties for other offenses of comparable seriousness." Pursuant to Option 1, for tax losses of \$40,000 or less, the offense levels of the proposed tax table would remain the same as the current tax loss table. For losses of more than \$40,000, the proposed increases in offense levels are the same as the increases in offense levels (two level increments) in the proposed theft and fraud loss tables. Option 2, on the other hand, increases the offense levels in increments of two throughout the proposed tax table.

Considering the two tax table options, Option 2 is our preference. Our preference is based on the fact that, in Option 2, lower tax losses result in higher offense levels than in either Option 1 or the existing tax table, which is consistent with the Commission's intention to treat tax violations as serious crimes. For instance, Zone D (mandatory prison)<sup>2</sup> is reached under Option 2 with a tax loss that exceeds \$30,000 while to reach Zone D under Option 1 and the current tax table requires a tax loss in excess of \$40,000. Option 2 enables courts to more effectively address a significant area

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<sup>2</sup> A sentence falling within Zone D of the Sentencing Table mandates that the minimum term shall be satisfied by a sentence of imprisonment. This would amount to 12 months in jail for an offense level of 13, the first offense level in Zone D.

of noncompliance within the segment of the income spectrum which files the majority of tax returns or fails to file tax returns for any given taxable period.<sup>2</sup>

As we noted above, the tax table in Option 2 incorporates two level increases as opposed to the one level increments in the first part of Option 1 and the present tax loss table, but we do not find this objectionable. In fact, Option 2's tax table seems to provide a somewhat smoother progression through the loss amounts than Option 1's progression from single to double level increments and the current table's single level increments.

#### Proposed Amendment 5 - Theft, Fraud and Tax Related Issues

Proposed Amendment 5(C), inter alia, provides for the modification of the existing sophisticated means enhancement in the tax guidelines and the addition of a "floor" offense level of 12. Once again, two options are presented for comment. Option 1 includes minor non-substantive modifications to the existing sophisticated means specific offense characteristic plus the addition of the "floor" offense level of 12. Option 2, on the other hand, changes the specific offense characteristic from sophisticated means to sophisticated concealment, thus conforming to the proposed language for the fraud and theft guidelines, and also includes the "floor" offense level of 12.

It is our opinion that the important aspect of this proposed amendment is twofold. First, there is the "floor" offense level of 12 which is contained in both options. An offense level of 12 places the offender in Zone C of the Sentencing Table with range of 10 - 16 months imprisonment.<sup>3</sup>

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<sup>2</sup> According to the SOI Bulletin (Fall 1997), for 1995, the average tax on returns in the adjusted gross income range of \$75,000 to \$100,000 was \$12,625. Returns with adjusted gross income of less than \$100,000 accounted for approximately 96 percent of all returns filed for 1995. As an unfortunate consequence, under either option the vast majority of taxpayers, even if they are completely noncompliant, would not face mandatory prison.

<sup>3</sup> Zone C of the Sentencing Table provides for a sentence of imprisonment or a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention provided that at least one-half of the minimum term is satisfied by imprisonment. For offense level 12, one-half of the minimum term would be five months.



It is also noted that it currently takes a tax loss of more than \$23,500 to reach level 12. Pursuant to Option 2, level 12 would be reached with a tax loss of more than \$12,500. Second, the difference between retaining the specific offense characteristic of "sophisticated means" (Option 1) as opposed to replacing it with "sophisticated concealment" (Option 2) is that the language in the latter specifically pertains to overall offense conduct as opposed to offender conduct," thus, favorably resolving a conflict between the circuits. See, United States v. Lewis, 93 F.3d 1075 (2d Cir. 1996); United States v. Richman, 93 F.3d 1085 (2d Cir. 1996); and, United States v. Kraig, 99 F.3d 1361 (6th Cir. 1996).

Based on the foregoing, we endorse the "floor" offense level of 12 contained in both Options and the concept set forth in Option 2 which makes clear that the enhancement is offense specific rather than offender specific. However, we believe that it is unnecessary to change the enhancement from "sophisticated means" to "sophisticated concealment." "Sophisticated means" has been a specific offense characteristic in Part T of Chapter 2 of the Guidelines since their inception. Judges, defense attorneys, probation officers and prosecutors have become familiar with the term "sophisticated means" and the body of law concerning its interpretation. Changing "sophisticated means" to "sophisticated concealment" seems unnecessary and destined to cause confusion and needless litigation over whether there is a definitional difference between the two terms. We believe it is in the best interests of all concerned to retain the "sophisticated means" specific offense characteristic and supplement the commentary thereto with language that clearly establishes that "sophisticated means" is offense specific rather than offender specific.

Proposed Amendment 4 - Definition of Loss (§§2B1.1 and 2F1.1)

Proposed Amendment 4, inter alia, addresses competing proposals for redefining "loss" in regard to fraud and theft offenses. There is no mention of this proposed amendment relating to offenses involving taxation but, notwithstanding that disclaimer, we mention it because of the concept which is present in the taxation guidelines. Both of the options in Proposed Amendment 4 define loss as the greater of the actual or intended loss. Specifically, actual loss is defined to include reasonably foreseeable harm resulting from a defendant's relevant conduct. Intended loss is defined as harm

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<sup>1</sup> Sophisticated concealment means complex or intricate offense conduct that is designed to prevent the discovery of the offense or its extent.



intended to be caused by the defendant and other persons for whose conduct the defendant is accountable under the relevant conduct provision.

By contrast, for the purpose of defining tax loss, §2T1.1(c)(1) provides that the tax loss in regard to tax evasion or filing a false return, statement or other document "is the total amount of loss that was the object of the offense (i.e., the loss that would have resulted had the offense been successfully completed)." Section 2T1.1(c)(2) provides that the tax loss in regard to a failure to file violation is "the amount of tax that the taxpayer owed and did not pay." Section 2T1.1(c)(3) provides, in regard to wilful failure to pay violations, "the tax loss is the amount of tax that the taxpayer owed and did not pay" and in regard to false claims for refund violations §2T1.1(c)(3) provides that "the tax loss is the amount of the claimed refund to which the claimant was not entitled." And, §2T1.1(c)(5) provides that "the tax loss is not reduced by any payment of the tax subsequent to the commission of the offense." Although these provisions, in conjunction with existing case law, results in the greater of the intended or actual tax loss being used for determining the offense level in the tax tables, §§2T1.1, 2T1.4, 2T1.6, 2T1.7 and 2T1.9 would benefit from the inclusion of similar language as used in Proposed Amendment 4, Option 1, §2F1.1 Application Note 7.<sup>5</sup> In addition, this would avoid confusion as to whether the concept of loss being the greater of the actual or intended loss was applicable to the tax guidelines.

Related to Proposed Amendment 4 is also Issue for Comment (G) which is, in essence, how to deal with an intended loss pursuant to §2F1.1. The concept of this issue seems to provide the framework for Option 2 of Proposed Amendment 4. More broadly stated, the issue becomes whether the current rule should be changed to provide that a loss should be based primarily on the actual loss, with the intended loss available only as a possible ground for departure or whether, if the substance of the current rule is retained, the magnitude of the intended loss should be limited by the amount that a defendant realistically could succeed in obtaining. In other words, whether the intended loss should be limited by concepts of "economic reality" or "impossibility." We believe that the current rule should be retained with no modification for the amount that the defendant realistically could have succeeded in obtaining.

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<sup>5</sup> Loss is the greater of the actual or the intended loss.



Basing loss on actual loss has the potential to reward defendants for factors beyond their control. For instance, a defendant who intended a large loss but who was discovered before he/she could consummate the offense would be treated less seriously than a defendant who was not discovered until after the offense was completed. Sentencing a defendant based on the intended loss still permits courts to take into account the value of pledged collateral in cases involving fraudulently obtained loans and actual performance in cases involving falsification to obtain contracts.

In addition, basing a determination of loss on the economic reality of a defendant's scheme would require courts to make speculative judgments and quite probably would lead to similarly situated defendants being treated differently. Regardless, change is unnecessary considering the fact that the concept of current Application Note 10 to §2F1.1 which provides that, "[i]n a few instances, the loss determined . . . may overstate the seriousness of the offense . . . [and] in such case, a downward departure may be warranted" would be incorporated in Proposed Amendment 4, Application Note 7. Specifically, Proposed Amendment 4, Application Note 7 provides that "[t]here may be cases in which the loss substantially understates or overstates the seriousness of the offense or the culpability of the defendant. In such cases, a departure may be warranted." We believe that this is adequate to address the issue without encumbering the courts with restrictive definitions and special rules.

#### Conclusion

We recommend that the Assistant Commissioner (Criminal Investigation) submit written comments to the United States Sentencing Commission which support Option 2 of Proposed Amendment 1 and the "floor" offense level of 12 and offense specific aspects of Proposed Amendment 5. In addition, opposition should be voiced in regard to basing the determination of any loss primarily on the actual loss and limiting intended loss by concepts of economic reality or impossibility.



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BARRY J. FINKELSTEIN