

JOHN L. DAVIDSON, P.C.

THE BERKLEY BUILDING

8015 FORSYTH

SAINT LOUIS (CLAYTON) MISSOURI 63105

TEL 314-725-2898

FAX 314-725-3275

March 10, 1998

United States Sentencing Commission

Attention: Public Information.

One Columbus Circle, N.E.

Suite 2-500,

Washington, D.C. 20002-8002

Written Testimony and Comments

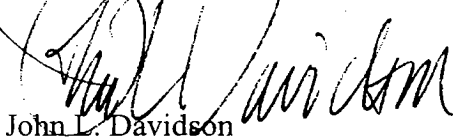
Dear Sir or Madam:

I am enclosing my written testimony regarding the proposed changes in the Fraud guidelines, published on January 6, 1998, in the Federal Register.

Thank you for your prompt attention to this matter. Please distribute copies as appropriate.

And, please direct any questions to my attention.

Sincerely yours,


John L. Davidson

Written Testimony
of
John L. Davidson, Esq.
John L. Davidson, P.C.
8015 Forsyth Avenue
Saint Louis, Missouri 63105
314-725-2898

I defend people charged with white collar crimes. Since before 1990 much of my practice has been concentrated in the defense of what another Missourian has, paraphrasing Mark Twain, called America's second native criminal class. They are a criminal class if you read the press releases of the Department of Justice, the newspapers, and pay no attention to either the facts or the law. That class, real estate developers and bank and savings and loan officers and directors, are the targets of the proposal before the Commission to lengthen sentences by making changes in the fraud tables and through other mischief, all for the purpose of increasing sentence length.

I neither support the existing approach of the Guidelines nor do I support the changes proposed by the Commission. Rather, I write to urge the Commission to abandon the entire present approach of the guidelines, with its emphasis on money and incarceration, even for first time offenders. Instead, the Commission should put in place a series of guidelines that focus on: (1) the intent and motives of the defendant; (2) the extent to which the defendant's conduct has departed from occupational norms; and (3) the known or reasonably foreseeable to the defendant, impact on the victim.

While I am no legal historian, I believe that we have a legal system that through about 800 years of intellectual development has come to understand that the moral authority to punish arises only in response to the motive and intent of the offender. A few days ago, in a different context, the Supreme Court reaffirmed this first truth, unanimously. *Kawaauhauet v. Geiger*, ____

U.S. ___, No. 97-115, March 3, 1998. *See also Eddings V. Oklahoma*, 455 U.S. 104 (1982)

Against that first truth is juxtaposed the first flaw of the fraud guidelines and that is its heads the government wins tails the defendant loses approach to loss, all worked by the rule that the amount of loss is the greater of the actual or intended loss. § 2 F 1.1 Application Note 7. This proposition makes both intent and motive irrelevant in the cases where its should have the most impact¹, including the following kinds of cases:

Those cases of fraud committed by policy-making officials for the corporation, especially when the gist of the prosecution is that the defendant used poor business judgment. An example would be when a bank officer makes a loan which someone later determines was undercollateralized. *E.g., U.S. v. Pribble*, 127 F.2d 583, 593[13](7th Cir. 1997(bank president criminally liable under 18 U.S.C. § 1344 because he "should have known" that the loan's collateral was insufficient).

All cases in which the government relies upon a wilful blindness instruction to obtain a conviction. *Sans* extraordinary circumstances, if the government has to resort to a wilful blindness instruction to obtain a fraud conviction, imprisonment ought not to be a sentencing option. The Securities Laws have long so provided, a Congressional policy which prosecutors routinely step around by indicting, instead, for wire or mail fraud.

All cases in which the government relies upon a recklessness instruction to obtain a conviction. *U.S. v. Ely*, 124 F.3rd 1026, 1033 [12] (9th Cir. 1997)(opinion withdrawn from publication) ("Reckless disregard equally satisfies the intent required under § 1344).

In all of these instances, the focus of the Commission on loss, without regard to intent or motive², makes the Commission's approach unsatisfactory. As Holmes observed, even a dog knows the

¹ Contrary to those who want to lump fraud and theft together, white collar crime is an area in which more rigid procedures are needed to render the classifications of maximum value. *See generally* Geis and Meier, *White Collar Crime Offenses in Business, Politics, and the Professions* 284 (1977).

² My choice of both words is deliberate. *See generally* Prosser and Keeton on Torts § 8, at 35 (5th Ed. 1984)(discussing the distinction). It seems to me that, as to loss, that motive and intent can be the same or different and that the guidelines should recognize those cases in which the distinction does make a difference as to the culpability of the defendant.

difference between being tripped over and being kicked. *Prosser and Keeton on Torts* § 8, at 33 (5th Ed. 1984). Where is that distinction made in the fraud guidelines? Why doesn't the Commission recognize the difference?

My second objection to the loss approach is that it is wholly illogical, which is illustrated by a simple robbery example. Assume that D plans to stop an armored truck and to rob its driver and guard, at gun point, of the on-board cash. D picks a truck that, so far as he knows, only distributes cash to small retail stores in a less well to-do part of town. D picks this truck because it carries little money and therefore the least experienced staff and for other reasons doing with his ability to carry out the scheme in the that part of town where the truck operates. Generally the truck carries no more than \$50,000, which the defendant knows. Unknown to the Defendant, on the day of the robbery, the truck has on board an additional \$10,000,000, destined to the local Federal Reserve Bank for destruction and replacement with new currency. What logical connection does the amount of loss in this case have to do with the sentence this defendant should receive? Did the Defendant intend to steal every dollar on the armored truck? You bet. Any argument for an increased sentence based on his taking the \$10,000,000 is only punishing him for his dumb luck. On seeing his bonanza, is the defendant going to pull out his pocket copy of the guidelines and calculate his added sentence? Is not such an approach to sentencing arbitrary? Everything you need to know is known, without regard to the amount of loss. Those who want to quarrel with this proposition should consider the opposite example in which D expects \$10,000,000 to be on board but finds only \$50,000, because at the last minute the money was sent on a different truck with a more experienced crew. Should this bad fortune result in a reduced sentence, because only \$50,000 was available to be stolen? The Commission's guidelines say heads the government wins and the Defendant gets a longer sentence, because he

intended to steal more. It seems to me that both defendants intended the same thing--to steal all the money on the truck--and both should be punished equally.

Other facets of the proposed amendments warrant discussion. First, *sans* any empirical or other supporting evidence, the given reason for change is to result in longer sentences. Like the weather, most every one deploring the present state of our society will sooner or later draw attention to our society's obsession with money. Is not the use of a loss table to determine a sentence likely to only reinforce that negative? And, if someone thinks our society's obsession with money is not an ill, then they might want to reflect on the following Old Testament passage, which reflected the values of that society and a far different approach to the punishment of cheats and frauds. Leviticus 6:1

The Lord said to Moses: If anyone sins and is unfaithful to the Lord by deceiving his neighbor about something entrusted to him or left in his care or stolen, or if he cheats him or if he finds lost property and lies about it, or if he swears falsely, or if he commits any such sin that people may do--when he thus sins and becomes guilty, he must return what he has stolen or taken by extortion, or what was entrusted to him, or the lost property he found, or whatever it was he swore falsely about. He must ***make restitution in full, add a fifth*** of the value to it and give it all to the owner on the day he presents his guilt offering. And as a penalty he must bring to the priest, that is, to the Lord, his guilt offering, a ram from the flock, one without defect and of the proper value.

What aspect of our society calls for and makes it appropriate to discuss punishments for cheating or fraud far exceeding that counseled by the Old Testament? What wisdom have we accumulated that better informs us about making judgments about the morality of punishment?

Second is the matter of the combination of the theft and fraud charts or guidelines or both. Apparently this enjoys some academic support. This argument reminds me of the law school professor's reply when asked how a trial court would respond to the proffer of a certain piece of evidence. The professor had to admit that he had no idea what would happen because he

had no idea how the rules and laws were actually applied. I always remind myself of this wisdom by recalling the title of a James W. McElhaney article on the Cleveland exception to the hearsay rule.

There are real life or as applied differences between fraud and theft. Often that difference lies in the conduct of the victim. With the possible exception of actively forged documents, in a commercial setting, it is hard for a fraud to happen without the active interplay of negligence or inattention on the part of the victim. In my experience, theft and fraud defendants are frequently very different kinds of people, coming from different backgrounds, and likely to be differently impacted by a conviction. Generally speaking, a fraud conviction means a lifetime bar of the defendant from his or her chosen occupation. Nor can the impact of conviction or threat of conviction on the fraud defendant, his or her family and friends, be overstated. Fraud prosecutions are like tornados spinning through lives.

Last, brief attention needs to be paid to the impact of the loss on the victim. Presently, the guidelines provide for an upward adjustment for a vulnerable victim, but only for 2 levels. However, the Guidelines wholly fail to consider the foreseeable impact of the loss on the victim. Thus, the guidelines treat cheating \$2,000 out of the government the same as cheating a college student of \$2,000 saved by working summer jobs and intended to be used only to pay for year tuition at a junior college or the defrauding of a retired person of a substantial part of his or her life savings, which can't be replaced. When a defendant knows that a special injury like this is likely to occur, that fact ought to be considered in setting the sentence. However, care must be taken to avoid inappropriate stereotypes. For example, though not understood by prosecutors, many if not most of our older citizens are not vulnerable, when it comes to financial matters.

of an ephah^a of fine flour^b for a sin offering. He must not put oil or incense on it, because it is a sin offering. ¹²He is to bring it to the priest, who shall take a handful of it as a memorial portion^c and burn it on the altar^d on top of the offerings made to the LORD by fire. It is a sin offering. ¹³In this way the priest will make atonement^e for him for any of these sins he has committed, and he will be forgiven. The rest of the offering will belong to the priest,^f as in the case of the grain offering.^g”

The Guilt Offering

¹⁴The LORD said to Moses: ¹⁵“When a person commits a violation and sins unintentionally^h in regard to any of the LORD’s holy things, he is to bring to the LORD as a penaltyⁱ a ram^j from the flock, one without defect and of the proper value in silver, according to the sanctuary shekel.^k It is a guilt offering.^l ¹⁶He must make restitution^m for what he has failed to do in regard to the holy things, add a fifth of the valueⁿ to that and give it all to the priest, who will make atonement for him with the ram as a guilt offering, and he will be forgiven.

¹⁷“If a person sins and does what is forbidden in any of the LORD’s commands, even though he does not know it,^o he is guilty and will be held responsible.^p ¹⁸He is to bring to the priest as a guilt offering^q a ram from the flock, one without defect and of the proper value. In this way the priest will make atonement for him for the wrong he has committed unintentionally, and he will be forgiven.^r ¹⁹It is a guilt offering; he has been guilty ofⁱ wrongdoing against the LORD.”^s

6 The LORD said to Moses: ²“If anyone sins and is unfaithful to the LORD^t by deceiving his neighbor^u about something entrusted to him or left in his care^v or stolen, or if he cheats^w him, ³or if he finds lost property and lies about it,^x or if he swears falsely,^y or if he commits any such sin that people may do— ⁴when he thus sins and becomes guilty, he must return^z what he has stolen or taken by extortion, or what was

5:11
a S Ex 16:36
b S Lev 2:1
5:12 c S Lev 2:2
d Lev 2:9
5:13
e S Ex 32:30
f Lev 2:3
g S Ex 29:41
5:15 h S Lev 4:2
i Lev 22:14
j S Ex 29:3
k Lev 6:6; Nu 5:8;
6:14; 15:6;
28:11
l S Ex 30:13
m Lev 16:18;
Lev 6:5, 6; 7:1;
7:14-12-17;
19-21-22;
Nu 6:12; 18:9;
15a 6:3;
Ezr 10:19;
Isa 53:10
5:16 n Lev 6:4
o ver 15;
Lev 27:13;
Nu 5:7
5:17 p ver 15
q S ver 1
5:18 r Lev 6:6;
14:12 s ver 15
5:19 t 2Ki 12:16
6:2 u Nu 5:6;
Ps 73:27;
Ac 5:4; Col 3:9
v Lev 19:11;
Jer 9:4, 5
w S Ex 22:7
x S Ge 31:7
6:3 y S Ex 23:4
z S Ex 22:11
6:4 t Lev 5:16;
Eze 33:15;
S Lk 19:8

6:5 a Nu 5:7
b S Lev 5:15
6:6 c S Lev 5:15
d Nu 5:8
6:7 e S Ex 32:30
6:9 f Lev 7:37
6:10
g S Ex 39:27
h Ex 28:39-42,
43; 39:28
i S Lev 1:16
6:11
j S Lev 4:12
6:12 k S Lev 1:7
m S Ex 29:13
n S Ex 32:6
6:14 o S Lev 2:1;
Nu 6:15; 15:4;
28:13
6:15 p S Lev 2:1
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entrusted to him, or the lost property he found, ⁵or whatever it was he swore falsely about. He must make restitution^a in full, add a fifth of the value to it and give it all to the owner on the day he presents his guilt offering.^b ⁶And as a penalty he must bring to the priest, that is, to the LORD, his guilt offering,^c a ram from the flock, one without defect and of the proper value.^d ⁷In this way the priest will make atonement^e for him before the LORD, and he will be forgiven for any of these things he did that made him guilty.”

The Burnt Offering

⁸The LORD said to Moses: ⁹“Give Aaron and his sons this command: ‘These are the regulations for the burnt offering^f: The burnt offering is to remain on the altar hearth throughout the night, till morning, and the fire must be kept burning on the altar.^g ¹⁰The priest shall then put on his linen clothes,^h with linen undergarments next to his body,ⁱ and shall remove the ashes^j of the burnt offering that the fire has consumed on the altar and place them beside the altar. ¹¹Then he is to take off these clothes and put on others, and carry the ashes outside the camp to a place that is ceremonially clean.^k ¹²The fire on the altar must be kept burning; it must not go out. Every morning the priest is to add firewood^l and arrange the burnt offering on the fire and burn the fat^m of the fellowship offeringsⁿ on it. ¹³The fire must be kept burning on the altar continuously; it must not go out.

The Grain Offering

¹⁴“These are the regulations for the grain offering:^o Aaron’s sons are to bring it before the LORD, in front of the altar. ¹⁵The priest is to take a handful of fine flour and oil, together with all the incense^p on the grain offering,^q and burn the memorial portion^r on the altar as an aroma pleasing to the LORD. ¹⁶Aaron

a 11 That is, probably about 2 quarts (about 2 liters)
b 15 That is, about 2/5 ounce (about 11.5 grams)
c 19 Or has made full expiation for his
d 12 Traditionally peace offerings

5:15 *guilt offering.* See further priestly regulations in 7:1-6 (see also Isa 53:10). Traditionally called the “trespass offering,” it was very similar to the sin offering (cf. 7:7), and the Hebrew words for the two were apparently sometimes interchanged. The major difference between the guilt and sin offerings was that the guilt offering was brought in cases where restitution for the sin was possible and therefore required (v. 16). Thus in cases of theft and cheating (6:2-5) the stolen property had to be returned along with 20 percent indemnity. By contrast, the sin offering was prescribed in cases of sin where no restitution was possible. The animal sacrificed as a guilt offering was always a ram.

6:3 *lost property.* See Dt 22:1-3.

6:6 *to the priest, that is, to the LORD.* Sacrifices were brought to the Lord, but priests were his authorized representatives.

6:8-7:36 Further regulations concerning the sacrifices, dealing mainly with the portions to be eaten by the priests or, in the case of the fellowship offering, by the one offering the sacrifice.

6:9 *burnt offering.* See ch. 1; Nu 15:1-16 and notes.

6:13 The perpetual fire on the altar represented uninterrupted offering to and appeal to God on behalf of Israel.

6:14 *grain offering.* See ch. 2 and notes.

and his sons^s but it is to be holy place;^t courtyard^w of must not be ba en. it as their made to me b ing and the h holy.^a ¹⁸Any n may eat it.^b If the offerings m the generation touches them v ¹⁹The LORD a is the offering bring to the anointed:^f a t fine flour^h as half of it in the evening.²¹Prep die;^j bring it the grain offer an aroma pleas who is to su priest^k shall p regular share a pletely.²³Eve priest shall be b not be eaten.”

The Sin Offering

¹⁰The LORD s Aaron and his s lations for the s fering is to be LORD^a in the p is slaughtered; priest who offe be eaten in a b yard^a of the T ever touches an holy,^s and if a tered on a garm a holy place. ²⁸ cooked in musl cooked in a bro scoured and ri male in a priest is most holy.^v whose blood is Meeting to ma Holy Place^x mu be burned.^y

6:25 *sin offering.* See 6:28 *clay.* Ordinary were made of clay, t or burnished.
7:2 *guilt offering.* S north side of the a tabernacle (1:11).
7:3 *fat tail.* See note 7:7-10 See Nu 18:8
7:11-36 This section about (1) three

argue that because the plaintiffs seek wide-ranging, wholesale institutional reforms of California's prison system, the suit is against the state and thus falls outside the bounds of *Ex parte Young*. No court, however, has carved out an exception to *Ex parte Young* on the basis of the complexity and scope of the prospective injunctive relief sought. To the contrary, many courts have permitted suits to proceed under *Young* where plaintiffs sought comprehensive relief similar to the reforms the plaintiffs seek here. See, e.g., *Committee to Save Mokelumne River v. East Bay Mun. Util. Dist.*, 13 F.3d 305, 307, 309-10 (9th Cir.1993) (rejecting Eleventh Amendment immunity claim where defendants were required to devise a remedial plan to remove contaminants); *Parents for Quality Educ. with Integration, Inc. v. Indiana*, 977 F.2d 1207, 1209-11 (7th Cir. 1992) (allowing suit seeking widespread educational reforms against state officials), *modified on other grounds*, 986 F.2d 206 (7th Cir.1993). We, too, see no basis for creating such an exception.

[5] The defendants also maintain that *Ex parte Young* is limited to violations of federal constitutional law and does not permit suits to remedy statutory violations. This argument is without merit. We have held squarely that *Young* applies to suits alleging violations of federal statutes. See *Natural Resources Defense Council v. California Dep't of Transp.*, 96 F.3d 420, 422-23 (9th Cir.1996) (stating that *Young* "applies to violations of federal statutory law" and permitting suit under *Young* for violations of the Clean Water Act); *Almond Hill Sch. v. United States Dep't of Agric.*, 768 F.2d 1030, 1034 (9th Cir.1985) ("The underlying purpose of *Ex parte Young* seems to require its application to claims against state officials for violations of federal statutes.").

Sovereign immunity presents no bar to this suit against state officials seeking prospective injunctive relief against ongoing violations of the ADA and RA in the state penal system. The district court thus correctly denied the defendants' motion for summary judgment.

V. CONCLUSION

Because we conclude that the ADA and RA apply to inmates and parolees in the

state penal system and that this suit may proceed in federal court under the doctrine of *Ex parte Young*, we affirm the judgment of the district court.

AFFIRMED.



UNITED STATES of America,
Plaintiff-Appellant,

Robert S. ELY, Defendant-Appellee.

UNITED STATES of America,
Plaintiff-Appellee,

Robert S. ELY, Defendant-Appellant.

UNITED STATES of America,
Plaintiff-Appellee,

Ralph E. WHITMORE, Jr.,
Defendant-Appellant.

UNITED STATES of America,
Plaintiff-Appellant,

Ralph E. WHITMORE, Jr.,
Defendant-Appellee.

UNITED STATES of America,
Plaintiff-Appellee,

William S. SWAIN, Defendant-Appellant.

UNITED STATES of America,
Plaintiff-Appellee,

H. Derrell SMITH, Defendant-Appellant.

Nos. 96-30070, 96-30072, 96-30073,
96-30130, 96-30074, 96-30075.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted July 17, 1997.

Decided Aug. 28, 1997.

The United States District Court for the
District of Alaska, H. Russel Holland, J.,

dismissed several counts of indictment charging defendants with bank fraud, but denied defendants' motions to dismiss indictment on double jeopardy grounds. Government and defendants cross-appealed. The Court of Appeals, Noonan, Circuit Judge, held that: (1) as a matter of first impression in its circuit, reckless disregard satisfies intent required under bank fraud statute; (2) indictment adequately alleged that defendants deprived bank of property; (3) false pretenses were adequately alleged in counts charging defendants with entry of false statements in bank records; (4) indictment stated charge of making, as bank director, false entries in bank records; (5) indictment charged crime under provision of bank fraud statute making it a crime to defraud financial institution; and (6) double jeopardy did not bar prosecutions.

Reversed in part and affirmed in part.

1. Banks and Banking §509.10

Indictment adequately alleged that bank fraud defendants deprived bank of property when it alleged that defendants, who were directors of bank, fraudulently arranged to postpone payment of loans they had each received from bank to buy different bank's stock, in that defendants, if they acted as alleged, would have deprived bank of property by preventing it from collecting loans and interest due and by arranging for bank to create further credit in defendants' favor that would pay interest due. 18 U.S.C.A. § 1344.

2. Banks and Banking §509.10

To deprive bank of property, bank fraud defendant does not have to move cash out of its vaults; defendant can deprive bank of property by preventing its collection of debts that are due or by arranging for bank to credit him or her with payment not made.

3. Banks and Banking §509.10

Indictment alleging that defendants acted with intent to obtain credits from bank by false pretenses sufficiently alleged intent element of bank fraud. 18 U.S.C.A. § 1344.

4. Banks and Banking §509.10

False pretenses were adequately alleged in indictment charging defendants, who were

bank's directors, with entry of false statements in bank records in connection with loan renewals, based on alleged omission of vital fact that purpose of loan renewals was to enable defendants to acquire different bank. 18 U.S.C.A. § 1005.

5. Banks and Banking §509.10

Statement may be false, for purposes of statute prohibiting false entries in bank records by bank director, if vital fact is omitted. 18 U.S.C.A. § 1005.

6. Banks and Banking §509.10

Indictment stated charge of making, as bank director, false entries in bank records when it alleged that defendants, who were bank directors, caused other directors to make false borrowers' agreements and, knowing their falsity, caused false agreements to be entered on bank's books. 18 U.S.C.A. § 1005.

7. Banks and Banking §509.10

Mere making of false promise as borrower, knowing that promise would be entered on bank's books, is not within scope of statute prohibiting bank directors and other representatives from making false entries in bank's records. 18 U.S.C.A. § 1005.

8. Banks and Banking §509.10

Counts of indictment charging defendant with making, as bank director, false entries in bank records had to be dismissed as to acts that occurred when defendant was not director, inasmuch as mere making of false promise as borrower, knowing that promise would be entered on bank's books, was not within scope of governing statute. 18 U.S.C.A. § 1005.

9. Banks and Banking §509.10

Indictment failed to charge crime under provision of bank fraud statute prohibiting execution of scheme to obtain bank property through fraudulent means when it alleged scheme by bank directors to cause bank to pay "massive and unprecedented dividends," but did not set out how alleged false representations were means by which disbursement of dividends was achieved. 18 U.S.C.A. § 1344(2).

10. Banks and Banking ¶509.10

Indictment alleging that defendants, who were bank's directors, declared large dividends with reckless disregard for payments' effect on bank charged crime under provision of bank fraud statute making it a crime to defraud financial institution; fraud consisted of reckless disregard by fiduciaries of property committed to their care, and reckless disregard satisfied intent required under statute. 18 U.S.C.A. § 1344(1).

11. Banks and Banking ¶509.15

Reckless disregard is equivalent of intent to defraud bank theft statute applicable to bank employees. 18 U.S.C.A. § 656.

12. Banks and Banking ¶509.10

Reckless disregard satisfies intent required under bank fraud statute. 18 U.S.C.A. § 1344.

13. Double Jeopardy ¶181

Double jeopardy clause did not bar prosecution of bank directors for bank fraud, despite civil action based on same acts in which Federal Deposit Insurance Corporation (FDIC) sought punitive damages against directors, in that FDIC was acting only as receiver of failed institution in civil action, and not as the United States, and thus the United States was not party to civil action. U.S.C.A. Const. Amend. 5.

Joseph W. Bottini, Assistant United States Attorney, Anchorage, AK, for plaintiff-appellant-appellee.

William Bankston, Bankston and McCollum, Anchorage, AK, and Walter Share, Seattle, WA, for defendant-appellant McSwain.

James H. McComas, Friedman Rubin, White, Anchorage, AK, for defendant-appellee-appellant Ely.

Ronald A. Offret, Anglietti & Offret, Anchorage, AK, for defendant-appellant Smith.

Rich Curtner and Kevin F. McCoy, Assistant Federal Public Defenders, Anchorage, AK, for defendant-appellant Whitmore.

Appeal from the United States District Court for the District of Alaska; H. Russel Holland, District Judge, Presiding. D.C.

Nos. CR-94-00136-5-HRH, CR-94-00136-1-HRH, CR-94-00136-4-HRH, CR-94-00136-3-HRH.

Before: WALLACE, JOHN T. NOONAN, and THOMPSON, Circuit Judges.

NOONAN, Circuit Judge:

The United States appeals the dismissal of certain counts of an indictment charging the named defendants with various forms of fraud on Alaska Statebank (Statebank), a federally-insured bank of which they were directors. The district court ruled that the counts in question stated bad banking practices but did not charge crimes. Reviewing the sufficiency of the allegations in the indictment as a matter of law, and of course not determining the truth of the allegations, we agree with the district court that certain counts failed to charge one non-director with a crime but we also hold that otherwise the dismissed counts did sufficiently set forth crimes under 18 U.S.C. § 1344 and § 1005, and § 2 and § 371. Addressing a question of first impression in this circuit, we further hold that a charge of "reckless disregard" of bank property adequately charges the bank's directors with a violation of § 1344. Accordingly, we reverse the judgment of the district court and reinstate the dismissed counts. We affirm the judgment of the district court that the indictment does not violate the constitutional prohibition against double jeopardy.

THE INDICTMENT

In the second superseding indictment of March 1, 1995, the grand jury charged, in substance, as follows:

Ralph E. Whitmore, Jr., chairman of Statebank, entered into a conspiracy with H. Derrell Smith, president and director of the bank, and three other directors, Robert C. Ely, Thomas J. Miklautsch, and William A. Swain. The object of the conspiracy was to obtain funds from Statebank by which Whitmore could buy the stock of Alaska National Bank of the North (ANBN). The conspiracy began in 1984 with loans by Statebank of \$500,000 apiece to Ely, Miklautsch, Swain

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HN T. NOONAN,
Judges.

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and one other director (The Director Stock Loans). The loans were renewed in 1985 and 1986. A substantial part of the loans and the renewals was unsecured. The means of obtaining the renewals consisted in false representations to Statebank and false entries on the books of Statebank. The conspiracy deprived Statebank of property and benefited the conspirators. Their agreement and actions violated 18 U.S.C. § 1344, which provided:

Whoever knowingly executes, or attempts to execute, a scheme or artifice—

- (1) to defraud a financial institution; or
- (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;

shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

Their actions also violated 18 U.S.C. § 1005, which at the time provided:

Whoever, being an officer, director, agent or employee of any Federal Reserve bank, member bank, national bank or insured bank

... makes any false entry in any book, report, or statement of such bank with intent to injure or defraud such bank, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such bank, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to examine the affairs of such bank, or the Board of Governors of the Federal Reserve System -

Shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

* * * * *

Their actions also abetted the charged crimes in violation of 18 U.S.C. § 2 and constituted a conspiracy in violation of 18 U.S.C. § 371.

Further, the indictment charged that in 1987 the named defendants (except for Ely, no longer a director) executed a scheme to defraud Statebank by recklessly causing the bank to pay \$2.7 million in dividends in violation of §§ 1344 and 2.

Such were the crimes alleged to have been committed by the defendants.

PROCEEDINGS

The district judge had presided over civil litigation against the defendants conducted by the Federal Deposit Insurance Corporation (the FDIC) as receiver of Statebank. The criminal case was assigned to the same judge, who was thus thoroughly familiar with the principals and the principal events in the case. The defendants moved to dismiss certain counts. The magistrate judge, to whom their motions were referred, recommended denial. The district judge, however, in two thoughtful memoranda, comprehending the core of the indictment, granted the dismissal of Count 7 charging the conspiracy to get Statebank funds to purchase the ANBN stock; Counts 8, 9 and 10 charging bank fraud in execution of the conspiracy; Counts 11, 12, and 14-19, charging false entries in execution of the conspiracy; and Counts 21, 22, 23 and 24 charging bank fraud in the declaration of dividends.

The district court laid two foundations for the dismissals of Counts 8-10: (1) To establish bank fraud, the government had to allege and prove a "specific intent to defraud a bank of money or property"—so, the district court reasoned, § 1344 should be construed in parallel with the mail fraud statute, 18 U.S.C. § 1341, as interpreted by *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987). The district court not only found no such intent charged but noted that the indictment, ¶ 7.19, declared that the defendants "acted with intent to defraud Alaska Statebank, that is with intent to deceive ordinarily in order to bring about a financial gain to oneself *but not necessarily to harm or cause economic loss to the bank*." (emphasis added). The specific intent to deprive Statebank of property appeared to be implicitly negated by the italicized words. (2) Counts 8, 9 and 10 alleged that the defen-

dants fraudulently arranged to postpone payment of the loans they had each received from Statebank to buy the ANBN stock. The district court held as to the scheme alleged in the indictment: "this extension of credit was for accruing interest. No money left the bank, although a debt to the bank was plainly created. The bank did not profit from interest it was due on the original stock purchase loans, but the scheme to further the acquisition of ANBN through the renewal of the original, nonfraudulent loans did not result in further money or property passing out of Alaska Statebank. The court holds that Alaska Statebank was not wronged criminally in its property interests through this kind of 'churning' of bank assets so as to keep the original shareholder loans current."

For these two reasons the district court dismissed Counts 8, 9 and 10. The court then turned to Counts 11 through 19 alleging false statements in violation of 18 U.S.C. § 1005. The court interpreted the statute as not criminalizing omissions. The court relied on "the somewhat dated" case of *Coffin v. United States*, 156 U.S. 432, 463, 15 S.Ct. 394, 406, 39 L.Ed. 481 (1895). In Count 11 the defendants were charged with causing the entry of the statement "the additional funds are a necessary injection of capital to enable expansion of business enterprises" and in Count 12 they were charged with causing the entry of the statement that the funds were needed "to maximize [the borrowers] investment." Neither statement, the court concluded, was false except by omission. Consequently, no crime was charged and Counts 11 and 12 should be dismissed.

The court upheld Count 13 and went on to Counts 14 through 19, each of which charged the defendants with causing false entries in the books of Statebank "in that Ralph E. Whitmore, Jr., and H. Derrell Smith caused Thomas J. Miklautsch, William A. Swain and Robert C. Ely, each to sign two Applications for Modification of Loans representing their purported agreements to repay both parts of the stock loans as renewed a second time with interest when, in truth and fact, as each defendant well knew, these agreements were false...." The court ruled that the applications had been executed by the applicants in

their capacity as borrowers, not directors. As borrowers, they said they would repay the loans and the interest due. When their representations as borrowers were entered on the books of the bank, nothing untrue was entered; the representations they had made were accurately recorded; as directors, they did not make false entries on Statebank's books. Section 1005 applied only to officers, directors, employees or agents of a bank, not to its borrowers. Consequently no crime was alleged. Counts 14 through 19 were dismissed.

The corollary of dismissing the counts charging the execution of the conspiracy was the dismissal of the conspiracy count itself, Count 7, to the extent that the predicate acts of Count 7 were the bank fraud and false statement counts. As a result, as the district court said, "the government's conspiracy count is in essence a nullity."

The district court also dismissed Counts 21 through 24 of the indictment alleging bank fraud in violation of § 1344 on the part of Whitmore, Smith, Miklautsch and Swain. The indictment stated that during 1987, while Statebank was losing millions of dollars, the defendants declared \$2.7 million in dividends "with reckless disregard" for the effect on Statebank. The district court ruled that the counts charged the systematic ignoring of "good banking practices" but no fraud. Everyone knew what was going on. Whitmore with the aid of the other defendants was apparently "able to do whatever he wished" at Statebank. He did "not have to engage in false or fraudulent pretenses, representations, or promises." The indictment's allegations of fraud were negated by the indictment's own description of the openness of the conduct carried out. "Bad judgment, bad banking, arrogance"—all these faults might be found by the FDIC but no criminal conduct was charged. What the defendants had been doing "had to be obvious to everyone; and it was equally obvious that the harm was done when the initial stock purchases were made, not from what followed."

The court added its own commentary on the situation in which the charged activities had arisen. In the 1980's real estate speculation "was rampant in the Anchorage commu-

nity," fueling the crash of the bubble. The consequent losses among the bank. The bank began to fail. The civil suit was sufficient to criminalize the spin in the to recriminate court, how tions to dis of double j

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nity," fueled by oil development in Alaska. The crash in the world market for oil "burst the bubble of real estate speculation." As a consequence many banks in Alaska failed, among them ANBN and, near the end, Statebank. The FDIC took over as receiver and began to sue the responsible officers civilly. The civil actions, the court implied, were sufficient redress for the unsound, but not criminal, banking practices which a sudden spin in the wheel of fortune had made open to recrimination and harsh criticism. The court, however, denied the defendants' motions to dismiss the indictment on the ground of double jeopardy.

The government appeals all of the dismissals. The defendants appeal the denial of their double jeopardy motions.

ANALYSIS

[1, 2] The Fraudulent Loan Renewals. Counts 8, 9 and 10 adequately alleged that the defendants deprived Statebank of property. Loans and interest were due from the defendants. Instead of collecting, Statebank was manipulated not to collect and was manipulated to extend further credit without security. To deprive a bank of property you do not have to move cash out of its vaults. You deprive a bank of property if you prevent its collection of debts that are due or if you arrange for the bank to credit you with a payment you have not made. That is what these defendants are alleged to have done, to have prevented Statebank from collecting loans and interest that were due and to have arranged for Statebank to create further credit in their favor which would pay the interest due. As § 1344 specifies, it is a crime to obtain bank credits by false pretenses.

[3] The district court focused on the awkward and ungrammatical, if not unintelligible, phrase in ¶ 7.19 of the indictment that the defendants acted "with intent to deceive ordinarily in order to bring about a financial gain to oneself but not necessarily to harm or cause economic loss to the bank." As we conclude that the alleged intent to obtain credits from the bank satisfies § 1344, and that this intent is sufficiently alleged, we do

not attach significance to the "not necessarily" clause of ¶ 7.19.

[4] *The False Entries.* False pretenses were adequately alleged as to the false entries. The century-old case relied on by the district court has become obsolete even if it has not received its own burial and coffin. See *United States v. Darby*, 289 U.S. 224, 227, 53 S.Ct. 573, 574, 77 L.Ed. 1137 (1933); *United States v. Luke*, 701 F.2d 1104, 1108 (4th Cir.1983).

Every circuit to interpret either 18 U.S.C. § 1005 or § 1006 (an analogous statute applying to non-bank financial institutions) has determined that material omissions are false statements for the purposes of the statutes. *United States v. Cordell*, 912 F.2d 769, 773 (5th Cir.1990); *United States v. Chandler*, 910 F.2d 521, 523 (8th Cir.1990); *United States v. Rochester*, 898 F.2d 971, 978 (5th Cir.1990); *United States v. Krepps*, 605 F.2d 101, 109 (3d Cir.1979); *United States v. Spector*, 326 F.2d 345, 349 (7th Cir.1963).

[5] Plainly, a statement may be false if a vital fact is omitted. In our case the vital fact allegedly omitted is that the purpose of the loan renewals was to enable the defendants to acquire ANBN. Counts 11 and 12 sufficiently allege false statements.

[6-8] Counts 14 through 19 were dismissed as at the most charging borrower fraud, a crime not within the reach of § 1005. The counts, however, allege that not only were the borrowers' agreements to pay false, but that the defendants, knowing their falsity, caused these false promises to be entered on Statebank's books. The alleged action of the defendants was not borrower fraud but false entries by directors. The government can prove its case in terms of the indictment if it can prove (a) that Whitmore and Smith caused Miklautsch, Swain and Ely to make false agreements and (b) that the defendants in their capacity as directors caused these agreements to be recorded on the books of the bank. If the government should prove (a) only, the government would not satisfy the requirements of § 1005. If the government should prove (a) and (b), it would prove violation of § 1005 as validly charged. The mere making of a false promise as a borrow-

er knowing that the promise would be entered on the bank's books is not within the scope of § 1005. Consequently, the indictment is bad as to Ely who was not a director in 1987. Counts 18 and 19 should be stricken as to him.

With the reinstatement of Counts 11, 12, 14, 15, 16, 17, 18, and 19 the indictment adequately charges the use of false representations to commit the bank fraud alleged in Counts 8, 9, and 10. With the restoration of all these specific counts the conspiracy charged in Count 7 ceases to be a nullity and becomes the comprehensive charge at the core of the government's case. The defendants are accused of agreeing with each other to deprive Statebank of cash and credits by making false representations and by causing false entries to be made upon its books.

[9] *The Dividend Counts.* Counts 21 through 24 begin with a narrative setting out the following: Whitmore was the majority stockholder in Alaska Bancorporation (ABC), whose wholly owned subsidiary was Alaska Bancshares (ABS). Through ABC and ABS Whitmore owned 81% of Statebank. In 1986 he caused ABS to borrow nearly \$4.7 million from Mellon Bank, pledging the Statebank shares owned by ABS and ABC. Dividends from Statebank were the only income ABS had from which to repay the loan. This situation created the objective of what the indictment alleges was a scheme to defraud Statebank by causing it to pay "massive and unprecedented dividends" in 1987.

The "manner and means" of the scheme are alleged as follows: Whitmore, Smith, Miklautsch and Swain caused the Director Stock Loans to roll over with additional infusions of unsecured credit. This charge is the same as that made in Counts 7-10, but additional effects are alleged, viz., the bank's income was overstated and a charge off of the loans to the Reserve for Loan Losses was avoided. Whitmore and Smith are additionally alleged to have maintained this Reserve at an inadequate level and to have filed false Consolidated Reports of Condition and Income (Call Reports) with the FDIC. It is then alleged that during 1987 the bank was "suffering huge losses" but the defendant directors went ahead with the declara-

tion of dividends in disregard of the advice of "various bank regulatory agencies." Climactically, it is alleged that Whitmore, Smith, Miklautsch and Swain voted dividends of \$1,000,915 on January 16, 1987 (Count 21); \$300,274 on March 25, 1987 (Count 22); \$600,549 on June 11, 1987 (Count 23); and \$800,732 on October 8, 1987 (Count 24).

The indictment is not clear how the allegedly false Call Reports permitted, or related to, the declaration of dividends, especially as banking regulatory agencies are said to have advised against the declarations. The indictment is not clear as to the causal connection between the treatment of the Director Stock Loans and the declaration of dividends. The indictment does not allege that the allegedly improper treatment of these loans made it possible to declare the dividends; it would be a guess, although not an unreasonable guess, that there was some connection between the two. The indictment affords no information about the surplus, if any, of Statebank or the state of its condition when the million dollar dividend was declared on January 16, 1987. The indictment, in short, does not set out how false representations were the means by which the disbursement of dividends was achieved. Consequently the indictment fails to charge a crime under § 1344(2).

[10] The indictment does allege that the defendant directors declared the dividends "without regard to prudent banking practices and with reckless disregard for the effects the payment of these dividends would have on Alaska Statebank." Is that allegation sufficient to charge a crime under § 1344(1), which does not refer to false representation but makes it a crime "to defraud a financial institution?" The fraud charged here consists in the reckless disregard by fiduciaries of the property committed to their care. If the indictment charged the directors in their capacity as directors with throwing the bank's money out the window, or if the indictment charged the chairman, abetted by the directors, of ordering the cashier to turn over \$2 million to him for his personal use, it could scarcely be doubted that crimes under § 1344(1) were being alleged. The brazen openness with which these hypothetical

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[11, 12] lent of ir § 656, the ble to be *Crabtree, cert. deni States v. 1989) (per F.2d 729, Krepps, United S (7th Cir.) satisfies See Willi 1007-08 (the indict of a fiduc but a bre reckless bank func appressed in violatio*

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handouts were made would not remove the stain of fraud. Here, the charge is of the use of a legal form, the declaration of dividends, to extract from Statebank cash that should not have been paid out. Neither the openness of the maneuver nor the legal form in which it was dressed remove the stain of fraud if in fact the fiduciaries acted in reckless disregard of the property of Statebank.

[11, 12] Reckless disregard is the equivalent of intent to defraud under 18 U.S.C. § 656, the parallel bank theft statute applicable to bank employees. *United States v. Crabtree*, 979 F.2d 1261, 1269 (7th Cir.1992), cert. denied, 510 U.S. 878 (1993). *United States v. Woods*, 877 F.2d 477, 480 (6th Cir. 1989) (per curiam); *United States v. Cyr*, 712 F.2d 729, 732 (1st Cir.1983); *United States v. Krepps*, 605 F.2d 101, 104 (3rd Cir.1979); *United States v. Larson*, 581 F.2d 664, 667 (7th Cir.1978). Reckless disregard equally satisfies the intent required under § 1344. See *Willis v. United States*, 87 F.3d 1004, 1007-08 (8th Cir.1996). What is charged in the indictment is not mere breach of the duty of a fiduciary to act honestly and prudently but a breach of that duty resulting in the reckless disposition of \$2.7 million of Statebank funds. The defendants are adequately apprised of the charge of crimes committed in violation of § 1344(1).

We take the district court's point that if the world price of oil had not fallen, all the troubles that befell the defendants might not have occurred. They might be today rich and respected citizens of Anchorage. They were unlucky in the extreme. Many financial irregularities come to light only in bad times. If the irregularities are criminal, as those charged here are portrayed as being, the defendants cannot excuse criminal conduct by the plea of bad luck.

[13] *Double Jeopardy*. The defendants contend that the Double Jeopardy Clause is offended because they were all sued civilly by the FDIC for the same acts and the FDIC sought punitive as well as actual damages. The defendants' syllogism is simple: The government cannot constitutionally seek to punish us twice for the same acts. Punitive damages, as the name implies, are a form of punishment. Since the government has

sought such punishment once, it is disabled from seeking to punish us by criminal proceedings.

This earnest argument does not succeed because the FDIC did not sue the defendants as the United States. The FDIC was "acting only as a receiver of a failed institution." See *Atherton v. FDIC*, — U.S. —, —, 117 S.Ct. 666, 673, 136 L.Ed.2d 656 (1997). The United States was not a party. The Double Jeopardy Clause has no application. *United States v. Heffner*, 85 F.3d 435, 439 (9th Cir.1996).

The dismissed counts should be Reinstated except that Ely is to be struck from Counts 18 and 19. The judgment of the district court denying the motions to dismiss for double jeopardy is **AFFIRMED**.



UNITED STATES of America,
Plaintiff-Appellee,

v.

Robert E. HYDE, Defendant-Appellant.

No. 95-10113.

United States Court of Appeals,
Ninth Circuit.

Aug. 28, 1997.

Jonathan D. Soglin, Oakland, California,
and Robert E. Hyde, pro se, San Francisco,
California, for the defendant-appellant.

Joel R. Levin, Assistant United States Attorney,
San Francisco, California, for the
plaintiff-appellee.

On Remand from the United States Supreme Court.

Before: FERGUSON, D.W. NELSON,
and FERNANDEZ, Circuit Judges.

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