
AIRING THE DIRTY LAUNDRY: THE APPLICATION OF THE UNITED STATES SENTENCING GUIDELINES TO WHITE COLLAR MONEY LAUNDERING OFFENSES

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INTRODUCTION

The passage of the Sentencing Reform Act of 1984 ("SRA")¹ virtually stripped federal trial court judges of all discretion in the sentencing of convicted criminals.² Prior to the SRA, trial judges exercised broad discretion with respect to the severity of punishment handed down to convicted criminals.³ In the eyes of many, including Congress,⁴ the broad discretion exercised by federal judges allowed for "unjustifi[ed]" and "shameful" results.⁵ For example, offenders often were given vastly different sentences based on similar criminal conduct.⁶ In response to significant outrage,⁷ Congress enacted the

1. See Sentencing Reform Act of 1984, ch. 2, Pub. L. No. 98-473, §§ 211-239, 98 Stat. 1837, 1987 (1984) (codified as amended at 18 U.S.C. §§ 3551-3586, 3601-3615, 3621-3624, 3661-3673, 3742 and at 28 U.S.C. §§ 991-998 (1994 & Supp. III 1997)).

2. See Kate Stith & José A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247, 1254-55 (1997) (describing how the Commission, and not judges, determine both the relevant and irrelevant factors used in formulating sentencing punishments and discussing the precise importance of these factors).

3. See *Koon v. United States*, 518 U.S. 81, 92 (1996) (noting that before the establishment of the Commission, sentencing judges took advantage of their broad discretion in considering how long, if at all, an offender should be incarcerated); *Mistretta v. United States*, 488 U.S. 361, 363-64 (1989) (finding that the court and the parole officer were in positions to exercise, and usually did exercise, broad discretion based on their own assessments of a particular offender's amenability to rehabilitation); see also Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed From Above*, 22 SYRACUSE L. REV. 635, 663 (1971) (stating that appellate courts understand that trial judges possess greater access to pertinent information when it comes to sentencing and therefore, should be granted broad discretion).

4. Support for removal of the vast discretion given to federal judges came from both liberal and conservative sides of the political spectrum in Congress. On the liberal side, the champion for sentence reform was Senator Ted Kennedy. The liberal perspective was that the almost unreviewable discretion of federal judges led to great sentencing disparity with sentencing decisions often based on criteria such as wealth and race. The conservative movement for sentencing reform, championed by Senator Strom Thurmond, expressed the view that broad discretion given to federal judges allowed for far too lenient punishment of convicted felons. See generally S. REP. NO. 98-225, at 37-38 (1983), reprinted in 1984 U.S.C.C.A.N. 3120, 3221 (describing the different legislation introduced by political factions and the eventual consensus reached regarding sentencing reform).

5. See *id.* at 38, 65, reprinted in 1984 U.S.C.C.A.N. 3221, 3248. The Senate Report discusses two undesirable ramifications that result from a trial judge's exercise of broad discretion in imposing sentences. The first ramification is the tremendous disparity in sentencing imposed by different judges for very similar criminal offenses. See *id.* at 41, reprinted in 1984 U.S.C.C.A.N. at 3224-27. The second ramification cited is the degree of uncertainty with respect to the actual length of incarceration. See *id.* at 56-58, reprinted in 1984 U.S.C.C.A.N. at 3239-41.

6. See Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 162-63 (1991) (stating that one purpose of sentencing

SRA.⁸ The SRA established the United States Sentencing Commission (“Commission”)⁹ with the following mandate: to formulate a framework or guideline for sentencing based upon accepted principles of punishment¹⁰ and to eradicate the apparent discrepancies in the imposition of sentences in the federal criminal justice system.¹¹ Ultimately, the Commission formulated a system of sentencing called the United States Sentencing Guidelines (“Guidelines”).¹²

Under the Guidelines, trial judges possess limited discretion in sentencing.¹³ To determine appropriate sentences under the Guidelines, judges must insert numbers predetermined by the Commission based on the factual circumstances surrounding the criminal offense into the Commission’s sentencing formulas.¹⁴ Beyond this formulaic process,¹⁵ judges may deviate from the Guidelines’ parameters only in limited circumstances.¹⁶

reform is to require judges to justify their sentencing decision, thereby eradicating discrimination); Theresa Walker Karle & Thomas Sager, *Are the Federal Sentencing Guidelines Meeting Congressional Goals? An Empirical and Case Law Analysis*, 40 EMORY L.J. 393, 393-94 (1991) (observing that prolific discrimination and disparity in the federal sentencing of criminals existed prior to the formulation of the Sentencing Guidelines); Stith & Cabranes, *supra* note 2, at 1247 (announcing that the Sentencing Reform Act “sought to bring consistency, coherence, and accountability to a federal sentencing process that was deficient”).

7. See, e.g., MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* vii (1972) (describing “gross evils and defaults in what is probably the most critical point in our system of administering criminal justice, the imposition of sentence”).

8. See Sentencing Reform Act of 1984, 18 U.S.C. § 3551 (1994 & Supp. III 1997).

9. See 28 U.S.C. § 991(a) (1994) (authorizing the formation of a Sentencing Commission to formulate sentencing guidelines).

10. See generally ELLIOT CURRIE, *CONFRONTING CRIME: AN AMERICAN CHALLENGE* (1985) (describing four theories of punishment—rehabilitation, retribution, deterrence and incapacitation—and their affect on future criminal acts and society as a whole); MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME AND PUNISHMENT IN AMERICA* (1995) (contrasting various theories of punishment in the American criminal justice system).

11. The mission of the Commission is to formulate guidelines according to the fundamental principles of criminal punishment and to create fair, uniform sentences. See U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, intro. cmts. 1-3 (1998). The Commission formulated the United States Sentencing Guidelines, which mandate an appropriate punishment range for an offender based on particular characteristics of the offense. See *Koon v. United States*, 518 U.S. 81, 92 (1996).

12. See U.S. SENTENCING GUIDELINES MANUAL (1998).

13. See *Koon*, 518 U.S. at 92-93 (finding that the SRA did not completely eliminate judges’ discretion, as the exercise of such discretion could occur in the rare instances that the Guidelines were inadequate).

14. See U.S. SENTENCING GUIDELINES MANUAL § 2S1.1(b).

15. See Carrie Legus, *Quantitative Justice: Have the Federal Sentencing Guidelines Forsaken Quality?*, 21 VT. L. REV. 1145, 1146 (1997) (analogizing the present system of sentencing under the Guidelines to filling out a tax return form).

16. The Commission allows for deviations from the Guidelines, referred to as upward or downward departures, when aggravating or mitigating factors present in a

The Commission intended for deviations from the Guidelines to be rare occurrences.¹⁷ For the crime of money laundering, however, deviations or departures are significantly more prevalent than in all other federal crimes.¹⁸ According to the Commission, the average downward departure rate for non-drug, or white collar, money laundering offenses from 1992 to 1997 was thirty-two percent higher than the overall departure rate for all other crimes.¹⁹

The Commission claims that this increased rate of departure has resulted from trial judges considering a mitigating factor that is not adequately taken into consideration in the Guidelines in order to determine a more just sentence.²⁰ Nevertheless, this increased rate of downward departure has not diminished, but rather increased sentencing disparities.²¹ Depending on the particular judge or circuit, defendants convicted for white collar money laundering offenses often are given vastly different sentences for similar criminal conduct.²² To fulfill the mandate of the Commission and realize the goals of the Guidelines, the money laundering provisions of the Guidelines need to be reexamined.

This Comment discusses several problems and the surrounding discourse associated with the money laundering Guidelines. This discussion will demonstrate that the federal courts' inconsistent use

particular situation have not been taken into account adequately in the formulation of the guideline. See U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (delineating appropriate circumstances where departures from the established Guidelines are permissible).

17. See U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, intro. cmt. 4(b) ("[D]espite the courts' legal freedom to depart from the guidelines, they will not do so very often.").

18. See U.S. SENTENCING COMM'N, REPORT TO CONGRESS: SENTENCING POLICY FOR MONEY LAUNDERING OFFENSES, INCLUDING COMMENTS ON DEP'T OF JUSTICE REPORT 9 (1997) [hereinafter SENTENCING POLICY REPORT] (finding the downward departure rate significantly higher for non-drug related money laundering offenses than the overall departure rate for other crimes).

19. See *id.* at 9 (comparing the departure rate for money laundering to departure rates for all other federal crimes).

20. See *id.* at 10 ("The appreciably higher downward departure rate for non-drug money laundering convictions . . . suggests that judicial dissatisfaction with the money laundering guideline structure . . . is far more commonplace than the reported decisions alone suggest.").

21. See Cynthia K.Y. Lee, *A New "Sliding Scale of Deference" Approach to Abuse of Discretion: Appellate Review of District Court Departures Under the Federal Sentencing Guidelines*, 35 AM. CRIM. L. REV. 1, 3 (1997) (asserting that frequent downward departures will undermine the Commission's goal of achieving sentencing uniformity).

22. Compare *United States v. Arnous*, 142 F.3d 437, 1998 WL 136533, at *2 (6th Cir. Mar. 16, 1998) (unpublished decision) (sentencing a defendant convicted of food stamp fraud to ten years in prison), with *United States v. Caba*, 911 F. Supp. 630, 635 (E.D.N.Y.) (sentencing a defendant convicted of food stamp fraud to approximately three years in prison), *aff'd*, 104 F.3d 354 (2d Cir. 1996).

of downward departures in white collar offenses has increased sentencing disparity, thereby contradicting the stated goals of the Commission. Part I of this Comment reviews the legislative intent of both the money laundering statutes and the SRA. In addition, Part I discusses the law governing downward departures. Part II analyzes the shortcomings of the present money laundering Guidelines. In addition, Part II examines the existing debate between the Commission and Department of Justice regarding whether Congress should amend the Guidelines. Furthermore, Part II examines the federal courts' response to this debate and the resulting sentencing disparities. Part III recommends how the Commission, Department of Justice, Congress, and the courts should respond to these apparent problems with the existing Guidelines. Finally, this Comment concludes that to fulfill the mandate of the Commission and the legislative intent of both the money laundering statutes and the SRA, either significant amendments to the present Guidelines are required or appellate courts must consider an additional issue when reviewing whether a sentence is correct.

I. BACKGROUND

A discussion of the legislative intent and development of money laundering jurisprudence is integral to understanding the present money laundering Guidelines. In addition, an examination of the elements of money laundering offenses reveals the extreme breadth of the statutes that govern such offenses. This breadth gives prosecutors enormous power to manipulate and take advantage of the money laundering Guidelines, which can lead to greater sentencing disparities.²³

A. *Money Laundering Jurisprudence and the Legislative Intent of the Money Laundering Control Act of 1986*

In recent years, the international drug market has become one of the most lucrative industries in the world.²⁴ According to a recent study, the international drug trade generates up to \$500 billion

23. See Robert G. Morvillo & Barry A. Bohrer, *Checking the Balance: Prosecutorial Power in an Age of Expansive Legislation*, 32 AM. CRIM. L. REV. 137, 142-43 (1995) (claiming that prosecutors have "assiduously" used the extensive list of underlying crimes in the money laundering statutes to gain leverage in plea negotiations and to prosecute cases unrelated to narcotics or organized crimes).

24. See Maura E. Fenningham, Note, *A Full Laundering Cycle is Required: Plowing Back the Proceeds to Carry on Crime is the Crime Under 18 U.S.C. § 1956(a)(1)(A)(1)(i)*, 70 NOTRE DAME L. REV. 891, 891 (1995) (noting that international narcotics is an incredibly lucrative vocation).

annually.²⁵ The drug industry appeals to criminals because of its potential for tremendous profits. These profits, which are mostly in the form of cash, can be a double-edged sword because large cash amounts often arouse government suspicion.²⁶

To avoid government scrutiny, drug dealers and other members of organized crime syndicates must transform “dirty” cash into legitimate money.²⁷ Money laundering is the process used by criminals to “wash” dirty money.²⁸ Money laundering is defined as “the process by which one conceals the existence, illegal source, or illegal application of income, and disguises that income to make it appear legitimate.”²⁹

Congress recognized the money laundering process as the “Achilles heel” of the drug trafficking industry.³⁰ In an effort to strengthen its

25. *See id.* (illustrating that the international drug industry is so lucrative that it can earn in interest, on original profits alone, three million dollars per hour).

26. According to Congressman George Wortley:

[M]oney is the reason people get into the drug trade. If we take away the lure of easy money, if we increase the costs associated with making that money, we will be much closer to greatly reducing, if not totally eliminating, the drug trade. To do this we have to get at the financial backers, which means we have to stop money laundering.

131 CONG. REC. H5382-01 (daily ed. July 10, 1985) (statement of Rep. George Wortley).

27. “To convert these profits into legally obtained income, the ‘dirty’ proceeds generated by the multi-billion dollar economy of the narcotics industry . . . are ‘washed’ to appear legitimate. This process of washing illegally obtained monies is appropriately labeled money laundering.” Fennigham, *supra* note 24, at 891.

28. *See* PRESIDENT’S COMM’N ON ORGANIZED CRIME, INTERIM REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL, THE CASH CONNECTION: ORGANIZED CRIME, FINANCIAL INSTITUTIONS, AND MONEY LAUNDERING 7 (1984) [hereinafter THE CASH CONNECTION] (labeling and defining the process of concealing the existence, the source, or the application of income to make it appear legitimate as money laundering). Executive Order 12435, July 28, 1983, established the President’s Commission to study the effectiveness of current laws on organized crime syndicates. *See* Jill R. Aranson et al., *Money Laundering*, 31 AM. CRIM. L. REV. 721, 721 n.1 (1994) (noting purposes for which President Ronald Reagan established this commission on organized crime).

29. *See* Andrew J. Camelio & Benjamin Pergament, *Money Laundering*, 35 AM. CRIM. L. REV. 965, 965 (1998) (citations omitted); *see also* THE CASH CONNECTION, *supra* note 28, at 7 (describing money laundering as plans formed to aid criminals “seek[ing] to change large amounts of cash . . . into an ostensibly legitimate form, such as business profits or loans, before using those funds for personal benefit”).

30. According to Senator Joseph Biden, Ranking Minority Member of the Senate Judiciary Committee, “money laundering is a crucial financial underpinning of organized crime and narcotics trafficking. Without money laundering, drug traffickers would literally drown in cash. Drug traffickers need money laundering to conceal the billions of dollars in cash generated annually in drug sales and to convert this cash into manageable form.” *See* S. REP. NO. 99-433, at 4 (1986); *Drug Money Laundering: Hearing Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 99th Cong. 7 (1985) (statement of Sen. D’Amato) (“Money Laundering permits the drug traffickers . . . to conduct their operations and finance their drug networks behind a veil of secrecy. It allows them to buy more drugs for resale, and to acquire the planes, boats, and front corporation they use to smuggle drugs into the United

arsenal in a losing battle on the war on drugs,³¹ Congress passed the Money Laundering Control Act of 1986 ("MLCA").³²

Prior to enacting the MLCA, Congress attempted to deter the laundering of criminal proceeds³³ by passing the Currency and Foreign Transactions Reporting Act.³⁴ The purpose of this Act is to generate financial reports with a "high degree of usefulness in criminal, tax, or regulatory investigations proceedings."³⁵ Despite the best intentions of Congress, the Currency and Foreign Transactions Reporting Act's provisions to combat money laundering did not have a tremendous effect because of a lack of attention and enforcement.³⁶

After considerable deliberation,³⁷ in 1986 Congress passed the MLCA and for the first time made the substantive act of money

States."); *see also* *Hearing Before the Subcomm. on Crime of the House Judiciary Comm. on the Use of Casinos to Launder the Proceeds of Drug Trafficking and Organized Crime*, 98th Cong. 1-3 (1985) (statement of Rep. Hughes) (recognizing money laundering as an essential tool for drug dealers and organized crime syndicates because it allows them to use the profits from their crimes both to finance further crimes and to infiltrate legitimate businesses).

31. *See* S. REP. NO. 99-433, at 4 (1986) (describing the importance of new federal legislation that criminalizes money laundering in light of recent efforts to curtail drug trafficking).

32. *See* Money Laundering Control Act of 1986, Pub. L. No. 99-570, tit. I, §§ 1351-1352, 100 Stat. 3207, 3218 (codified as amended at 18 U.S.C. §§ 1956, 1957 (1994 & Supp. III 1997)).

33. *See* Mark. R. Irvine & Daniel R. King, Comment, *The Money Laundering Control Act of 1986: Tainted Money and the Criminal Defense Lawyer*, 19 PAC. L.J. 171, 174-77 (1987) (discussing previous unsuccessful attempts to deter money laundering, including the Currency and Foreign Transactions Reporting Act).

34. Currency and Foreign Transactions Reporting Act of 1970, Pub. L. No. 91-508, 84 Stat. 1114 (1970) (codified as amended at 12 U.S.C. §§ 1730d, 1829b, 1951-1959 and at 31 U.S.C. §§ 321, 5311-5324 (1994 & Supp. II 1996)).

35. 31 U.S.C. § 5311 (1994).

36. *See* S. REP. NO. 99-433, at 3 (1986) (illustrating that the Currency Transaction Report, Currency or Monetary Instruments Report, and Foreign Bank Account Report requirements of the Bank Secrecy Act were not being enforced by either the Department of the Treasury or the private sector). In testimony before the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs, the General Accounting Office testified that both the private sector and the Department of Treasury had all but ignored the reporting provisions of the Bank Secrecy Act. *See id.*

Even after enforcement of the reporting provision was upgraded, serious questions arose as to whether the Treasury Department could handle the vast number of reports. In addition to questions about the practicality of enforcing the statutes, after a small number of successful prosecutions it became evident to Congress that stiffer penalties were needed to deter money laundering. *See* 31 U.S.C. §§ 5311-5324 (1994 & Supp. II 1996) (providing an array of penalties including injunction, civil penalties and criminal penalties as well as up to \$500,000 in fines and ten years in prison). Under the Act, financial institutions are required to report domestic currency transactions or its equivalent of more than \$10,000, currency imported or exported in amounts exceeding \$10,000, and foreign accounts in excess of \$10,000. *See id.*

37. *See* 131 CONG. REC. 17,006 (1985) (Remarks of Hon. Romano L. Mazzoli of Kentucky calling for tougher laws for money laundering).

laundering a crime.³⁸ Prior to this law, much of the activity now associated with money laundering was not illegal.³⁹ The MLCA, however, aims at prosecuting both those who provide the funds to be laundered as well as those who accept the criminal proceeds through otherwise legal financial transactions.⁴⁰ Thus, the MLCA allows prosecution of both the drug dealer who uses his proceeds to buy a good and the salesman who sold the good to the drug dealer.⁴¹

B. *The Money Laundering Control Act of 1986*

The substantive crime of money laundering is outlined in two sections of the MLCA, § 1956 and § 1957.⁴² Three distinct money laundering violations exist under § 1956.⁴³ The first violation under § 1956(a)(1) is referred to as “transaction money laundering.”⁴⁴ A transaction money laundering violation under § 1956(a)(1) occurs when persons take part in a transaction with criminally derived money.⁴⁵ The second and third type of violations are found under § 1956(a)(2) and (a)(3) respectively.⁴⁶ Violations of these money

38. See Kelly Neal Carpenter, *Money Laundering*, 30 AM. CRIM. L. REV. 813, 820 (1993) (distinguishing prior attempts to eradicate money laundering through the use of reporting requirements and money laundering statutes and basing this distinction on the characteristics of the money involved). “Under the reporting requirements of the Bank Secrecy Act it is irrelevant whether the money is ‘clean’ or ‘dirty,’ ‘taxable’ or ‘non-taxable.’ In contrast, for the substantive offense of money laundering, the transaction must in fact contain ‘dirty’ money.” *Id.* (citations omitted).

39. See Jimmy Gurulé, *The Money Laundering Control Act of 1986: Creating a New Federal Offense or Merely Affording Federal Prosecutors an Alternative Means of Punishing Specified Unlawful Activity?*, 32 AM. CRIM. L. REV. 823, 825-26 (1995) (stating that many of the transactions now criminalized under the MLCA were once benign and legal activities).

40. See NATIONAL SENTENCING INSTITUTE, U.S. SENTENCING COMM’N, SENTENCING GUIDELINES FOR MONEY LAUNDERING: APPLICATION AND ISSUES (1998) [hereinafter MONEY LAUNDERING GUIDELINES] (describing the way the MLCA expanded the prosecution for money laundering to those who accepted criminal proceeds).

41. See *id.* (describing activities once legal that are now illegal under the MLCA).

42. See 18 U.S.C. §§ 1956-1957 (1994 & Supp. III 1997) (defining offenses and providing sanctions).

43. See *id.* § 1956.

44. See Camelio & Pergament, *supra* note 29, at 969 (describing the violation under § 1956(a)(1) as transaction money laundering because the prohibited act is the financial transaction itself).

45. See 18 U.S.C. § 1956(a)(1) (1994). Specifically, to be convicted of a § 1956(a)(1) offense, the defendant must conduct a financial transaction with criminally derived proceeds with the intent to promote the carrying on of the specified unlawful activity; engage in conduct which violates 26 U.S.C. § 7201 or § 7206; conceal or disguise the nature, location, source, ownership, or control of the proceeds of the specified unlawful activity; or avoid a transaction reporting requirement. See *id.*

46. See *id.* § 1956(a)(2) (requiring either the domestic or international transfer of funds with the intent to support the illegal activity or knowing that the funds were derived by illegal means and designed to conceal the endeavor); *id.* § 1956(a)(3)

laundering provisions are virtually the same as a § 1956(a)(1) violation.⁴⁷ There are, however, two distinctions between a § 1956(a)(1) violation and an (a)(2) violation. First, rather than requiring a financial transaction as required by § 1956(a)(1), the government must show only that a transfer of proceeds occurred either into or out of the United States for § 1956(a)(2).⁴⁸ Second, the requirement that proceeds be from a specified unlawful act is not present in § 1956(a)(2)(A).⁴⁹ A § 1956(a)(3) violation results from government sting operations.⁵⁰ The elements of both knowledge and that the proceeds be derived from criminal activity are replaced by representations of those elements by a law enforcement officer or agent thereof.

A separate money laundering offense is codified at 18 U.S.C. § 1957.⁵¹ Section 1957 makes it a crime for any person to participate in a financial transaction using criminal proceeds in excess of \$10,000.⁵² The most significant difference between a § 1956 violation and a § 1957 violation is that no specific intent requirement exists in the latter.⁵³ Therefore, § 1957 makes it a crime to do virtually anything with the proceeds of a criminal activity if such proceeds

(requiring only the intentional act that promotes the illegal activity, conceals the source of the funds, or evades the laws).

47. *See id.* § 1956(a)(2).

48. *See id.*

49. *See id.* § 1956(a)(2)(A).

50. *See id.* § 1956(a)(3) (including under the scope of the statute representations by law enforcement officers and authorized investigations).

51. *See id.* § 1957 (prohibiting engaging in certain monetary transactions in property derived from specified unlawful activity).

52. *See United States v. Allen*, 129 F.3d 1159, 1165 (10th Cir. 1997) (stating that the intent requirement of § 1956 is not present in § 1957 money laundering, thus making it more likely that dirty money will not infiltrate the economic system); *United States v. Rutgard*, 108 F.3d 1041, 1062 (9th Cir. 1997) (stating that the purpose of § 1957 is to eliminate criminal proceeds from the legitimate banking system, thereby making criminal proceeds worthless). The \$10,000 requirement is necessary in that § 1957 is basically a strict liability crime.

The legislative intent of § 1957 is relatively clear in its desire to make it a crime for an individual to participate even in a legitimate monetary transaction with a person involved in a criminal scheme. *See H.R. REP. NO. 99-855*, at 14 (1986) ("It is time for us to tell the local trafficker and everyone else, 'If you know that person is a trafficker and has this income derived from the offense, you better beware of dealing with that person.'") (statement of Rep. Lungren); *see also Rutgard*, 108 F.3d at 1062 (describing congressional concern with third parties who provide criminals with a laundering opportunity, as well as conduct of launderers using criminal proceeds in ordinary transaction).

53. *See United States v. Wynn*, 61 F.3d 921, 926-27 (D.C. Cir. 1995) (holding that § 1957 lacks a specific intent requirement and, therefore, is easier for the government to prove); *see also Carpenter*, *supra* note 38, at 824-25 (differentiating § 1957 from § 1956 money laundering offenses because it "does not require that the recipient exchange or launder the funds, that he have knowledge that the funds were proceeds of a specified unlawful activity, nor that he have any intent to further or conceal such an activity").

exceed \$10,000.⁵⁴

Although the legislative intent illustrates that the money laundering statutes were meant to be a weapon to fight the war on drugs,⁵⁵ the language of the MLCA criminalizes activity not even remotely related to drug trafficking or organized crime.⁵⁶ The extraordinarily broad elements of the crime of money laundering have allowed federal prosecutors to bring money laundering actions in almost every instance of economic or white collar criminal activity.⁵⁷

To secure a money laundering conviction under § 1956, the government must establish five elements; none of the elements correlate either to drug trafficking or organized crime.⁵⁸ The first element requires a financial transaction that affects interstate commerce.⁵⁹ The criminal act of a money laundering violation is the

54. See generally *United States v. Griffith*, 17 F.3d 865, 878 (6th Cir. 1994) (finding that the sale of inventory from fraud to a third party is a violation of § 1957).

55. See *Drug Money Laundering: Hearing Before the Senate Comm. on Banking, Housing and Urban Affairs*, 99th Cong. 7 (1985) (describing drug trafficking as the principal target for proposed anti-money laundering statutes).

56. See 18 U.S.C. § 1956(c)(7) (1994 & Supp. III 1997) (listing all underlying criminal activities that can give rise to a money laundering conviction).

57. See *Morvillo & Bohrer*, *supra* note 23, at 142 ("In its characteristic blunderbuss fashion . . . Congress enacted legislation that defines both 'transactions' and the underlying crimes so broadly that the statutes reach not only the proceeds of conduct characteristic of organized crime and narcotics trafficking, but also of many additional criminal offenses that have a very different character.").

58. See generally 18 U.S.C. §§ 1956-1957 (1994 & Supp. III 1997) (describing the elements of a money laundering offense).

59. See *id.* § 1956(a)(2). The financial transaction element has been interpreted extremely broadly and the threshold is low. See *Camelio & Pergament*, *supra* note 29, at 976 ("The definition [of financial transaction] is not limited to transactions with banking or financial institutions."); see also *United States v. Herron*, 97 F.3d 234, 237 (8th Cir. 1996) (holding that a wire transfer via a money wire service is a financial transaction under § 1956(c)(4)), *cert. denied*, 117 S. Ct. 998 (1997); *United States v. Rounsavall*, 115 F.3d 561, 565-66 (8th Cir.) (finding that using a check from a personal or business account to purchase a bank check is a financial transaction), *cert. denied*, 118 S. Ct. 256 (1997); *United States v. Brown*, 31 F.3d 484, 489 & n.4 (7th Cir. 1994) (concluding that the filing of credit card charges through a financial institution is a financial transaction under § 1956(c)). See generally *United States v. Otis*, 127 F.3d 829, 833 (9th Cir. 1997) (holding that delivery of cash from a drug dealer to a money launderer is a financial transaction), *cert. denied*, 118 S. Ct. 1400 (1998); *United States v. Westbrook*, 119 F.3d 1176, 1191-92 (5th Cir. 1997) (deciding that transferring a vehicle's title is a financial transaction), *cert. denied*, 118 S. Ct. 1059 (1998). But see generally *United States v. Puig-Infante*, 19 F.3d 929, 938 (5th Cir. 1994) (finding that moving criminal proceeds from one state to another is not, in and of itself, a financial transaction).

In addition to proving that a financial transaction occurred, the government must show that the transaction affected interstate commerce. See *United States v. Wilkinson*, 137 F.3d 214, 237 (4th Cir.) (finding that the government must prove beyond a reasonable doubt in a § 1956 prosecution that there is an effect on interstate commerce), *cert. denied*, 119 S. Ct. 172 (1998); *United States v. Ripinsky*, 109 F.3d 1436, 1443 (9th Cir. 1997) (describing the relationship between the financial transaction and interstate commerce), *cert. denied*, 118 S. Ct. 870 (1998).

financial transaction.⁶⁰ The second element is a knowledge or scienter requirement.⁶¹ The knowledge element, though worded differently in § 1956 and § 1957, is the same under both violations.⁶² The third element mandates the existence of a specified unlawful activity.⁶³ The specified unlawful activities encompass a wide range of crimes from drug trafficking and murder to bank and food stamp fraud.⁶⁴ The fourth element requires that the money involved in the

Courts, however, have interpreted the commerce factor so that only a minimal effect on interstate commerce is necessary. *See Ripinsky*, 109 F.3d at 1444 (holding that if the financial transaction is commercial it need only have a minimal effect on interstate commerce).

60. *See* 18 U.S.C. § 1956(a)(2) (1994) (emphasizing the act of the transfer); *see also id.* § 1956(c)(4) (defining the term “financial transaction”).

61. *See id.* § 1956(a)(2)(B).

62. *Compare id.* § 1956(a)(1) (“Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity . . .”), *with id.* § 1957(a) (“Whoever . . . knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than \$10,000 and is derived from specified unlawful activity, shall be punished.”).

The government must prove that at the time of the financial transaction, the defendant knew that the property involved was the proceeds from some form of unlawful activity. *See id.* § 1956(c)(1) (defining the knowledge element of a § 1956 violation as knowing that the property involved in the transaction was derived from some felonious activity). Therefore, it is not a defense to a money laundering violation for a defendant to claim that he or she did not know that the proceeds were derived from a particular type of criminal activity. The defendant need only know that the proceeds were criminally derived.

Some circuits have decreased the knowledge element to the level of willful blindness. *See United States v. Campbell*, 977 F.2d 854, 857 (4th Cir. 1992) (holding that the knowledge element may be inferred by willful blindness); *see also* S. REP. NO. 99-433, at 6-9 (1986) (noting that willful blindness is equivalent to knowledge); *Camelio & Pergament*, *supra* note 29, at 973 & n.64 (describing the softening of the knowledge standard in some circuits to allow willful blindness to meet the requisite intent element).

As for proof of the knowledge requirement, courts consistently allow the government to use circumstantial evidence. *See Otis*, 127 F.3d at 832-33 (holding that delivery of money to Cali cartel agents was sufficient to show an intent to conceal or disguise nature of the money); *United States v. Hardwell*, 80 F.3d 1471, 1482-83 (10th Cir. 1996) (ruling that when the defendant is a known drug dealer and has insufficient legitimate funds to explain the cash amounts seized at the time of the arrest, it can be inferred that the money was drug money derived from an illegal activity). *But see Herron*, 97 F.3d at 237 (noting that the money laundering statutes should not be used as “money spending statute[s]”), *cert. denied*, 117 S. Ct. 998 (1997). In *Herron*, even though enough evidence existed to show that the money was drug proceeds, the prosecution produced no evidence that the defendant had an intent to conceal the money. *See id.* Merely wiring drug money from one location to another does not, by itself, constitute money laundering. *See id.*

63. *See* 18 U.S.C. § 1956(a)(2)(A) (1994).

64. *See Camelio & Pergament*, *supra* note 29, at 974 (describing that the money laundering statutes criminalize transactions involving the proceeds of a “specified unlawful activity”); *see also* 18 U.S.C. § 1956(c)(7)(D) (1994 & Supp. III 1997) (providing a laundry list of specified unlawful activities); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 726, 110 Stat. 1214, 1301-02 (codified as amended at 18 U.S.C. § 1956(c)(7)(D) (1994 & Supp. III 1997))

financial transaction be the proceeds of a specified unlawful activity.⁶⁵ The term "proceeds," however, is not defined in the statute, and therefore, the interpretation of the term has been left to the courts. The issue is whether the term "proceeds" is limited to money or whether the term is more expansive. Courts have held that proceeds include property in addition to money.⁶⁶ Another predominant question arises out of the proceeds element: does the government need to trace the proceeds to a specific, identifiable illegal act? Courts have answered this question in the negative.⁶⁷ The fifth and final element is intent, and "specific intent is determinative of the crime with which a suspect will be charged."⁶⁸

To obtain a conviction, the government must prove one of four specific intents.⁶⁹ The first possible specific intent for a § 1956 violation is if the financial transaction is completed to promote continuing specified illegal activity.⁷⁰ Originally, courts interpreted

(expanding the list of specified unlawful activity pertaining to money laundering to include "murder, kidnapping, robbery, extortion, or destruction of property by means of explosive or fire").

65. See 18 U.S.C. § 1956(a) (2) (B) (1994).

66. See *United States v. Estacio*, 64 F.3d 477, 480 (9th Cir. 1995) (rejecting the argument that proceeds under the money laundering statutes must always consist of money or a tangible asset and holding that a fraudulently obtained credit line that artificially inflates a bank balance is within § 1956's scope of proceeds); *United States v. Werber*, 787 F. Supp. 353, 356-57 (S.D.N.Y. 1992) (asserting that if Congress intended to limit the term proceeds to "monetary instruments or funds" it could have done so plainly in the statute); *United States v. Ortiz*, 738 F. Supp. 1394, 1400 (S.D. Fla. 1990) (stating that the definition of proceeds is not limited solely to cash).

67. See *United States v. Jackson*, 983 F.2d 757, 766 (7th Cir. 1993) (determining that the government need not trace the proceeds to a particular transaction; instead, the government may rely on evidence such as evidence of unexplained wealth); *United States v. Blackman*, 904 F.2d 1250, 1256-57 (8th Cir. 1990) (rejecting the argument that government must trace proceeds to a specific unlawful act). In *Blackman*, the court held the government could rely on evidence that showed the defendant's participation in drug trafficking rings and his lack of legitimate income to create an inference that the money used to buy an automobile was the proceeds of the drug trafficking. See *id.* at 1257; see also *Camelio & Pergament*, *supra* note 29, at 980 (asserting that prosecutors do not have to trace the proceeds involved in the laundering of money to a particular specified unlawful act); *Carpenter*, *supra* note 38, at 839 (arguing that the government does not have to trace proceeds when the proceeds involved in a money laundering scheme are derived from multiple offenses); *Fennigham*, *supra* note 24, at 911-12 (tracing the proceeds to a specific act of money laundering charged is unnecessary).

68. *Camelio & Pergament*, *supra* note 29, at 981-83 (discussing the intricacies of the inquiry into intent, a necessary element of a money laundering conviction under § 1956).

69. See *id.* at 976 & n.82 (noting that a "financial transaction" is subject to criminal prosecution if it, among other requirements, "satisfies at least one of the four intent requirements of § 1956(a) (1) (A)-(B)").

70. See *United States v. Marbella*, 73 F.3d 1508, 1514 (9th Cir. 1996) (holding that the intent to use criminal fraud proceeds to pay employees who solicited additional victims of the scheme is sufficient for a § 1956 violation); *United States v. Olson*, Nos. 95-8006, 95-8019, 1995 WL 743845, at *2-4 (10th Cir. Dec. 15, 1995)

this intent requirement to mean that defendants must intend to funnel money back into the criminal activity.⁷¹ In *United States v. Jackson*⁷² the defendant, a preacher and part-time drug dealer, deposited cash proceeds of his drug trafficking activities into a church account, which also contained legitimate funds.⁷³ The defendant wrote checks on this account for personal matters.⁷⁴ The court held that the government failed to prove that the personal use of this money in any way promoted the illegal activity.⁷⁵

Some courts, however, have moved away from this “plowed back” standard in favor of a more expansive definition. The Ninth Circuit, for example, reduced the specific intent to promote the underlying criminal activity threshold even further.⁷⁶ The concept that money must be “plowed back” into the criminal activity, as described in *Jackson*, no longer applies.⁷⁷

The second category of specific intent is the intent to conceal or disguise the criminal proceeds and activities.⁷⁸ Circumstantial

(unpublished decision) (noting generally how the specific intent requirement is met and meeting it by showing that the use of proceeds to pay business expenses of the front company was used to promote the scheme); *United States v. Cole*, 988 F.2d 681, 684 (7th Cir. 1993) (stating that payment of “interest” to victims in a scheme met the specific intent requirement for a money laundering conviction); *United States v. Estacio*, 64 F.3d 477, 480-81 (9th Cir. 1995) (ruling that the intent to promote requirement was met when check was deposited and written on insufficient funds to continue check bouncing scheme); *United States v. Savage*, 67 F.3d 1435, 1442 (9th Cir. 1995) (holding that launderer who used criminal proceeds to allow for an air of legitimacy provided specific intent to promote continued unlawful activity).

71. See *United States v. Jackson*, 935 F.2d 832, 842 (7th Cir. 1991) (describing the “promote” prong as “aimed at . . . the practice of plowing back proceeds of ‘specified unlawful activity’ to promote the activity”).

72. 935 F.2d 832 (7th Cir. 1991).

73. See *id.* at 842.

74. See *id.* at 836.

75. See *id.* at 842.

76. See *United States v. Manarite*, 44 F.3d 1407, 1415-16 (9th Cir. 1995) (rejecting the argument that the specific intent requirement was not met because the proceeds of the criminal activity were simply distributed in cash rather than “plowed back” into the activity).

77. See *id.* at 1415-17 (holding that the defendants met the intent requirement even though they did not plow their proceeds back into the criminal activity); *United States v. Montoya*, 945 F.2d 1068, 1075 (9th Cir. 1991) (determining that the deposit of a check that was the proceed of a bribery promoted the bribery by allowing the criminal to enjoy the profits of the illegal activity); see also *United States v. Paramo*, 998 F.2d 1212, 1218 (3d Cir. 1993) (ruling that cashing embezzled checks promoted a scheme by making an otherwise unprofitable venture profitable), *cert. denied*, 510 U.S. 1121 (1994).

78. See *United States v. Tencer*, 107 F.3d 1120, 1129-31 (5th Cir.) (holding that a pattern of behavior based on activity, such as depositing checks in diverse bank accounts around the country and converting accounts to cash, illustrated an intent to conceal or disguise the criminal proceeds), *cert. denied*, 118 S. Ct. 390 (1997); *United States v. Wolny*, 133 F.3d 758, 760-62 (10th Cir. 1998) (participating in transactions taking place in unusual secrecy and carrying one million dollars in cash, broken into

evidence showing the use of a false or third-party name, or a legitimate business, often indicates the intent to conceal or disguise the proceeds of an illegal activity.⁷⁹ Although courts infer an intent to disguise or conceal from the use of proceeds to buy goods and services, the very purchase of those goods is not always enough to sustain a conviction.⁸⁰

The conceal or disguise element of specific intent is satisfied when defendants seek to “conceal or disguise the nature, the location, the source, the ownership or the control of the proceeds of specified unlawful activity.”⁸¹ The court in *United States v. Lovett*⁸² stated that there is “no requirement in the statute . . . that every money laundering conviction must be supported by evidence of intent to conceal the identity of the participants to the transaction.”⁸³ The third specific intent is the intent to evade income taxes.⁸⁴ Finally, the last specific intent for a § 1956 violation is the intent to avoid a transaction-reporting requirement.⁸⁵

ten thousand dollar groupings, indicate intent to disguise or conceal); *United States v. Golb*, 69 F.3d 1417, 1423 (9th Cir. 1995) (ruling that the intent requirement for a money laundering conviction may be inferred from defendant’s pattern of financial transactions); *United States v. Hurley*, 63 F.3d 1, 15-16 (1st Cir. 1995) (holding that the only plausible explanation for defendant’s multiple unusual banking transactions was an intent to disguise or conceal).

79. *See United States v. Garcia-Emanuel*, 14 F.3d 1469, 1476-78 (10th Cir. 1994) (holding that the government met the intent requirement by showing that the defendant put the proceeds in the name of a third party or in the name of a legitimate business); *United States v. Chesney*, 10 F.3d 641, 644 (9th Cir. 1993) (finding that transferring proceeds from one bank account to another account under a different name was sufficient to infer the defendant’s intent to conceal the money); *United States v. Posters ‘N’ Things Ltd.*, 969 F.2d 652, 661 (8th Cir. 1992) (ruling that commingling proceeds with legitimate business assets in a single account indicates intent to disguise or conceal), *aff’d on other grounds*, 114 S. Ct. 1747 (1994); *United States v. Rutgard*, 108 F.3d 1041, 1062-63 (9th Cir. 1997) (stating that intent to conceal may be inferred from the commingling of criminal proceeds and legitimate income).

80. *See United States v. Sanders*, 929 F.2d 1466, 1470-71 (10th Cir. 1991) (holding that buying a car in daughter’s name did not meet the threshold for the intent to conceal or disguise).

81. *United States v. Lovett*, 964 F.2d 1029, 1033-34 (10th Cir.), *cert. denied*, 506 U.S. 857 (1992).

82. 964 F.2d 1029 (10th Cir. 1992).

83. *Id.* at 1034; *see also United States v. Manarite*, 44 F.3d 1407, 1416 (9th Cir.) (holding that the mere fact that the defendants did not disguise themselves and had knowledge that activities were being videotaped negates their intent to disguise or conceal), *cert. denied*, 515 U.S. 1158 (1995).

84. *See United States v. Suba*, 132 F.3d 662, 676 (11th Cir. 1998) (holding that not reporting Medicare-reimbursed checks on one’s tax return showed that money was laundered to evade paying federal taxes).

85. *See United States v. Patino-Rojas*, 974 F.2d 94, 96 (8th Cir. 1992) (ruling that the intent to structure a transaction to avoid a reporting requirement meets the intent element of a money laundering charge).

C. The Sentencing Reform Act of 1984 and the Creation of the United States Sentencing Commission

Historically, the sentencing of convicted criminals was based upon the principle of rehabilitation.⁸⁶ Congress, during its investigation and deliberation of sentencing reform, concluded that the concept of rehabilitation was long defunct.⁸⁷ Congress failed to reach a consensus, however, as to what principle should replace rehabilitation. As a result, federal judges were left to their own accord when making decisions on how and why convicts should be sentenced.⁸⁸

Sentencing judges used an “indeterminate” system of sentencing during this time and retained almost total discretion over the nature and extent of punishment that a criminal received.⁸⁹ Trial judges had the option to take into account the defendant’s cooperation or to consider any other factors such as family situation and to adjust the sentence accordingly.⁹⁰ Trial judges acted with unbridled authority because appellate courts rarely reviewed sentencing decisions.⁹¹ In addition, trial judges were left to fend for themselves during sentencing because they received no standards or guidelines to follow

86. See S. REP. NO. 98-225, at 38, *reprinted in* 1984 U.S.C.C.A.N. 3220, 3221 (stating that rehabilitation was the fundamental principle of sentencing in the federal criminal justice system).

87. See *id.* at 38, *reprinted in* 1984 U.S.C.C.A.N. at 3221 (stating rehabilitation as a goal of punishment is outmoded). The Senate concluded that “almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated.” *Id.*, *reprinted in* 1984 U.S.C.C.A.N. at 3221.

88. See *id.*, *reprinted in* 1984 U.S.C.C.A.N. at 3221 (arguing that judges were left to rely upon their own notions of “the purposes of sentencing”); see also Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1688 (1992) (arguing that judges regularly disagreed with respect to which one of the several sentencing goals, incapacitation, rehabilitation, deterrence, or punishment, should prevail); Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 5 (1972) (stating that prior to the Guidelines, no rule established what sentencing goal the judges should follow).

89. See Stith & Cabranes, *supra* note 2, at 1250-51 (stating that federal sentencing judges, except in rare situations, had the ability to exercise tremendous, almost unlimited discretion over the type and severity of punishment). The extraordinary discretion left to a federal trial judge was almost completely unreviewable by appellate courts. See *id.* at 1251 (arguing that only in preliminary civil trial case management decisions is more discretion given to federal trial judges).

90. See Frankel, *supra* note 88, at 5 (describing the inconsistencies in trial courts as to what factors may constitute a mitigating factor). Courts disagreed as to what factors were adequate, such as whether a guilty plea could mitigate the sentence because it saved the court and public time. See *id.*

91. See *United States v. Tucker*, 404 U.S. 443, 447 (1972) (stating that a sentence imposed by a district court judge that falls within the statutory requirements generally is not open to review).

other than statutory maximums and minimums.⁹² This combination of unbridled authority and lack of guidance resulted in great disparities in sentencing.⁹³

In response to both sentencing disparities and lack of effective review by the appellate courts, Congress passed the SRA⁹⁴ with the intent to create more just results in the sentencing of convicted criminals.⁹⁵ The enactment of the SRA “created the mechanisms for replacing indeterminate sentencing with a more structured determinate sentencing system.”⁹⁶ To effectuate these changes, the SRA mandated the establishment of the Commission,⁹⁷ an independent agency whose stated purpose is to “establish sentencing policies and practices for the federal criminal justice system that will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes.”⁹⁸ The Commission formulated and sent the

92. See Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 901 (1991) (discussing the congressional pattern of merely providing judges with maximum and minimum sentences often ranging from zero to 20 years); see also Freed, *supra* note 88, at 1687-88 (stating that judges received minimal guidance on what was appropriate as either a mitigating or aggravating factor in sentencing).

93. See Robert S. Johnson, *The Ills of the Federal Sentencing Guidelines and the Search for a Cure: Using Sentence Entrapment to Combat Governmental Manipulation of Sentencing*, 49 VAND. L. REV. 197, 202 (1996) (noting the lack of uniformity in the Second Circuit, which led to sentences that ranged from three to 20 years for identical criminal cases).

94. Sentencing Reform Act of 1984, ch. 2, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C. (1994 & Supp. III 1997)).

95. The purpose of the SRA “provides for the development of guidelines that will further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation.” See U.S. SENTENCING GUIDELINES MANUAL ch.1, pt. A, 2; *United States v. Bart*, 973 F. Supp. 691, 692 (W.D. Tex. 1997) (citing as a major reason for enacting the federal sentencing guidelines, the statistically supported perception of disparity in federal sentencing and a good faith desire to propagate justice).

96. Karle & Sager, *supra* note 6, at 394.

97. “The United States Sentencing Commission is an independent agency in the judicial branch composed of seven voting and two non-voting, *ex officio* members.” U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, 1.

98. *Id.* The SRA provided the Commission with broad authority to create the new Guidelines. See *id.* at ch. 1, pt. A, 2 (indicating that the SRA delegated to the Commission authority “to review and rationalize the federal sentencing process”). The language of the SRA clearly provided instructions on exactly how to formulate these Guidelines. See 28 U.S.C. § 994(a) (1994) (detailing the duties of the Commission, which are promulgating and distributing to all U.S. courts and the U.S. Probation System the sentencing guidelines and general policy statements of the guidelines). The Commission first needed to create characteristics of the offender and offense behavior. See *id.* The Commission then needed to formulate guideline ranges that indicated a just and rational sentence by combining the offense characteristics with the personal characteristics of the convict. See *id.* When the appropriate sentence for the offender was imprisonment, the range had to be narrow. The range maximum could not exceed the minimum range by more than

proposed Guidelines to Congress in April 1987.⁹⁹ In the absence of congressional action to the contrary,¹⁰⁰ the Guidelines formally became law on November 1, 1987.¹⁰¹

The Guidelines replaced the indeterminate system of sentencing with a complex formula.¹⁰² This formula requires judges to account for points and then insert these points into a grid, which ultimately determines the sentence range.¹⁰³ Although the Guidelines establish strict formulas to determine the severity of punishment a criminal should receive, they also allow for upward and downward adjustments at the discretion of the sentencing judge in certain instances.¹⁰⁴

25% or six months. *See id.* § 994(b)(2) (establishing specific parameters for a sentence involving imprisonment).

99. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, 2.

100. Notably, Congress took no affirmative steps to enact the Sentencing Guidelines. *See* 28 U.S.C. § 994(p) (1994).

101. *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 217(a), 98 Stat. 1837, 2017-34 (codified as amended at 28 U.S.C. §§ 991-998 (1994 & Supp. II 1996)).

102. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (providing specific application instructions to determine the sentence).

103. The U.S. Sentencing Guidelines Manual provides judges with instructions on how to apply the Guidelines in particular situations.

Application Instructions:

Determine the applicable offense guideline section from Chapter Two. The Statutory Index provides a listing to assist in this determination.

Determine the base offense level and apply any appropriate specific offense characteristics, cross references, and special instructions contained in the particular guideline in Chapter Two in the order listed.

Apply the adjustments as appropriate related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three.

If there are multiple counts of conviction, repeat steps (a) through (c) for each count. Apply Part D of Chapter Three to group the various counts and adjust the offense level accordingly.

Apply the adjustment as appropriate for the defendant's acceptance of responsibility from Part E of Chapter Three.

Determine the defendant's criminal history category as specified in Part A of Chapter Four. Determine from Part B of Chapter Four any other applicable adjustments.

Determine the guideline range in Part A of Chapter Five that corresponds to the offense level and criminal history category determined above.

For the particular guideline range, determine from Parts B through G of Chapter Five the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution.

Refer to Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and to any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence.

U.S. SENTENCING GUIDELINES MANUAL § 1B1.1.

104. The Guidelines provide certain grounds for departure:

Under 18 U.S.C. § 3553(b) the sentencing court may impose a sentence outside the range established by the applicable guidelines, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."

D. Deviations from the Guidelines

A district court may depart from the Guidelines if “the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Commission in formulating the Guidelines that should result in a sentence different from that described.”¹⁰⁵ The Commission, in formulating these Guidelines, did not take into account unusual cases.¹⁰⁶

The Commission intends the sentencing courts to treat each Guideline as carving out a “heartland,” a set of typical cases embodying the conduct that each Guideline describes. When a court finds an atypical case, one to which a particular Guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.¹⁰⁷

Nevertheless, the Commission provides some guidance as to when departures from the Guidelines are warranted.¹⁰⁸ For example, the Commission sets forth a short list of factors that a court may never use as a basis for departure, including race, sex, national origin, creed, religion, and economic status.¹⁰⁹ In addition, courts may not base a departure on lack of guidance as a youth,¹¹⁰ drug or alcohol dependence,¹¹¹ or economic hardship.¹¹²

The Commission also sets forth encouraged and discouraged factors leading to departure.¹¹³ If an encouraged factor is present and not taken into account already by the specific Guideline provision,

Id. § 5k2.0 (quoting 18 U.S.C. § 3553(b) (1994)).

105. 18 U.S.C. § 3553(b) (1994).

106. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, intro. cmt. 4(b) (mentioning that when the Commission formulated the Guidelines, it gave consideration only to what it thought to be the most typical cases for a particular offense).

107. *See id.*

108. *See* *Koon v. United States*, 518 U.S. 81, 94 (1996) (finding that sentencing courts are not “left adrift” by the Commission when they need to determine if downward departures are appropriate in a situation).

109. *See* U.S. SENTENCING GUIDELINES MANUAL § 5H1.10.

110. *See id.* § 5H1.12.

111. *See id.* § 5H1.4.

112. *See id.* § 5K2.12.

113. *See Koon*, 518 U.S. at 94-95 (announcing that the Guidelines provide rules as to what factors are or are not appropriate to make a case atypical by describing factors that are either encouraged or discouraged bases for departure). Encouraged factors are those that the Commission has been unable to consider fully when creating the Guidelines. *See id.* at 94 (citing U.S. SENTENCING GUIDELINES MANUAL § 5K2.0). Discouraged factors are those that the Commission does not view as relevant in determining whether a sentence should lie outside the applicable guideline range. *See id.* at 95 (citing U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. H, intro. cmt.).

the sentencing court may depart from the Guidelines.¹¹⁴ If a discouraged factor is present, a court may not depart from the Guidelines unless it is present to an exceptional degree or magnitude.¹¹⁵ If a mitigating or aggravating factor is present, but not forbidden, encouraged, or discouraged, the court should consider the “structure and theory of the guidelines section as a whole”¹¹⁶ to decide if the factor removes the case from the Guideline’s heartland.¹¹⁷

Although the SRA permits trial judges to exercise slight discretion, it also alters appellate review of sentencing.¹¹⁸ As discussed above, prior to the SRA, trial court sentences virtually were insulated from appellate review.¹¹⁹ In contrast, the SRA provides defendants with the ability to appeal upward departures and the government has the opportunity to appeal any downward departures from the Guidelines.¹²⁰

Recently, in *Koon v. United States*,¹²¹ the Supreme Court determined the appropriate standard of review when a court reviews sentencing and departures from the Guidelines.¹²² The question of what constitutes the proper standard of appellate review is significant to money laundering jurisprudence because of the growing number of money laundering sentences that have been decreased in length under a “heartland” analysis.¹²³ In *Koon*, the Court interpreted the language of the SRA to allow district courts to retain much of their traditional discretion in departing from the Guidelines.¹²⁴ In

114. See *id.* at 96 (setting forth standards on which courts may use encouraged factors to depart from the Guidelines).

115. See *id.* (recognizing standards on which courts may use discouraged factors to depart from the Guidelines).

116. See *United States v. Rivera*, 994 F.2d 942, 949 (1st Cir. 1993) (describing factors that a court should consider to determine when departure from the Guidelines is appropriate, such as the nature and circumstances of the offense, the history and characteristics of the defendant, and the basic purposes of the sentencing).

117. See *Koon*, 518 U.S. at 96 (stating the rule for departure when a factor is neither forbidden nor encouraged nor discouraged in the Guidelines).

118. See *id.* (stating that the SRA altered the scheme of federal sentencing by permitting limited appellate review of sentences).

119. See *Dorszynski v. United States*, 418 U.S. 424, 431 (1974) (holding that if a sentence is within the statutory limitation, appellate review ceases).

120. See 18 U.S.C. § 3742(a)-(b) (1994) (describing parties’ standing to appeal departures).

121. 518 U.S. 81 (1996).

122. See *id.* at 85 (addressing the issue of the appropriate standards of appellate review for upward and downward departures from the Guidelines).

123. See *3D Circuit Advocates Broad Use of “Heartland” Departure*, MONEY LAUNDERING L. REP. (Leader Publications), Aug. 1999, at 1, available in WESTLAW, at 10, No. 1 Moneyllr 1.

124. See *Koon*, 518 U.S. at 97-98 (asserting that Congress did not intend merely to

situations of departures, district courts are granted substantial deference.¹²⁵ Because district courts maintain an “institutional advantage” over appellate courts with respect to sentencing, the Court in *Koon* adopted an abuse-of-discretion standard as the proper standard under which appellate courts can review departures from the Guidelines.¹²⁶

The abuse-of-discretion standard announced in *Koon* has made it difficult for appellate courts to reverse a trial judge’s refusal to depart from the money laundering Guidelines. Appellate courts have been able to avoid the burdensome *Koon* standard by reviewing the initial decision of which Guideline provision to apply, rather than the decision whether or not to depart from the money laundering Guidelines. Courts have held that the initial decision of which Guideline to apply is a legal question subject to the easier, plenary review standard.¹²⁷

E. Application of the Sentencing Guidelines to the Money Laundering Control Act of 1986

In many respects, the Commission has accomplished its stated goals through use of the Guidelines and appropriate departures.¹²⁸ Yet not all of those involved in the criminal justice system believe the Guidelines to be a success.¹²⁹ In particular, the application of the

replace the judgment of a district court in sentencing with the discretion of an appellate court); *see also* *Williams v. United States*, 503 U.S. 193, 205 (1992) (“Although the [Sentencing Reform] Act established a limited appellate review of sentencing decisions, it did not alter a court of appeals’ traditional deference to a district court’s exercise of its sentencing discretion.”).

125. *See Koon*, 518 U.S. at 98 (ruling that departures from the Guidelines fall within the traditional discretion of the sentencing court and therefore, substantial deference will be maintained); *see also* *Mistretta v. United States*, 488 U.S. 361, 367 (1989) (noting that the SRA did not entirely strip trial courts’ ability to apply their expertise in sentencing and therefore, district courts should continue to receive due deference).

126. *See Koon*, 518 U.S. at 98-100 (noting factors that give the district courts an institutional advantage and articulating the abuse-of-discretion standard to include appellate review to determine that departure was not guided by errors in law).

127. *See, e.g.*, *United States v. Smith*, 186 F.3d 290, 297 (3d Cir. 1999) (“The initial choice of guideline . . . is a question of law subject to plenary review”).

128. *See* Stith & Cabranes, *supra* note 2, at 1247-48 (announcing that mandating sentencing judges to explain their rationale for sentences and allowing for appellate review of such decisions have accomplished the Act’s basic goals and decreased unfairness in sentencing by bringing “consistency, coherence, and accountability”).

129. *See* Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 208 (1991) (arguing that the Guidelines failed to end sentencing disparities and instead, have caused further disparity and raised due process issues in many circumstances); Jack H. McCall, Jr., *The Emperor’s New Clothes: Due Process Considerations Under the Federal Sentencing Guidelines*, 60 TENN. L. REV. 467, 470-72 (1993) (describing the recent lack of support for the Guidelines from not only civil libertarians and defense attorneys, but also judges and professors as well);

Guidelines to money laundering offenses has gained the attention of many harsh critics recently.¹³⁰ Even the Commission recognizes the flaw in the present money laundering Guidelines.¹³¹

To fulfill the legislative intent of the MLCA,¹³² which is to provide federal prosecutors with a powerful weapon to fight drug syndicates, the Commission formulated severe penalties for money laundering.¹³³ For a violation of § 1956 the base level offense is a twenty.¹³⁴ A base level of twenty ranges from thirty-three to eighty-seven months in prison, depending upon the criminal history of the convicted individual.¹³⁵ According to the Guidelines, the baseline is a twenty-three, however, if the individual is convicted specifically under 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A).¹³⁶ A baseline of twenty-three ranges from forty-six to 115 months of incarceration.¹³⁷ In addition, different factors, such as the amount of money laundered, allow for substantial increases to the baseline.¹³⁸

A § 1957 violation has a similar Guideline to those set forth for a

Criticizing Sentencing Rules, U.S. Judge Resigns, N.Y. TIMES, Sept. 30, 1990, at A22 (reporting that a judge resigned because mandatory sentencing guidelines were too harsh and inflexible). *But see* Karle & Sager, *supra* note 6, at 394-95 (arguing that although criticism of the Guidelines is widespread, there is little statistical evidence to support these criticisms in comparison with the former sentencing system).

130. The sentences for money laundering offenses are disproportionately high in relation to the sentence one would have received if charged with the actual predicate activity. This imbalance has led prosecutors to charge money laundering for improper purposes—e.g., coercing a plea; punitively enhancing the sentence; and obtaining forfeiture under the money laundering laws when no forfeiture would be available were the individual only charged with the predicate crime. *See* Gerald B. Lefcourt, *Money Laundering Laws Invite Abuses*, CHAMPION, June 1998, at 5.

131. *See* Sentencing Guidelines for United States Courts, 60 Fed. Reg. 2430, 2463-64 (1995) (proposing new money laundering Guidelines that would base the sentence on the underlying criminal conduct).

132. *See* H.R. REP. NO. 99-855, at 7 (1986) (providing for a maximum penalty of 20 years plus penalties and possibilities for civil and criminal forfeiture).

133. *See* U.S. SENTENCING GUIDELINES MANUAL § 2S1.1, commentary (noting that the statutory provision is part of the Anti-Drug Abuse Act, 18 U.S.C. § 1346 (1994), and stating that in formulating the Guidelines for money laundering, substantial penalties were enacted in accord with congressional intent).

134. *See id.* § 2S1.1(a)(2).

135. *See id.* at 310 (providing a table for the determination of a sentence).

136. *See id.* § 2S.1.1(a)(1) (providing greater sentence levels for certain convictions). A higher baseline standard is given for these violations because the individual used the proceeds either to encourage or facilitate continuing criminal activity. *See id.* § 2S.1.1, commentary (explaining the reasons for higher sentences for some convictions); Carpenter, *supra* note 38, at 844 (stating that encouragement or facilitation of additional crime through the use of money laundering proceeds adds three points to the original baseline).

137. *See* U.S. SENTENCING GUIDELINES MANUAL, at 310.

138. *See id.* § 2S1.2(b) (allowing courts to take into consideration the amount of money laundered). The threshold level, however, is \$100,000. *See id.* No distinction is made for amounts between one dollar and \$100,000. *See id.*

§ 1956 violation, except that the baseline is lower.¹³⁹ The baseline for a § 1957 violation is set at seventeen instead of twenty because there is no intent requirement.

II. ANALYSIS

A. Sentencing Guidelines Fail to Meet the Legislative Intent of the Money Laundering Control Act of 1986 and the Sentencing Reform Act of 1984

Congress established the Commission to eradicate disparate and unjust sentences in the federal criminal justice system that were prevalent because of the previous lack of guidance and broad discretion accorded to federal judges.¹⁴⁰ With respect to money laundering offenses, however, the Guidelines fail to fulfill their legislative mandate.¹⁴¹

Based on a clear legislative mandate, the Commission formulated the Guidelines with a severe baseline in relation to the seriousness of drug offenses.¹⁴² The Commission also set the sentencing structure for money laundering less than six months after Congress passed the MLCA.¹⁴³ As a result, the Commission was forced to formulate a sentencing structure without the benefit of either prosecutorial experience or judicial guidance.¹⁴⁴ Thus, the Commission, under the assumption that the MLCA would be used to fight serious organized crime and drug syndicates, set high penalty levels.¹⁴⁵

139. *See id.* § 2S1.2.

140. *See Lee, supra* note 21, at 6-8 (discussing how sentencing reform was intended to reduce sentencing disparity in the federal criminal justice system and describing the characteristics of the sentencing system that made such reform necessary).

141. *See* SENTENCING POLICY REPORT, *supra* note 18, at 5, 7 (discussing problems associated with the money laundering Guidelines, including the application of the Guidelines to a broader scope of offenses than originally anticipated and the tenuous relationship that developed between the severity of the crime and the Guideline's sentence).

142. *See id.* at 3-4 (claiming that high base offense levels were meant to penalize conduct that Congress seemed most concerned about, such as drug trafficking and organized crime).

143. *See id.* at 3 (describing the limited time frame in which the Commission formulated the money laundering Guidelines).

144. *See id.* (finding that without the benefit of either sentencing experience or settled jurisprudence, the Commission was forced to set the money laundering Guidelines based solely on assumptions about the conduct that it thought Congress was most concerned about when it enacted the money laundering legislation).

145. The report states that:

[T]he Commission originally set relatively high base offense levels . . . to penalize the conduct about which Congress seemed most concerned . . . namely: 1) situations in which the "laundered" funds derived from serious underlying criminal conduct such as a significant drug trafficking operation or organized crime; and 2) situations in which the financial transaction was separate from the underlying crime and was

The Commission did not base the sentence structure for money laundering on the Guidelines' penalty structure for the underlying criminal activity.¹⁴⁶ According to the Commission, the "penalty structure . . . for money laundering . . . [was] substantially greater than those for the less serious crimes that produced laundered proceeds (e.g., minor fraud), and substantially less than those . . . more serious, money-generating crimes (e.g., substantial drug trafficking)."¹⁴⁷

Prosecutors' use of the money laundering statutes over the past decade demonstrates that drug dealers and members of organized crime syndicates are not the major targets of the MLCA.¹⁴⁸ Rather, the money laundering laws are used to prosecute white collar or economic criminals.¹⁴⁹ Money laundering is prosecuted vigorously in white collar situations because of MLCA's many benefits, such as: broad statutory elements, long prison terms, and the possibility of forfeiture of property involved in the scheme.¹⁵⁰

Because the financial transaction element of the money laundering statutes is defined broadly, money laundering charges often are based on minor or routine transactions, such as bank deposits or withdrawals.¹⁵¹ These financial transactions frequently have only a tenuous connection to the underlying criminal conduct.¹⁵² The Commission found that although the targeted criminal conduct

undertaken to either: a) make it appear that the funds were legitimate, or b) promote additional criminal conduct by reinvesting the proceeds in additional criminal conduct.

Id. at 4.

146. *See id.* at 3-5 (discussing how the Commission failed to take into account the underlying criminal activity when it formulated the Guidelines that pertained to money laundering offenses and instead, focused on the type of conduct that seemed to be of greatest concern to Congress).

147. *Id.* at 4.

148. *See id.* at 5 (concluding that the scope of prosecution under the money laundering statutes is broader than Congress anticipated).

149. *See* Morvillo & Bohrer, *supra* note 23, at 144-45 (noting that the broad language found in the money laundering provisions led prosecutors to use the money laundering statutes more readily to prosecute fraud, bribery, and other white collar offenses than for drug cases).

150. *See id.* at 143 (asserting that prosecutors use the varied benefits of the money laundering statutes in instances outside the realm of organized crime to negotiate attractive plea bargain deals).

151. *See* United States v. Haun, 90 F.3d 1096, 1100 (6th Cir. 1996) (finding that a financial transaction occurred for money laundering purposes when defendant deposited criminal proceeds into a personal bank account), *cert. denied*, 519 U.S. 1059 (1997); United States v. Paramor, 998 F.2d 1212, 1218 (3d Cir. 1993) (holding that the financial transaction requirement was met when the defendant cashed an embezzled check).

152. *See* United States v. Blackman, 904 F.2d 1250, 1257 (8th Cir. 1990) (finding that the purchase of a truck for non-criminal use with commingled criminal funds constituted money laundering).

tends to be the underlying offense, an additional money laundering charge can increase significantly the offense level in the Guidelines, which results in a more severe punishment.¹⁵³ Because money laundering charges are brought for minor and somewhat “harmless” financial transactions, the ensuing penalties for the crime are not always proportional to the harm caused to society.¹⁵⁴

The ramifications of this prosecutorial practice are serious. Because the Guidelines are set up to punish drug dealers severely, defendants convicted of economic or white collar crimes are sentenced more drastically than if the offense of money laundering was involved.¹⁵⁵ This unfair result occurs because the Guidelines for money laundering offenses are based neither on the underlying criminal offense nor on the complexity of the money laundering scheme.¹⁵⁶ Instead, the Guidelines are based on a strict formula in which all money laundering offenses, without regard to the severity of the underlying offense, have the same baseline punishment.¹⁵⁷ Thus, a money laundering violation with an underlying offense of bank fraud receives the same base-level offense as a money laundering scheme in which arson is involved.¹⁵⁸

Moreover, the Guidelines do not fulfill the legislative intent of the MLCA to deter drug trafficking.¹⁵⁹ Because of the way the Guidelines as a whole are structured, the punishment is higher for drug trafficking than the punishments for money laundering.¹⁶⁰

153. See MONEY LAUNDERING WORKING GROUP, U.S. SENTENCING COMM’N 2 (1995) [hereinafter MONEY LAUNDERING WORK GROUP] (stating that a money laundering offense charge increases the penalty 90% of the time for the same underlying criminal conduct).

154. See Lefcourt, *supra* note 130, at 5.

155. See MONEY LAUNDERING WORKING GROUP, *supra* note 153, at 8 (finding that in a white collar offense the addition of a money laundering charge raised the offense level 96% of the time).

156. See Hon. Fred Biery, *Nurturing Departures: A Plum (Tomato) of a Decision*, CHAMPION, Dec. 1997, at 33 (arguing that downward departures from the money laundering Guidelines are appropriate because the Guidelines do not take into consideration adequately the seriousness of the money laundering offense).

157. See U.S. SENTENCING GUIDELINES MANUAL § 2S1.1 (setting the baselines for money laundering offenses without modifications available for the characteristics of the underlying offense).

158. See *id.* § 2S1.2 (setting the baseline offense level regardless of the nature of the underlying criminal offense that led to the money laundering).

159. See *generally* H.R. REP. NO. 99-855, at 13 (1986) (finding that because money laundering is an essential tool of drug dealers, eradicating money laundering would cripple the drug and organized crime syndicates); S. REP. NO. 99-433, at 4 (1986) (arguing that drug proceeds would become virtually worthless and the profitability and appeal of drug dealing would decrease if drug dealers were not able to launder money).

160. See U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c) (setting forth the base levels for drug trafficking offenses depending on the quantity of contraband); *cf. id.* § 2S1.1 (establishing the base level for money laundering offenses at a minimum of

Therefore, in drug trafficking prosecutions, a money laundering charge often is used as a device to effectuate plea bargaining.¹⁶¹ This disparity in punishments allows federal prosecutors to plea bargain with drug dealers to the lesser money laundering count because it often is easier to prove than the drug offense.¹⁶² Consequently, white collar defendants bare the brunt of the severe penalties because they often have no opportunity to plea to a lesser charge.

An individual convicted of a money laundering offense for an economic crime, such as bank or mail fraud, frequently will receive either the same or a more severe punishment than a person who commits drug offenses.¹⁶³ This disparity in punishment led to investigation by both the Commission and the U.S. Department of Justice.¹⁶⁴ Each, however, arrived at different conclusions.

B. Continuing Conflict between the United States Sentencing Commission and the Department of Justice

1. United States Sentencing Commission's proposed solution to the sentencing disparity caused by the money laundering guidelines

The Commission, besides having to formulate the Guidelines, also received the mandate from Congress to study and amend the

20).

161. See Lefcourt, *supra* note 130, at 5 (discussing prosecutorial abuses that result from the availability of extremely high sentences); cf. Jeffrey L. Fisher, Note, *When Discretion Leads to Distortion: Recognizing Pre-Arrest Manipulation Claims Under the Federal Sentencing Guidelines*, 94 MICH. L. REV. 2385, 2400-01 (1996) (asserting that sentencing manipulation in drug cases allows defendants to be sentenced disproportionately to the underlying crimes committed).

162. See SENTENCING POLICY REPORT, *supra* note 18, at 14-15 (describing the plea practices of federal prosecutors with respect to money laundering offenses). The Commission describes the inherent hypocrisy present in the federal prosecutors' charging and plea practices because many drug dealers are prosecuted for money laundering offenses instead of drug trafficking laws, which carry a more severe punishment. If prosecutors do not have enough evidence to prosecute a drug offense, they will plea the defendant to a money laundering offense, which has a lower sentencing range than the drug trafficking. See *id.* at 13-14.

163. See *id.* at 7-8 (showing an example of the significant "negative" impact of the guidelines on a white collar criminal as compared to a drug-related criminal).

164. See MONEY LAUNDERING WORK GROUP, *supra* note 153, at 6 (analyzing the present controversy over the proposed amendment to the money laundering guidelines and outlining the Commission's findings on the application of the Guidelines to the money laundering statutes); U.S. DEP'T OF JUSTICE, REPORT FOR THE SENATE AND HOUSE JUDICIARY COMMITTEES ON THE CHARGING AND PLEA PRACTICES OF FEDERAL PROSECUTORS WITH RESPECT TO THE OFFENSE OF MONEY LAUNDERING 10 (1996) [hereinafter CHARGING AND PLEA PRACTICES] (arguing that no amendments are needed because the Justice Department promulgated informal guidelines, which addressed the issues of disparate or unfair sentences); SENTENCING POLICY REPORT, *supra* note 18, at 14-16.

Guidelines when necessary.¹⁶⁵ Congress, therefore, intended for the Guidelines to be a work in progress.¹⁶⁶ On May 1, 1995, after several years of studying the application of the Guidelines to the offense of money laundering, the Commission voted unanimously¹⁶⁷ to amend the Guidelines in its application to the money laundering offenses for the fourth consecutive year.¹⁶⁸

The Commission stated that when it formulated the money laundering Guidelines it made assumptions, including a belief that prosecutors would use the money laundering offense only in situations of serious criminal schemes.¹⁶⁹ The Commission also made several findings that support its attempt to amend and restructure the money laundering Guidelines. First, the Commission argued that the MLCA is used to prosecute activities far less serious than those contemplated by the Commission.¹⁷⁰ Second, the Commission cited the lack of sentencing proportionality and uniformity as reasons for amending the Guidelines.¹⁷¹ Last, the Commission discussed how the disparate use of downward departures has caused sentences to be disproportional and random.¹⁷²

165. The Sentencing Guidelines state that:

The Commission is a permanent body, empowered by law to write and rewrite guidelines, with progressive changes over many years. By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so . . . the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted.

U.S. SENTENCING GUIDELINES MANUAL 6 (declaring the Commission's reasons for allowing departures and the Commission's responsibility to react with appropriate modifications to the Guidelines).

166. *See id.* (noting that the Commission is empowered by the law to write and rewrite the Guidelines as needed).

167. One Commission member abstained from the vote on the proposed amendment to the money laundering sentencing Guideline. *See* SENTENCING POLICY REPORT, *supra* note 18, at 1 (describing the attempt to amend the money laundering Guidelines).

168. *See* CHARGING AND PLEA PRACTICES, *supra* note 164, at 8 (describing the Commission's attempts to amend the money laundering Guidelines for the past four consecutive amendment cycles).

169. *See* SENTENCING POLICY REPORT, *supra* note 18, at 3-4 (rationalizing the high base offense level for money laundering on the premise that prosecutors would target activities essential to organized crime and would apply the money laundering Guidelines to offenses that were related to future crime or that "were intended to . . . conceal the nature of the proceeds or avoid a transaction reporting requirement"). The Commission states that severe penalties are given to penalize "conduct about which Congress seemed most concerned when it enacted the money laundering statutes, namely: situations in which the 'laundered' funds derived from serious underlying criminal conduct such as a significant drug trafficking operation or organized crime . . ." *Id.* at 4.

170. *See id.* at 5.

171. *See id.* at 7.

172. *See id.* at 9.

The Commission then submitted its proposed Guidelines to Congress. The purpose of the proposed amendments was:

to effect a major structural change in the money laundering Guidelines, a change that would result in Guideline penalties for money laundering offenses that were more proportionate to both the seriousness of the underlying criminal conduct from which the laundered funds were derived and to the nature and seriousness of the laundering conduct itself.¹⁷³

The United States Department of Justice, however, strenuously objected to the Commission's proposal on several grounds.¹⁷⁴

2. *Department of Justice's reaction to the United States Sentencing Commission's proposed amendments*

The Department of Justice responded to the Commission's proposed amendments to the Guidelines with the claim that Congress intended to penalize severely not only the drug syndicates but also white collar criminals.¹⁷⁵ Moreover, the Department of Justice refused to accept the Commission's assertion that sentencing disparities are a reality or as widespread as the Commission claimed.¹⁷⁶

The Department of Justice relies on the fact that the Guidelines allow for a sentence increase if the defendant knew the funds involved were proceeds of drug trafficking.¹⁷⁷ Therefore, the

173. *Id.* at 2. The proposed amendment to the money laundering Guidelines would use the base level for the underlying criminal conduct as the basis and allow for enhancements to "reflect[] the integral part which money laundering plays in certain very serious crimes." *See id.*

174. *See* CHARGING AND PLEA PRACTICES, *supra* note 164, at 8 (stating that the Department of Justice vigorously opposed the Commission's proposed amendments to the money laundering Guidelines). The Department of Justice argues that the high Guidelines set for money laundering are warranted by the seriousness of the money laundering problem and the fact that Congress has strengthened the money laundering statute consistently. *See id.*

175. *See id.* at 3 (stating that "Congress sent a message to white collar criminals . . . that they may not use legitimate financial institutions to facilitate the enjoyment of criminal profit").

176. "To the extent that revision of the money laundering guidelines is prompted by a perceived disparity between [the money laundering] guidelines and the fraud guidelines, we suggest the Commission review the fraud guidelines—which we believe generally to be inadequate—before weakening the money laundering guidelines." Statement of Jay P. McCloskey and Robert S. Litt, Before the United States Sentencing Commission Concerning Proposed Sentencing Guideline Amendments, at 12, Mar. 14, 1995, *available in* CHARGING AND PLEA PRACTICES, *supra* note 164, at attachment 2.

177. *See* *United States v. Hemmingson*, 157 F.3d 347, 361-62 (5th Cir. 1998) (rejecting the Department of Justice's argument that because the money laundering Guidelines allow for a three-level increase if the defendant knew or believed the funds were the proceeds of drug trafficking, the Guidelines also intended that money laundering sentences are appropriate for cases in which the underlying crime was

Department of Justice concluded that all other provisions of the Guidelines apply to non-drug related crimes as well.¹⁷⁸ Courts have rejected this argument, however, stating that “the enhancement provision merely distinguishes between defendants who *knowingly* launder drug money, and those who are ignorant of the source of the illicit funds.”¹⁷⁹ The Department of Justice’s argument fails to recognize that the MLCA was intended to apply to organized crime as well as drug trafficking, and that the provision merely differentiates the two.¹⁸⁰ The Department of Justice can point to no other example in either the legislative history of MLCA or the Guidelines in which Congress or the Commission demonstrated an intent to aim the money laundering offense at white collar activity.¹⁸¹

Although vigorously contradicting the findings of the Commission,¹⁸² the Department of Justice concedes the potential for abuse of the severe Guidelines in certain instances of “receipt-and-deposit”¹⁸³ money laundering.¹⁸⁴ Still, the Department of Justice maintains that it is not necessary to amend the money laundering Guidelines based on, what it describes as, a small number of minor cases.¹⁸⁵ The Department of Justice asserts that it has taken measures to limit the potential for abuse of the money laundering statutes.¹⁸⁶

not drug related); *United States v. Caba*, 911 F. Supp. 630, 635 (E.D.N.Y.) (examining the Government’s argument that the drug enhancement provision would be superfluous if money laundering only included drug-related offenses and holding that the provision does not describe the underlying criminal activity, rather it only discusses the defendant’s state of mind), *aff’d*, 104 F.3d 354 (2d Cir. 1996).

178. See *Hemmingson*, 157 F.3d at 362 (stating the Government’s position that “the guideline provides for a three-level increase if the defendant knew or believed the funds were proceeds of drug-trafficking, which implies that the guideline encompasses more than just drug-related offenses”).

179. *Id.*

180. See *id.* (“[The court’s] interpretation harmonizes with the elements of the money laundering statute, which does not require knowledge of the source.”). In *Hemmingson*, the court further states that the “argument that § 2S1.1 is not limited solely to drug offenses fails to engage the district court’s observation that the statute targets both drug-related money-laundering and money-laundering that stems . . . from organized crime.” *Id.*

181. See *generally* CHARGING AND PLEA PRACTICES, *supra* note 164, at 4 (pointing to the lack of legislative history of federal money laundering statutes that describe an attempt to aim the money laundering statutes at white collar criminal activities).

182. See *id.* at 8 (discussing the Department of Justice’s response to the Commission’s amendments).

183. “‘Receipt and deposit’ cases are cases in which a person obtains proceeds, generally in the form of a check, from a specified unlawful activity and deposits the proceeds into his or her own bank account without any attempt to conceal the nature, source or ownership of the funds.” *Id.* at 9.

184. See *id.* at 10 (recognizing the potential abusive application of the money laundering statutes and accompanying Guidelines by federal prosecutors for minor economic crimes).

185. See *id.*

186. See *id.* (discussing that steps outlined in “Principles of Federal Prosecution”

For example, the Department of Justice claims that it has instituted approval and consultation requirements in certain instances of money laundering charges to eliminate the need for lowering sentences.¹⁸⁷ The case law demonstrates, however, that prosecutors continue to bring minor money laundering charges in receipt-and-deposit cases.¹⁸⁸

3. *Congressional response to the existing debate*

In response to the disagreement between the Commission and the Department of Justice, Congress chose to make no substantive changes to the money laundering Guidelines.¹⁸⁹ Congress' refusal to

explain practices such as multi-layered oversight both by the Department of Justice and within the United States Attorneys' offices, which provide checks to limit practice abuses).

187. *See id.* at 12-16. Although the Department of Justice has approval and consultation requirements in certain instances of money laundering, approval requirements are necessary in only a very few instances. *See id.* at 13; U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-105.100 (1999) [hereinafter U.S. ATTORNEYS' MANUAL]. The Department of Justice requires that approval be sought in instances of extraterritorial jurisdiction, tax division cases, prosecutions of attorneys, and prosecutions of financial institutions. *See* U.S. ATTORNEYS' MANUAL, *supra*, § 9-105.100. For financial crimes, the prosecutors need only consult with a Department of Justice attorney from the Money Laundering and Asset Forfeiture Section of the Criminal Division. *See id.* These attorneys merely convey the Department of Justice's discouragement of these kinds of prosecutions. *See* MONEY LAUNDERING WORKING GROUP, *supra* note 153, at 15. After consultation, prosecutors still are free to charge a money laundering offense despite the conveyed Department of Justice position on the matter. *See* U.S. ATTORNEYS' MANUAL, *supra*, § 9-27.310.

188. *See, e.g.*, United States Sentencing Commission ID No. 229000, *cited in* SENTENCING POLICY REPORT, *supra* note 18, at 7 n.15 (prosecuting money laundering in the case of an individual who made less than a \$10,000 down payment on a home bought in the individual's own name); United States Sentencing Commission ID No. 249697, *cited in* SENTENCING POLICY REPORT, *supra* note 18, at 7 n.15 (prosecuting money laundering in a case where criminal proceeds were used to buy an automobile in defendant's own name from a personal bank account); *see also* Lefcourt, *supra* note 130, at 5 (maintaining that the approval and consultation guidelines tooled by the Department of Justice pertain to limited cases and have had little "ameliorative effect"). Even if the Department of Justice advises against the money laundering prosecutions, Assistant United States Attorneys still are free to prosecute in most instances. *See* Lefcourt, *supra* note 130, at 5.

189. *See* Act of Oct. 30, 1995, Pub. L. No. 104-38, 109 Stat. 334 (codified at 28 U.S.C. § 994 (1994 & Supp. II 1996)) (disapproving of the amendments submitted by the Sentencing Commission with respect to lowering sentences for money laundering offenses); *see also* H.R. REP. NO. 104-272, at 14-15 (1995), *reprinted in* 1995 U.S.C.C.A.N. 335, 348-49 (disapproving of any change to the Guidelines as applied to the money laundering offenses). The House report stated that the Commission's proposed amendments

appear to respond in part to the class of money laundering cases in which the money laundering activity is not extensive, including "receipt and deposit" cases—those in which the money laundering conduct is limited to depositing the proceeds of unlawful activity in a financial institution account identifiable to the person who committed the underlying offense. While the application of the current guidelines to receipt-and-deposit cases, as well as to certain other cases that do not involve aggravated money laundering

adopt the Commission's proposed amendments effectively disregarded the Sentencing Commission's mandate to study and amend the Guidelines on a continuous basis.¹⁹⁰ The U.S. Supreme Court, in *Mistretta v. United States*,¹⁹¹ defined the mandate of the Commission: "The Commission does have discretionary authority to determine the relative severity of federal crimes The Commission also has significant discretion to determine which crimes have been punished too leniently, and *which too severely*."¹⁹² Congress, however, conceded that a problem may exist with the present money laundering Guidelines and directed both the Commission and the Department of Justice to continue to study money laundering prosecutions.¹⁹³ In addition, courts have interpreted Congress' failure to adopt the amendments as a signal that courts, not Congress, should deal with sentencing disparities caused by the Guidelines.¹⁹⁴

C. *Judicial Dissatisfaction with the Current Money Laundering Guidelines*

Several district and circuit courts recently accepted downward departures from the severe punishments mandated by the Guidelines.¹⁹⁵ Although judges intend to reduce the unjust sentences

activity, may be problematic . . . past sentencing anomalies arising from relatively few cases do not justify a sweeping downward adjustment in the money laundering guidelines.

Id., reprinted in 1995 U.S.C.C.A.N. at 348-49.

190. See Sentencing Reform Act of 1984, 28 U.S.C. § 994(o)-(p) (1994) (mandating that the Commission continually study the effects of the Guidelines and amend them when necessary). The Commission's proposed amendments become law after 180 days, unless Congress affirmatively disapproves the amendments. See *id.* § 994(p). Congress often relies on the expertise of the Commission and rarely disapproves any of its proposed amendments. Cf. Thomas N. Whiteside, *The Reality of Federal Sentencing: Beyond the Criticism*, 91 NW. U. L. REV. 1574, 1589 (1997) (stating that by 1977, the Guidelines already had been amended 534 times).

191. 488 U.S. 361 (1989).

192. *Id.* at 377 (emphasis added).

193. See Act of Oct. 30, 1995 Pub. L. No. 104-38, § 2(b), 109 Stat. 334, 335 (codified at 28 U.S.C. § 994 (1994)) (directing the Department of Justice to submit a report to Congress addressing the charging and plea practices of federal prosecutors with respect to the offense of money laundering and requiring the Commission to comment on the report).

194. See *United States v. Smith*, 186 F.3d 290, 299 (3d Cir. 1999) (stating that because Congress failed to adopt the Commission's amendments, courts should attempt to alleviate sentencing problems associated with the money laundering Guidelines).

195. See *id.* at 299-300 ("The fact that the money laundering statute facially applied to the defendant's activity was insufficient to mandate the application of U.S.S.G. § 2S1.1 because [the defendant's] conduct, when viewed alongside that usually prosecuted under the statute, was atypical"); *United States v. Woods*, 159 F.3d 1132, 1135 (8th Cir. 1998) (upholding a downward departure from the money laundering Guidelines because the money laundering offense was minor and the underlying crime had no connection to drugs or organized crime; thus, the case fell outside the

and sentencing disparity associated with the money laundering Guidelines, in actuality, they further compound the problem. This consequence is due in part to judges' conflicting attitudes towards the money laundering Guidelines and the Guidelines in general.¹⁹⁶

Courts that accept departures from the Guidelines make several distinct arguments in support thereof. The first and most widely utilized argument is based on the legislative intent of the money laundering Guidelines.¹⁹⁷ In offenses where the underlying crime either is economic or white collar in nature, several courts found the factual situations outside the heartland of cases considered when the Commission formulated the Guidelines.¹⁹⁸

heartland); *United States v. Gamez*, 1 F. Supp. 2d 176, 183 (E.D.N.Y. 1998) (granting a motion for a downward departure; holding that the conduct fell outside the heartland of money laundering cases because no highly organized money laundering scheme existed, and illegal profits represented the same profits as the legal equivalent); *United States v. Bart*, 973 F. Supp. 691, 697 (W.D. Tex. 1997) (departing downwards from the money laundering Guidelines because the case represented a deviation from the normal prosecutorial practice of charging a money laundering offense only in serious drug or organized crime situations); *United States v. Buchanan*, 987 F. Supp. 56, 65 (D. Mass. 1997) (allowing for a downward departure because fraud fell outside the heartland where the amount of money laundered was small and it had no connection to drugs or organized crime); *cf. United States v. Caba*, 911 F. Supp. 630, 638 (E.D.N.Y.) (holding in a case of food stamp fraud in which the prosecutor also brought a money laundering charge, that the food stamp fraud Guidelines was more appropriate than the harsher money laundering Guidelines because the Commission did not contemplate food stamp fraud when it formulated the sentencing framework for money laundering), *aff'd*, 104 F.3d 354 (2d Cir. 1996). *But see United States v. Charles*, No. 98-4010, 1998 WL 539469, at *2 (4th Cir. Aug. 25, 1998) (unpublished disposition) (affirming the district court's finding that it was without the authority to depart from the money laundering Guidelines based on lack of severity in money laundering scheme); *United States v. Adams*, 74 F.3d 1093, 1103 (11th Cir. 1996) (ruling that the district court did not have authority to depart from the money laundering Guidelines because it would have nullified the jury's finding of guilt on that charge); *United States v. Pierro*, 32 F.3d 611, 620 (1st Cir. 1994) (holding that departure from the Guidelines was not warranted because the defendant's conduct fell within the language of the money laundering statute, regardless of the complexity of the crime); *United States v. Rose*, 20 F.3d 367, 374-75 (9th Cir. 1994) (stating that a downward departure was neither required nor appropriate because, had the prosecutor charged the identical conduct under another statute, it would have allowed for significantly less severe punishment); *United States v. LeBlanc*, 24 F.3d 340, 345-47 (1st Cir. 1994) (reversing a downward departure because the district court interpreted the heartland of money laundering cases too narrowly).

196. *See, e.g., Biery, supra* note 156, at 34.

197. *See S. REP. NO. 99-433*, at 4 (1986) (describing the legislative intent of money laundering statutes as combating drug trafficking and fighting organized crime).

198. *See United States v. Smith*, 186 F.3d 290, 298 (3d Cir. 1999) (ruling that the defendant's conduct fell outside the heartland of money laundering offenses, because the Commission formulated the money laundering Guidelines based on a clear legislative mandate that the money laundering statutes would be used against drug dealers); *United States v. Woods*, 159 F.3d 1132, 1134 (8th Cir. 1998) (upholding the district court's assessment that because the underlying offense involved bankruptcy fraud rather than drug trafficking or another organized crime offense, the case fell outside the heartland); *United States v. Buchanan*, 987 F. Supp.

A second rationalization made by several courts is based on the attempt by the Commission to amend the Guidelines.¹⁹⁹ Courts have based downward departures on the Commission's recognition of the Guidelines' inadequacies when applied to economic or white collar money laundering offenses.²⁰⁰ In addition to the Commission's unsuccessful attempt to amend the Guidelines, the courts reason that the Commission did not take into account adequately the possibility of prosecutions for relatively minor money laundering offenses.²⁰¹

Lastly, courts base downward departures from the money laundering Guidelines on the desire to reconcile the suggested harsh sentence with the fact that, had a different charge, such as mail fraud, been brought without the money laundering charge, the sentence would be significantly lower even though the underlying criminal conduct is identical.²⁰² Surprisingly, the prosecutor's election to charge a person with a money laundering offense instead of fraud would increase the penalty eighty-five to ninety percent of the time.²⁰³ Courts often reason that the criminal act of laundering the proceeds of economic crimes is not damaging enough to society to justify the significant increase in punishment.²⁰⁴ Many judges frown upon the prosecutorial practice of manipulating the severity of a sentence

56, 64-65 (D. Mass. 1997) (characterizing the "heartland" of money laundering offenses as "the knowing conversion of large sums of money from transactions" such as drug trafficking or organized crime). *But see LeBlanc*, 24 F.3d at 347 (reversing the trial court's finding that the case fell outside of the money laundering heartland, even though the case dealt with gambling and did not involve either drugs or organized crime).

199. *See Bart*, 973 F. Supp. at 696-97 (relying on the Commission's position that it formulated the money laundering Guidelines to penalize persons involved in transactions that related to drugs or organized crime). *But cf. United States v. Nguyen*, 46 F.3d 781, 783-84 (8th Cir. 1995) (finding the defendant's argument for downward departure based on the Commission's attempt to amend the Guidelines was not ripe and therefore, no departure was warranted).

200. *See Woods*, 159 F.3d at 1135 (relying in part on the intent of the Commission to lessen the severity of the money laundering Guidelines as applied to white collar crime in deciding that the case warranted a downward departure).

201. *See id.* at 1136 (examining the structure of money laundering guidelines). The money laundering Guidelines make no distinction between frauds of \$1,000 and frauds of \$100,000. *See* U.S. SENTENCING GUIDELINES MANUAL § 2S1.2 (listing the initial amount of the laundered table as \$100,000).

202. *See United States v. Gamez*, 1 F. Supp. 2d 176, 184-85 (E.D.N.Y. 1998) (holding that the defendant should receive a downward departure from an offense level of 20 to an offense level of 12, to reflect use of Guidelines' provisions relating to structuring crime, the gravamen of the offense).

203. *See* MONEY LAUNDERING GUIDELINES, *supra* note 40, at 3 (describing the ability of federal prosecutors to manipulate sentencing based upon the offenses he or she chooses to charge).

204. *See United States v. Hemmingson*, 157 F.3d 347, 361-62 (5th Cir. 1998) (holding that defendants' conduct, which involved interstate transportation of stolen property and money laundering, did not justify punishment under the severe money laundering Guidelines).

based upon the criminal statute under which the charge is brought.²⁰⁵ Thus, when prosecutors act in such a manner, trial judges are more likely to grant downward departures.

Although the current trend in many district courts is to allow for downward departures based on the above-mentioned reasons,²⁰⁶ still there are many instances where district courts refuse to allow departures.²⁰⁷ Because of the level of discretion granted by the Supreme Court in *Koon v. United States*²⁰⁸ to trial judges in sentencing, an appellate court may not reverse a trial judge's refusal to depart from the Guidelines unless clear error exists.²⁰⁹ Appellate courts may overturn a refusal to grant a departure from the Guidelines only if the district court possessed a mistaken belief that it was without the authority to depart.²¹⁰ Thus, refusals to depart are insulated almost completely from appellate review. In order to avoid the *Koon* standard of review, however, courts may review the initial decision of which Guideline to apply, rather than the question of whether or not the trial judge should have departed. This is a question of law subject to the less difficult plenary review standard.²¹¹

205. See *Woods*, 159 F.3d at 1135 (citing the broad and inconsistent charging of money laundering offenses coupled with severe and inflexible Guideline as a major cause of sentencing disparity, thereby warranting downwards departure in many instances). *But cf.* *United States v. Rose*, 20 F.3d 367, 373 (9th Cir. 1994) (ruling that the sentencing court is not required to grant a downward departure from money laundering Guidelines in favor of fraud Guidelines to minimize sentencing disparity for identical conduct underlying both the fraud and money laundering charges).

206. See *supra* notes 197-205 and accompanying text (reviewing reasons considered by courts in granting departures).

207. See *United States v. Arnous*, No. 96-6275, 1998 WL 136533, at *2 (6th Cir. Mar. 16, 1998) (unpublished disposition) (holding that the district court had discretion to depart from the Guidelines and that although enough evidence was present on the record to allow for a downward departure, the law did not require the district court to do so).

208. 518 U.S. 81, 98 (1996) ("A district court's decision to depart from the Guidelines . . . will in most cases be due substantial deference, for it embodies the traditional exercise of discretion by a sentencing court.").

209. See *id.* at 98-99 (stating that appellate courts should grant considerable deference to trial judges based on the sentencing judge's expertise in such areas); *Hemmingson*, 157 F.3d at 361 (deferring to the trial court in its determination that the case fell outside the heartland of money laundering cases considered by Commission).

210. See *United States v. Organek*, 65 F.3d 60, 63 (6th Cir. 1995) (ruling that a failure of the trial court to depart downward is not an issue that can be appealed as long as the trial court is aware of its authority to do so); *United States v. Piervinanzi*, 23 F.3d 670, 685 (2d Cir. 1994) (stating that the appellate court lacked the authority to consider an argument that claimed the district court wrongly withheld downward departure where the sentencing judge was aware of his authority to grant the departure but refused to do so). *But see* *United States v. Pierro*, 32 F.3d 611, 620 (1st Cir. 1994) ("The determination of whether a particular circumstance is sufficiently 'special' or 'unusual' to warrant departing presents a question of law, the determination of which is reviewed *de novo* on appeal.").

211. See *United States v. Smith*, 186 F.3d 290, 297 (3d Cir. 1999).

Compounding the problem of sentencing disparity even further, some courts hold that it is beyond a sentencing court's discretion to depart downwards based on the rationales outlined above.²¹² As a result, situations occur where identical underlying criminal conduct gives rise to vastly different punishment, depending solely on the judge or jurisdiction.²¹³

For example, in *United States v. Caba*,²¹⁴ the defendant was convicted of money laundering and food stamp fraud.²¹⁵ From the food stamp fraud, the defendant laundered, in total, over \$11,700,000 in proceeds over a period of two and one-half years, thereby earning a personal profit of over \$600,000.²¹⁶ In sentencing, the trial court felt that the defendant's actions fell outside of the heartland of money laundering cases.²¹⁷ Therefore, the court granted the defendant's request for a downward departure and used the food stamp fraud Guideline for sentencing.²¹⁸ If the judge had refused to grant the requested downward departure, the defendant's sentence based on the money laundering Guidelines would have resulted in a twelve to fifteen year prison sentence.²¹⁹ Instead, the defendant received a sentence of thirty to thirty-seven months imprisonment.²²⁰

In *United States v. Arnous*,²²¹ a defendant was convicted of food stamp fraud and money laundering.²²² Yet, the district court refused

212. *United States v. Charles*, No. 98-4010, 1998 WL 539469, at *1 (4th Cir. Aug. 25, 1998) (unpublished disposition) (holding that district court did not err in finding that it was without the authority to depart from the Guidelines because departing would negate a guilty verdict on the money laundering charge); *United States v. Ripinsky*, 109 F.3d 1436, 1446 (9th Cir. 1997) (ruling that the district court was without authority to grant a downward departure where both the bank fraud criminal act and the money laundering offense were secondary charges because it would have circumvented Commission's intent to set high sentences for money laundering), *cert. denied*, 118 S. Ct. 870 (1998); *see also* *United States v. Rose*, 20 F.3d 367, 374 & n.6 (9th Cir. 1994) (affirming the district court's refusal to grant downward departures from money laundering Guidelines and refusing to reach the issue of whether the trial court possessed discretion to grant a downward departure).

213. *See supra* notes 202-10 and accompanying text (analyzing case law illustrating disparities in downward departures).

214. 911 F. Supp. 630 (E.D.N.Y.), *aff'd*, 104 F.3d 354 (2d Cir. 1996).

215. *See id.* at 642 (finding defendant guilty and imposing the sentencing level).

216. *See id.* at 632.

217. *See id.* at 637-38 (stating that the crime committed was not the type of money laundering that would justify a 10-year prison sentence).

218. *See id.* at 638 (holding that a downward departure was appropriate because the instant case fell well outside the heartland of money laundering cases used by the Commission to formulate the Guidelines).

219. *See id.* at 637.

220. *See id.* at 642 (asserting that an appropriate sentence is determined by the fraud and not the money laundering Guidelines).

221. No. 96-6275, 1998 WL 136533 (6th Cir. Mar. 16, 1998) (unpublished disposition).

222. *See id.* at *2 (discussing the Arnous scheme of trafficking in food stamps and laundering them through supermarkets); *cf. Caba*, 911 F. Supp. at 632 (detailing a

to grant the defendant a downward departure.²²³ As a result, the defendant received a sentence of ten years in prison and three years in a supervised release program.²²⁴ Although the defendant requested a downward departure at sentencing, the district court found that the defendant's conduct fell within the heartland of money laundering cases because all elements of the money laundering offense were met.²²⁵ Thus, the district court based the sentence on the more severe money laundering Guideline, rather than on the more lenient food stamp fraud Guideline.²²⁶

On appeal, the Sixth Circuit held that although the district court possessed the discretion to grant the downward departure, it was not a clear error to deny the motion.²²⁷ The Sixth Circuit held further that the district court's denial of the motion for departure could not be reviewed on appeal.²²⁸ Ironically, in *Arnous* the defendant laundered less money than the defendant in *Caba*, but still received a more severe sentence for the crime.²²⁹

Caba and *Arnous* exemplify the sentencing disparity caused by some courts' choosing to apply the harsh money laundering Guideline, while other courts refuse to do so. Thus, in the case of white collar money laundering, the possibility of sentencing disparity has increased rather than decreased under Guideline sentencing.

III. RECOMMENDATIONS

Although the application of the Guidelines to money laundering offenses results in greater sentencing disparity, the situation is not without solutions. Several steps can be taken to reduce the sentencing disparity and also meet the intent of the SRA. These steps include: adopting the Commission's proposed amendments; increasing Department of Justice oversight of federal prosecutors;

food stamp laundering scheme where food stamps were purchased for a fraction of their value and deposited in individual store accounts).

223. *Arnous*, 1998 WL 136533, at *2 (ruling that the offense fell well within the heartland considered by the Commission).

224. *See id.* (upholding the district court's sentence for the acts committed).

225. *See id.* (discussing the district court's decision not to grant downward departures based on the heartland of cases).

226. *See id.* at *5.

227. *See id.* (stating that the failure to exercise the option to grant a downward departure was not reversible error).

228. *See id.* (holding that the trial court was without discretion to grant a downward departure because the case clearly did not fall outside of the heartland, in that the activity was covered by the statutes).

229. *Compare id.* at *4 (stating that the defendant laundered the equivalent of \$1,056,000 over a two-year period), *with* *United States v. Caba*, 911 F. Supp. 630, 632 (E.D.N.Y. 1996) (describing a food stamp fraud scheme in which the defendant laundered over \$11,000,000 in a two-year period).

and refocusing appellate review of money laundering sentences.

First, Congress should adopt the proposed amendments formulated by the Commission. The proposed amendments would reduce disparity in sentencing by effectively lowering the baseline offense level for money laundering violations and providing for substantial increases based on both the complexity of the money laundering offense and the severity of the underlying criminal conduct.²³⁰

The Commission's intent in changing the penalty structure for money laundering is not to reduce per se the penalties for money laundering, but rather to reformulate the penalties in conjunction with the seriousness of the underlying criminal act.²³¹ In addition, the Commission's proposed amendments are in accordance with the legislative intent of the MLCA, because they provide increased penalties for those criminals involved in drug trafficking.²³² Thus, if prosecutors use the money laundering statute for its intended purpose, more severe penalties will be at their disposal.

Second, if Congress once again refuses to accept the amendments proposed by the Commission, then, at the minimum, it should encourage the Department of Justice to monitor more strictly federal prosecutors' use of the MLCA. To implement this more strict monitoring process, the Department of Justice should change its policy with respect to how money laundering offenses are charged. Currently, the Department of Justice requires that prosecutors obtain approval only in very limited circumstances for prosecuting certain money laundering offenses from the Money Laundering and Asset Forfeiture Section of the Criminal Division.²³³ Normally, the Criminal Division only requires consultation in most white collar situations,

230. See SENTENCING POLICY REPORT, *supra* note 18, at 10-12 (describing the Commission's intent in amending the money laundering Guidelines and delineating the specifics of the proposed amendments).

231. See *id.* at 10 (stating the Commission's intent merely to recalibrate the sentencing structure so that the Guidelines' objective of sentencing proportionality may be met).

232. See *id.* at 11 (proposing increases in sentencing for those money launderers involved in drug transactions). The Commission further states that the proposed amendments were meant to avoid "arbitrarily determined, heightened penalty levels in those situations where a financial transaction may *technically* violate the money laundering statutes but not present additional societal harm sufficient to merit substantially more severe sanctions than those appropriate for the underlying offense from which the illicit funds were generated." *Id.*

233. See U.S. ATTORNEYS' MANUAL, *supra* note 187, § 9-105.100 (listing various circumstances in which federal prosecutors are required to seek approval from the Criminal Division of the Department of Justice, such as: extraterritorial jurisdiction, tax division cases, prosecutions of attorneys, and prosecutions of financial institutions).

such as “receipt-and-deposit cases.”²³⁴ For such situations of white collar or economic crimes, the Department of Justice should require not only consultation but also *approval* from the Money Laundering and Asset Forfeiture Section.

Last, if Congress refuses to place additional responsibility upon the Department of Justice to regulate money laundering prosecutions more closely, appellate courts should take a more active role in avoiding sentencing injustice. In order to solve the problems associated with the money laundering Guidelines, appellate courts should review the issue of whether the trial judge’s initial choice of Guideline was proper, rather than the issue of whether the trial judge should have granted a downward departure from the Guideline. In reviewing the initial question of which Guideline to apply, appellate courts are not limited by the more deferential clear-error standard announced in *Koon*. Instead, appellate courts are able to take advantage of the less deferential standard of plenary review. This less deferential review will help alleviate the problem of sentencing disparity currently associated with the money laundering Guidelines.

CONCLUSION

In the era of federalization of crime, the importance of the United States Sentencing Commission and the Sentencing Guidelines cannot be overstated. The Commission now enters its second decade, and its experience and expertise in the area of sentencing have had the opportunity to mature. The Commission recognized its errors in the formulation of the money laundering Guidelines and attempted to rectify the situation through its proposed amendments.

If the Commission is to fulfill its statutory mandate of reducing sentencing disparity and unfairness in federal sentencing, both the Department of Justice and Congress must be willing to rely on the expertise of the Commission. To date, however, the Department of Justice and Congress have disregarded the Commission’s input with respect to the money laundering Guidelines.²³⁵ Both Congress and the Department of Justice also ignore the fundamental unfairness created by judicial dissatisfaction with the money laundering

234. If the prosecution does not further the professed purposes of money laundering prosecutions, the Department of Justice could recommend that the course of action not be taken. Still, Assistant United States Attorneys do not need to heed these recommendations. *See supra* note 187 and accompanying text (discussing measures that the Department of Justice has taken to combat abuses in the money laundering process).

235. *See* Shannon Duffy, *Laundering Charges Use Limited*, NAT’L L.J., Aug. 23, 1999, at B4.

Guidelines. If the money laundering Guidelines continue to be applied to white collar offenses in their present state, the ideal of sentencing proportionality, will never be fully achieved.