

Jefferson M. Gray
Member
(202) 828-3444
grayj@arentfox.com

March 12, 2001

The Hon. Diana E. Murphy
Chair, United States Sentencing Commission
U.S. Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 200002-8002

RE: Proposed Amendment to the Money Laundering Guidelines
(U.S.S.G. § 2S1.1)

Dear Judge Murphy and the Members of the Commission:

As a current white collar criminal defense attorney and former federal prosecutor, I am writing to express my support for the amendment the Commission staff has proposed to the money laundering guidelines (U.S.S.G. § 2S1.1). The most important change the proposed amendment makes is that it eliminates the money laundering table in § 2S1.1, and instead bases the offense level for money laundering offenses primarily on the offense level for the underlying offense. This change is critically needed to correct certain unfortunate anomalies that have crept into judicial interpretations of this guideline over the years. These anomalies have produced inconsistent and inequitable results in individual cases, depriving the sentencing process for money laundering offenses of the predictability and relative uniformity the Guidelines were intended to secure.

The proposed amendment also remedies what has become a confusing circuit split on the question of whether fraud and money laundering offenses should be "grouped" under § 3D1.2(d). Several circuits have held that grouping is not appropriate. *See, e.g., United States v. Green*, 225 F.3d 955 (8th Cir. 2000); *United States v. Napoli*, 179 F.3d 1, 8-13 (2d Cir. 1999); *United States v. Kneeland*, 148 F.3d 6, 16 (1st Cir. 1998); *United States v. O'Kane*, 155 F.3d 969 (8th Cir. 1998); *United States v. Taylor*, 984 F.2d 298, 303 (9th Cir. 1993); *United States v. Johnson*, 971 F.2d 562 (10th Cir. 1992). Other circuits have held that grouping of money laundering and fraud offenses is appropriate. *See United States v. Landerman*, 167 F.3d 895, 899 (5th Cir. 1999) (dicta); *United States v. Wilson*, 98 F.3d 281, 282-84 (7th Cir. 1996) (dicta); *United States v. Walker*, 112 F.3d 163, 167 (4th Cir. 1997); *United States v. Sokolow*, 91 F.3d 396, 410-11 (3d Cir. 1996); *United States v. Leonard*, 65 F.3d 1181, 1186 (5th Cir. 1995). Finally, some circuits have held that whether to "group" money laundering and fraud or other offenses under § 3D1.2(d) should be left to a case-by-case determination. *See United States v. McClendon*, 195 F.3d 598, 602 (11th Cir. 1999); *United States v. Filippi*, 1999 U.S. App. Lexis 2840 (4th Cir. Feb. 23, 1999) (mail fraud and money laundering counts were properly not grouped); *United States v. Walker*, 112 F.3d 163, 167 (4th Cir. 1997) (mail fraud and money laundering counts were properly grouped); *United States v. McMahon*, 1997 U.S. App. LEXIS 36369 (4th Cir. 1997) (fraud and money laundering

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should not have been grouped); *United States v. Mullens*, 65 F.3d 1560, 1564-65 (11th Cir. 1995) (fraud and money laundering counts should be grouped where amount taken by fraud and amount laundered were co-extensive); *United States v. Porter*, 909 F.2d 789, 792-93 (4th Cir. 1990) (gambling and money laundering counts should not have been grouped).

During my own career as a federal prosecutor between 1989 and 1996, I used the money laundering statute in cases involving organized crime figures and individuals who had agreed to launder money for narcotics traffickers. The money laundering statutes (18 U.S.C. § 1956 and 1957) filled a significant void in the federal criminal code when they were enacted in 1986, and they unquestionably constitute one of the Justice Department's most important weapons against large-scale criminal enterprises.

During the course of the 1990's, however, the money laundering statutes became increasingly popular with federal prosecutors, and they have been put to uses that are far afield of what Congress envisioned when it enacted these statutes. While some of this increase in federal money laundering prosecutions is doubtless attributable to federal prosecutors' growing familiarity with, and understanding of, the money laundering statutes, there is another, less appropriate explanation for the increasing use of the money laundering statute as well.

Many federal prosecutors have long believed that the offense levels imposed by the Fraud Table under § 2F1.1(b)(1) were too low. This frustration with the penalties available under § 2F1.1 encouraged some prosecutors to use the money laundering statute as a way of circumventing the penalties that would otherwise be applicable in a fraud case. Prosecutors also discovered that the threatened use of money laundering charges -- with their much greater penalties -- could be employed as a cudgel to coerce guilty pleas in cases that might otherwise have gone to trial. While many federal prosecutors have avoided this temptation and have continued to employ the money laundering statutes in a manner consistent with the intent of the statute's drafters and the Justice Department's public pronouncements, there are some U.S. Attorney's Offices where the use of the money laundering statutes to increase the potential sentencing exposure of defendants in fraud cases has become essentially standard practice. Thus, rather than being used primarily against organized crime and narcotics trafficking, as the original drafters of the money laundering statutes contemplated, they are increasingly used by some federal prosecutors as a means of circumventing the penalty structure that would otherwise apply in fraud cases under § 2F1.1.

It is unfortunate enough that federal prosecutors are using the threat of possibly ill-founded money laundering charges to coerce defendants into entering guilty pleas in fraud cases they might otherwise choose to contest.¹ But equally problematic is the way that some courts have interpreted

¹ Unfortunately, juries do not necessarily see through ill-founded charges of money laundering. A review of the appellate case law suggests that money laundering convictions are

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the grouping rules in cases where the laundering of funds is a secondary or incidental part of the defendant's overall scheme of fraudulent conduct. After holding that fraud and money laundering offenses should be "grouped" under § 3D1.2(d), several courts have held that the entire amount taken by fraud falls within the scope of the "relevant conduct" of the money laundering offense, even if only a small portion of the funds taken by fraud were ever laundered or intended to be laundered. The fraud loss is then used to calculate the defendant's sentence on the money

frequently reversed on grounds of insufficiency of the evidence or because the conduct in question simply did not constitute money laundering. *See, e.g., United States v. Dobbs*, 63 F.3d 391, 397-98 (5th Cir. 1995) (reversing defendant's convictions on two counts of money laundering under § 1956(a)(1)(B)(i) because of insufficient evidence of intent to conceal); *United States v. Heaps*, 39 F.3d 479, 484-87 (4th Cir. 1994) (reversing defendant's convictions on four counts of money laundering charged under §§ 1956(a)(1)(A)(i) and 1956(a)(1)(B)(i) because evidence insufficient to establish the promotion or concealment elements of these offenses); *United States v. Dimeck*, 24 F.3d 1239, 1243-47 (10th Cir. 1994) (reversing defendant's conviction on charge of conspiracy to commit money laundering under § 1956(a)(1)(B)(i)); *United States v. Piervinanzi*, 23 F.3d 670, 677 (2d Cir. 1994) (reversing conviction for violation of 18 U.S.C. § 1957 because funds involved in financial transaction were not properly derived from mail and wire fraud scheme); *United States v. Garcia-Emanuel*, 14 F.3d 1469, 1474-1478 (10th Cir. 1994) (affirming district court's grant of judgment of acquittal on twelve money laundering counts charging violations of § 1956(a)(1)(B)(i) because of insufficient evidence of intent to conceal, but reinstating five others); *United States v. Johnson*, 971 F.2d 562, 569-570 (10th Cir. 1992) (reversing the defendant's convictions on 27 counts charging violations of § 1957 because the "proceeds" of the defendant's acts of wire fraud were not received until after these transactions occurred); *United States v. Awan*, 966 F.2d 1415, 1433-35 (11th Cir. 1992) (reversing verdict on charge of conspiracy to violate money laundering statute because evidence insufficient to establish that defendant knew the funds involved were derived from criminal activity); *United States v. Gonzalez-Rodriguez*, 966 F.2d 918, 923-25 (5th Cir. 1992) (reversing money laundering conviction under § 1956(a)(1)(B)(i)); *United States v. Lovett*, 964 F.2d 1029, 1036-37 (10th Cir. 1992) (reversing two money laundering counts based on § 1956(a)(1)(B)(i) because evidence insufficient to establish that defendant acted with the intent to conceal the nature or source of the funds used); *United States v. Sanders*, 929 F.2d 1466, 1472 (10th Cir. 1991) (reversing two money laundering convictions under § 1956(a)(1)(B)(i) because of insufficient evidence to establish that transactions were designed to conceal the nature or source of the proceeds used); *United States v. LaBrunerie*, 914 F. Supp. 340, 346 (W.D. Mo. 1995) (dismissing money laundering charges prior to trial because transactions did not involve proceeds derived from a specified unlawful activity). *Cf. United States v. Jackson*, 935 F.2d 832, 841 (7th Cir. 1991) (finding that evidence was insufficient to sustain three money laundering charges under § 1956(a)(1)(A)(i), although it was sufficient to sustain the defendant's convictions under § 1956(a)(1)(B)(i)).

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laundrying table under § 2S1.1, even though the actual amount laundered was a mere fraction of the figure that is used. See *United States v. Landerman*, 167 F.3d 895, 899 (5th Cir. 1999) (dicta) (court could properly have consolidated \$23,000 personally laundered by defendant with \$6.1 million taken in fraud scheme and then calculated loss using the money laundering table); *United States v. Walker*, 112 F.3d 163, 167 (4th Cir. 1997) (where defendant laundered only \$5,051, but received \$851,000 as the proceeds of his fraudulent activities, the \$851,000 figure would be used to calculate his offense level under the money laundering table); *United States v. Wilson*, 98 F.3d 281, 282-84 (7th Cir. 1996) (dicta); *United States v. Sokolow*, 91 F.3d 396, 410-11 (3d Cir. 1996) (calculating defendant's sentence under the money laundering table based upon not only the \$2.2 million laundered, but also an additional \$1.8 million taken by the underlying fraud scheme); *United States v. Leonard*, 65 F.3d 1181, 1186 (5th Cir. 1995) (where defendant obtained \$200,000 by fraud, but laundered only \$3,320, defendant's sentence would be calculated based on the \$200,000 amount, using the money laundering table). Moreover, all of the Chapter 3 enhancements that would otherwise have applied to an offense level derived from § 2F1.1 are now applied to a figure derived from § 2S1.1. This methodology can dramatically transform the defendant's sentence, as a case drawn from my own experience as defense counsel demonstrates.

The defendant, the operations manager of a North Carolina nursing home, was convicted on charges of misstating expenses on the facility's cost reports in order to avoid making substantial paybacks on funds previously advanced to the home under the Medicaid state plan. The total amount of the fraud loss was found to be \$700,000. Two-level enhancements were also applied for more than minimal planning, role in the offense, abuse of position of trust, and vulnerable victims. Had the case been limited to the fraud charges, the defendant's offense level would have been a 24 (51-63 months).

However, the defendant was also charged with money laundering for allegedly devising a separate scheme whereby she purchased supplies for the nursing home from her husband's company by way of a dummy intermediary set up to disguise the fact that she was dealing with a related party. While the purpose of this scheme seems to have been to disguise the source of the supplies she was purchasing, rather than to disguise the source or ownership of the funds she was using to purchase them, the defendant was simultaneously charged with both "concealment" money laundering under § 1956(a)(1)(B)(i) and "reinvestment" or "promotion" money laundering under § 1956(a)(1)(A)(i). She was convicted by the jury under both theories. The total amount of funds involved in this series of transactions -- which were also charged in the indictment as a scheme to defraud the government by evading the related party rules -- totaled roughly \$55,000.

The District Court found that the fraud and money laundering offenses "grouped" under § 3D1.2(d). Accordingly, rather than calculate the defendant's money laundering guidelines based on the amount actually at issue in the supposed "laundering" transactions (\$55,000), the court calculated the defendant's sentence under § 2S1.1's money laundering table using the \$700,000

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amount. This generated an offense level of 27, to which a further six levels of Chapter III enhancements related to the fraud offense were added, producing a final offense level of 33 (135-168 months). Thus, what would have been a sentence of 4-5 years, if calculated based on the fraud guidelines alone, was converted by the successful (and supplemental) use of the money laundering statute into a case carrying a sentence of 11-14 years.² The actual sentence imposed of 140 months (eleven-and-a-half years) was wildly out of proportion to that typically imposed in fraud cases involving far greater losses, as the cases cited in the accompanying attachment from our sentencing memo demonstrate.³

This troubling result was expressly recognized by the Second Circuit in *United States v. Napoli*, where it noted that

grouping fraud and money laundering counts would produce an anomalous result in an important class of cases: viz., where only a small portion of the funds obtained by a fraud scheme are thereafter laundered. . . . [In such cases,] grouping -- which is meant to protect defendants against arbitrary additions resulting from the Government's formal charging decision -- would actually increase the defendant's sentence, and this problem occurs systematically in cases where only a small portion of the funds obtained from a fraud victim are laundered.

179 F.3d at 12.

The Introductory commentary to U.S.S.G. § 3D1 states that the grouping rules are intended "to provide incremental punishment for significant additional criminal conduct" while also "limit[ing] the significance of the formal charging decision and [] prevent[ing] multiple punishment for substantially identical offense conduct" In cases where there is a vast disparity between the amount of money obtained by fraud and that which is laundered, however, allowing the fraud loss amount to be used to calculate the defendant's offense level under the money laundering guideline and table will result in a dramatic increase in the defendant's

² Under the amendments currently proposed by the Commission staff, the defendant's offense level in this case would have been either a 28 (78-97 months) or a 29 (87-108 months), depending on how much of an enhancement was given based upon the defendant's conviction for "promotion" or "reinvestment" money laundering.

³ It perhaps is also worth noting that prior to trial, the Government offered the defendant a plea agreement to a single conspiracy charge, with a recommendation that she serve 18 months. In this case, the money laundering statutes were clearly used to dramatically punish a defendant for not agreeing to a guilty plea, with the apparent intention of making her case a cautionary example to others.

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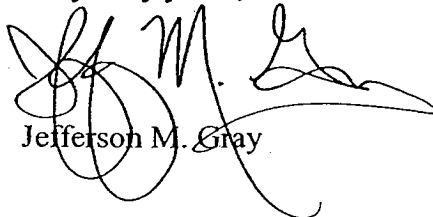
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prospective sentence, thereby turning on their head the fundamental principles underlying the grouping rules. In such a case, there will not be "incremental" punishment for additional criminal conduct, but a complete transformation in the defendant's sentencing exposure based upon conduct that was only a small part of the overall scheme. In addition, rather than limiting the significance of the formal charging decision, the approach reflected by cases like *Leonard* and *Walker* winds up dramatically magnifying the effect of the prosecutor's decision to charge particular acts as money laundering, rather than as merely additional overt acts in the underlying scheme to defraud.

Two drafting issues that apparently remain unresolved by the Commission staff are (1) whether the enhancement applied in cases of "promotion" or "reinvestment" money laundering under § 1956(a)(1)(A)(i) should require a showing that the laundered funds "significantly" or "materially" promoted further criminal conduct, and (2) whether the resulting enhancement should be two or three levels (*see* section § 2S1.1(b)(2)(B) of the proposed amendment). It is my sense that many federal prosecutors either do not clearly understand the difference between "promotion" or "reinvestment" and "concealment" money laundering, or prefer to charge both in order to increase the pressure on defendants to plead guilty (because "promotion" money laundering is a higher base offense level [23] at present). The defendant in the case I discussed earlier was charged with both "promotion" and "concealment" for the exact same set of transactions, and was convicted by the jury on both theories. *United States v. Jackson*, 935 F.2d 832, 841 (7th Cir. 1991) and *United States v. Bifeld*, 42 F. Supp.2d 477 (M.D. Pa. 1999) provide additional illustrations of defendants being charged under both subsections. Because it is my sense that neither prosecutors nor juries are able to reliably distinguish between what constitutes "promotion" and "concealment" money laundering, I believe it is very important that any additional enhancement for "promotion" money laundering require a showing to the court that the laundered funds "significantly" or "materially" promoted further criminal conduct.

I therefore strongly endorse the efforts of the Commission staff to restore equity, uniformity, and predictability to the operation of the money laundering guidelines, as well as to remedy the circuit split that has developed concerning the "grouping" of fraud and money laundering offenses.

Very truly yours,


Jefferson M. Gray

Enclosure

**COMPARATIVE SENTENCES IN OTHER FEDERAL FRAUD
AND/OR MONEY LAUNDERING CASES**

**FRAUD AND MONEY LAUNDERING CASES FROM
THE WESTERN DISTRICT OF NORTH CAROLINA:**

United States v. Guller, Docket No. 3:97CR294-20-MU (W.D.N.C. 1999): defendant convicted at trial of laundering \$1.139 million derived from \$17 million theft from Loomis Fargo sentenced to 97 months (pertinent documents attached)

United States v. Cole, Docket No. 3:97CR87-V (W.D.N.C. 1998): defendant, Criminal History Category IV, who pled guilty to fraud charges involving a loss of at least \$600,000 and possibly as much as \$870,000 [the amount ordered payable as restitution], and who also pled guilty to "promotion" money laundering, and who received an enhancement for obstruction of justice and was denied a reduction under § 3E1.1, received an agreed sentence of 110 months (pertinent documents attached)

United States v. McMahon, 1997 U.S. App. LEXIS 36369 (4th Cir. Dec. 30, 1997) (unpublished): defendant convicted at trial in W.D.N.C. on charges of fraud (involving a loss of \$9 million), "concealment" money laundering (involving \$1.2 million), tax evasion (evading more than \$1.8 million in taxes), and other offenses found to be an offense level of 31 (108-135 months) (pertinent documents attached); *see also* Government's Brief in Appeal No. 96-4515 at pages 4-7 (attached as Exhibit 13)

United States v. Mederos, Docket No. 3:97CR132 (W.D.N.C. 1997): defendant who pled guilty to charges of fraud (involving a loss of more than \$13 million) and money laundering (involving more than \$1 million) and who received 4-level enhancement for role (= offense level of 32?) sentenced to 87 months after receiving three-level reduction under U.S.S.G. § 3E1.1 (pertinent documents attached)

**FRAUD AND/OR MONEY LAUNDERING CASES
FROM OTHER JURISDICTIONS:**

United States v. Hedges, 175 F.3d 1312, 1999 U.S. App. LEXIS 9773, *8 (11th Cir. 1999): defendant who pled guilty to securities fraud that caused a loss of more than \$92 million found to be an offense level 28 (78-97 months) and received a sentence of 84 months

United States v. Nesenblatt, 171 F.3d 1227, 1229 (9th Cir. 1999): defendant pled guilty to wire fraud charges involving a loss of \$80 million; with additional enhancements for role in the offense (3 levels) and receiving more than \$1 million in proceeds from an offense involving a financial institution (4 levels), defendant's offense level was a 30 (97-121 months) before applying downward departures

United States v. Reeder, 170 F.3d 93, 109 (1st Cir. 1999): defendant was convicted at trial of various fraud-related offenses causing a loss of \$16.5 million [no money laundering charges were brought]; he received a four-level enhancement for role; defendant was found to be an offense level 23 (46-57 months), and received a 46-month sentence

United States v. Landerman, 167 F.3d 895, 897-98 (5th Cir. 1999): defendant, an attorney, pled guilty (after appealing and securing reversal of his original convictions at trial) to charges of conspiracy to commit mail fraud, wire fraud, and money laundering arising out of a scheme that resulted in a loss of \$6.1 million; "virtually all of the \$6.1 million acquired by the scheme during Landerman's involvement was laundered"; defendant received a 60-month sentence

United States v. Christopher, 142 F.3d 46, 55-56 (1st Cir. 1998): defendant was convicted of wire fraud charges at trial arising out of a scheme that resulted in losses of \$26.7 million and was sentenced under 1988 version of the Sentencing Guidelines to 121 months, after receiving various enhancements

United States v. Fivaz, 1998 U.S. App. LEXIS (10th Cir. June 16, 1998) (unpublished): defendant who pled guilty to fraud charges arising out of a Ponzi scheme that caused a total loss of at least \$7 million found to be an offense level 19/Criminal History Category III (37-46 months)

United States v. Calozza, 125 F.3d 687, 689-93 (9th Cir. 1997): defendant stole \$8.8 million through a Ponzi scheme, and recycled \$2.3 million in payments to the earlier investors; defendant pled guilty to charges of fraud and money laundering; defendant received enhancements for vulnerable victims and abuse of position of trust, but a reduction for acceptance of responsibility; money laundering and fraud charges were not "grouped"; Court of Appeals found that defendant's offense level should have been a 31 (108 to 135 months)

United States v. Loayza, 107 F.3d 257, 266 (4th Cir. 1997): defendant in mail fraud Ponzi scheme defrauded investors of \$643,000, and used funds coming in from new investors to make \$96,000 in "interest payments" to earlier investors; defendant was convicted at trial on fraud

charges [no money laundering charges were brought] and appears to have been sentenced based on an offense level of 18 (27-33 months)

United States v. Rockson, 1996 U.S. App. LEXIS 33480, *26-*28 (4th Cir. December 24, 1996) (unpublished): two defendants (Dadzie and Rockson) were convicted at trial of laundering \$6 million and \$2 million respectively for international narcotics traffickers; Dadzie received a sentence of 121 months and Rockson was sentenced to 87 months

United States v. Smith, 44 F.3d 1259, 1263 (4th Cir. 1995): defendants were convicted at trial on charges of both fraud and of money laundering involving a loss of \$2.9 million; the lead defendant received a sentence of 87 months

United States v. George, 986 F.2d 1176, 1177-79 (8th Cir. 1993): defendant who pled guilty to bank fraud charges involving an actual loss to seven banks totaling \$4.3 million was sentenced to 33 months in prison and ordered to pay restitution "in an amount exceeding \$4 million"

United States v. Hernandez, No. 98-963-CR-Moreno (S.D. Fla. sentenced 4/13/99): Elsa Hernandez, director of nursing at a home health agency, received a 63-month sentence after pleading guilty to participation in a conspiracy to file more than \$42 million in false claims to Medicare (*BNA Health Care Fraud Report*, 4/21/99, at 357 (copy attached))

United States v. Dominguez (S.D. Fla. 1999): owner of health care agency who pled guilty to charges of Medicare fraud involving losses of \$12.9 million sentenced to six years in prison (*New York Times*, 1/25/99, at page A19) (copy attached)

United States v. Johnson, No. 1:97-CR-426 (N.D. Ga. sentenced 12/28/98): two defendants were convicted at trial on some charges, and subsequently entered guilty pleas to other charges, which alleged that they had defrauded Medicaid out of \$9.5 million. The two defendants were accused of overbilling Medicaid for costs at three nursing homes owned by one defendant, and then diverting the resulting proceeds to themselves through various financial transactions. The two defendants received sentences of 50 months and 36 months in prison and were ordered to pay restitution of \$5 million and \$1.15 million respectively (*BNA Health Care Fraud Reporter*, 1/13/99, at 23) (copy attached)

