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Grid & Bear It

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Downward Departures in Money-Laundering Cases: The Punishment Should Fit the Real Crime

The money-laundering sentencing guidelines (U.S.S.G. 2S1.1, *et. seq.*) were designed by the Sentencing Commission to punish the serious conduct for which Congress had passed the money-laundering statutes (18 U.S.C. 1956 and 1957). The legislation was intended to curtail the drug trade and organized crime by disrupting the financial conduits through which they channeled their profits. Seeking to make punishments proportional to that criminal conduct, the Sentencing Commission established a high-base offense level for money-laundering offenses. However, as a result of the expansive scope of the money-laundering statutes, prosecutors have successfully brought actions in "garden variety" economic crime cases and exposed defendants to the extremely harsh sentences dictated by U.S.S.G. 2S1.1 and 2S1.2. This article is to provide defense attorneys with some ammunition in the downward departure war currently being waged in those cases.

In 1995, the Sentencing Commission attempted to amend the money-laundering guidelines to bring a measure of rationality to the sentencing scheme in these cases; but, as we know, that amendment became intertwined with the political fate of the cocaine/crack amendment, and both amendments were rejected by

Congress. Despite that setback, the commission's pronouncements during the amendment process about the intended heartland of money-laundering offenses provide a glimmer of hope that a downward departure may be available to certain defendants, pursuant to 18 U.S.C. 3553(b) and U.S.S.G. 5K2.0.[1] Specifically, there is now strong support for the proposition that the money-laundering heartland does not include those cases which involve a charged financial transaction which is not truly distinct from the predicate criminal activity.[2] In the aftermath of *Koon v. United States*, 518 U.S. 81, 116 S. Ct. 2035 (1996), several courts, in fact, have departed downward in money-laundering cases, relying on U.S.S.G. 5K2.0. This article will focus on the potential arguments available to counsel who are arguing that their clients' conduct falls outside of the money-laundering heartland and that, therefore, the client is entitled to a downward departure.

Overview of Departures

In drafting the guidelines, the commission set forth a general framework for analyzing departure issues and, in so doing, recognized that "departures" are necessary for the guidelines to effectuate their purpose. *See* U.S.S.G. ch.1, pt. A., intro. comment. Indeed, Congress codified departures from the sentencing guidelines, *see* 18 U.S.C. 3553(b), and those departures are described in Section 5K2.0 of the guidelines.

Specifically, the guidelines suggest that a court may impose a sentence outside the guidelines' range where "'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[.]'" U.S.S.G. 5K2.0 (quoting 18 U.S.C. 3553(b)). The guidelines provide a *partial* list of factors which a court may use to decide whether a departure is appropriate. U.S.S.G. 5K2.1 - 5K2.18.[3] In addition to these listed factors, a court may also consider other characteristics "if [they are] present to an unusual degree and distinguish [a case] from the 'heartland' of cases covered by the guidelines[.]" U.S.S.G. 5K2.0. The "'heartland' [is] a set of typical cases embodying the conduct that each guideline describes." *Id.* at ch. 1, pt. A. A case falls outside the heartland where the "particular guideline linguistically applies but where conduct [of the specific case] significantly differs from the norm[.]" *Id.* In such cases, a court is free to depart from the guidelines. *Id.*

In *Koon*, the Supreme Court assisted defendants seeking a downward departure. Among other things, the Court provided sentencing judges with an analytical framework for addressing departure issues. In the money-laundering context, Judge Biery, in *United States v. Bart*, 973 F.Supp. 691, 693 (W.D. Tex. 1997),[4] provided an excellent distillation of *Koon*'s principles for determining whether a departure from the guidelines is appropriate:

1. Whether the "features of [the] case, potentially, take it out of the 'heartland' and make of it a special, or unusual, case[.]" *Koon*, 116 S. Ct. at 2045.

2. Whether the commission has "forbidden departures based on those features[.]" *Id.* If the factor is forbidden, "the sentencing court cannot use it as a basis for departure."[5] *Id.*

3. Whether "the commission has encouraged departures based on those features[.]"*Id.* If the factor is encouraged by the commission, "the court is authorized to depart if the applicable guideline does not already take it into account."[6] *Id.* Where the guideline does account for this factor, the court may still depart from the guidelines if the factor is "present to an exceptional degree or [it] in some other way makes the case different from the ordinary case where the factor is present."*Id.*

4. Whether the "Commission discouraged departures based on those features[.]"[7] *Id.* If the factor is discouraged by the commission, the court may depart from the guidelines if, as in #3 above, it is present to an exceptional degree or the case is extraordinary from the usual case where the factor is present. *Id.*

5. Finally, if the court determines that a factor is present in the case which is unmentioned in the guidelines, it must consider "the 'structure and theory of both relevant individual guidelines and the guidelines taken as a whole [to] decide whether it is sufficient to take the case out of the guideline's heartland." *Id.* (citation omitted).

As part of the 1998 amendment cycle, the Sentencing Commission passed an amendment to U.S.S.G. 5K2.0 "to incorporate the principal holding and key analytical points" from the decision in *Koon*.[8] That amendment likely will take effect on November 1, 1998.

Departures in Money-Laundering Cases

Since the Supreme Court's holding in *Koon*, several courts have addressed the availability of downward departures in money-laundering cases. Any practitioner representing a client facing sentencing in a money-laundering case would be well advised to be familiar with several key cases: *United States v. Walters*, 87 F.3d 663 (5th Cir.), (affirming district court's downward departure; under 5K2.0, district court could depart where defendant received no personal benefit); *United States v. Skinner*, 946 F.2d 176 (2d Cir. 1991) (reversing district court's finding that it did not have the authority to depart downward; under 5K2.0, lower court should have considered whether the small amount of the proceeds and the "de

minimis" nature of the "promotion" took the case out of the money-laundering heartland); *cert. denied*, 117 S. Ct. 498 (1996); *United States v. Gamez*, 1 F. Supp. 176, (E.D.N.Y. 1998) (Following *Skinner* and departing downward under 5K2.0, where defendants as part of their automobile brokerage business exported cars to Columbia in exchange for cash, because of the limited proceeds and relatively small scale of the operation; court applied the structuring guideline, 2S1.3, instead); *United States v. Ferrouillet*, No. CRIM.A.96-198, 1997 WL 266627 (E.D. La. May 20, 1997) (departing downward under 5K2.0 in FECA case because money-laundering heartland does not include illegal campaign contribution; instead, court used the fraud guideline as a basis for imposing sentence); *United States v. Bart*, 973 F. Supp. 691 (W.D. Tex. 1997) (departing downward in 1957 case arising from fraudulent manipulation of purchase orders related to the Israeli military program, pursuant to 5K2.0, based on case being outside of the money-laundering heartland); and *United States v. Caba*, 911 F. Supp. 630 (E.D.N.Y.) (departing downward in 1956 case arising from scheme involving the use of food stamps for prohibited purposes, pursuant to 5K2.0, because the case fell outside of the money-laundering heartland; the court used the fraud guidelines for determining the appropriate sentence), *aff'd* 104 F.3d 354 (2d Cir. 1996) (table).

These cases provide a number of arguments which may apply in seeking a downward departure in a variety of money-laundering cases. District courts that have granted such 5K2.0 departures rely upon the primary argument that the "garden variety" criminal cases being brought under 18 U.S.C. 1956 and 1957 were not the types of cases which the commission intended the applicable guideline to cover. Rather, the commission, relying upon the legislative history of the money-laundering statutes, drafted guidelines designed to punish individuals who were laundering large amounts of cash from drug sales or other illegal activities for members of "organized crime."

Money-Laundering Cases: Finding a 'Heartland'

The threshold question in the 5K2.0 departure analysis is what constitutes the "heartland" of the offense. In money-laundering cases, the legislative history (behind the statute), the guideline and its supporting commentary, and the Department of Justice's policies and procedures[9] all support the proposition that the heartland in this area is limited to professional money launderers engaging in financial transactions with major drug dealers and organized crime. *See Ferrouillet*, 1997 WL 266627, at 4.

1. The legislative history of the money-laundering statute reflects that Congress intended that these statutes would be used to punish "professional" money launderers who were aiding drug traffickers and organized crime.

Congress enacted the money-laundering statutes, as part of the Anti-Drug Abuse Act of 1986, to "combat the large amounts of money being laundered by the drug trade and organized crime." *See United States v. Bart*, 973 F. Supp. 691, 695

(W.D. Tex. 1997); *see also Ferrouillet*, 1997 WL 26627 at 5 (citing Maura E. Fenningham, Note, A Full Laundering Cycle is Required: Plowing Back the Proceeds to Carry On Crime is Crime Under 18 U.S.C. 1956(a)(1)(A)(i), 70 Notre Dame L. Rev. 891, 893 (1995)).

The congressional debates surrounding the passage of these statutes reflect this fairly narrow and specific legislative intent. *See Ferrouillet*, 1997 WL 266627 at 5; *Bart*, 973 F. Supp. at 695. Senator D'Amato (R-NY), a chief sponsor of the money-laundering statutes, described the need for this law:

> Money-Laundering permits the drug traffickers to evade taxes and to 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 States.

Ferrouillet, *supra*, at 5 (citing Drug Money-laundering; Hearing Before the Senate Comm. on Banking, Housing, and Urban Affairs, 99th Cong., 1st Sess. 7 (1985)). Similarly, Senator Biden (D-DE) noted:

> Money-laundering is a crucial financial underpinning of organized crime and narcotics trafficking. Without [it], drug traffickers would literally drown in cash. . . . [They] need money-laundering to conceal the billions of dollars in cash generated annually in drug sales and to convert [their] cash into manageable form.

Ferrouillet, *supra*, at 5 (citing S. Rep. No. 433, 99th Cong., 2d Sess 4 (1986).[10] *See also* Statements on Introduced Bills and Joint Resolutions, 1986: Proceedings and Debates on the Money-Laundering Crimes Act, 99th Cong., 2d Sess. (Thursday, July 24, 1986), available in WESTLAW, 132 C.R. S96266-04. After reviewing reports related to the Anti-Drug Abuse Act, the Tenth Circuit concluded the purpose behind 18 U.S.C. 1957 was to criminalize the "classic case" of laundering money "where a drug trafficker collects large amounts of cash from drug sales[.]" *United States v. Johnson*, 971 F.2d 562, 568 (10th Cir. 1992).

2. The Sentencing Commission drafted the money-laundering guidelines under the assumption that cases brought under these statutes would reflect the more serious conduct described by Congress.

The Sentencing Commission relied on this legislative history when it drafted the money-laundering guidelines and assumed that prosecutions under Sections 1956 and 1957 would involve the type of serious criminal activity described by legislators. As noted in the commentary to 2S1.1, the guideline provides for "substantial punishment" to comport with "the clear intent of the legislation." U.S.S.G. 2S1.1, comment. (backg'd). *See United States v. Caba*, 911 F. Supp. 630, 635 (E.D.N.Y.) (noting that "the money-laundering guideline was set at a

relatively severe base offense level . . . in order to counteract the illegal drug trade in this country" and that "[t]here is no indication that Congress intended to equate [minor] fraud with drug trafficking or to escalate it to a crime whose sentencing exposure would be a multiple of what [the underlying offense] had been."), *aff'd* 104 F.3d 354 (2d Cir. 1996) (table); *accord Ferrouillet*, *supra*, at 6.

In *United States v. Skinner*, 946 F.2d 176, 179 (2d Cir. 1991), the appellate court remanded for re-sentencing where the lower court had refused to depart downward in a money-laundering case involving a very small amount of proceeds because it believed that it did not have the authority to do so. There, the appellate court noted that the district court possessed the authority to depart, pursuant to 5K2.0, because the money-laundering heartland in "promotion" cases was intended to impose additional punishment on those defendants "who did not merely conceal a serious crime that had already taken place, but encouraged or facilitated the commission of further crimes." *Id*. (citations omitted). The court noted that the "promotion" in that case "was de minimis, because the transactions in reality represented only the completion of the [drug] sale." *Id.* Thus, "the appellants conduct was both atypical of the conduct described by the Sentencing Guidelines and inadequately considered by the Sentencing Commission, thus empowering the district court to consider a downward departure." *Id.* at 180.

In 1992, the Sentencing Commission staff acknowledged that its selection of the high base offense levels was based on the conclusion that the statute "would generally be applied primarily to 'traditional,' and perhaps large-scale, professional money-launderers." United States Sentencing Commis-sion, Money-Laundering Working Group Report, October 14, 1992, at 17.[12]

In 1997, the Sentencing Commission, itself, in a report to Congress on the money-laundering guidelines, noted:

> Without the benefit of either sentencing experience or settled jurisprudence interpreting the new statutes, the commission necessarily based the guideline penalties for money-laundering offenses upon its own understanding of the types of conduct about which Congress was most concerned, and on information from DOJ about how it expected to employ the new laws. The relatively high base offense levels for money-laundering were premised on the commission's anticipation that prosecutions would address "money-laundering activities [which] are essential to the operation of organized crime[.]"

United States Sentencing Commission, Report to the Congress: Sentencing Policy for Money-Laundering Offenses 3-4, September 18, 1997 (footnotes omitted).

The Sentencing Commission in that report noted that many cases in which the money-laundering guidelines have been applied have involved "money-laundering conduct . . . so attenuated as to be virtually unrecognizable as the type of conduct for which the original money-laundering sentencing guidelines were drafted." *Id.* at 6. The report, which constituted a multi-year, detailed study of charging and sentencing practices in money-laundering cases, concluded that "money-laundering sentences are being imposed for a much broader scope of offense conduct, including some conduct that is substantially less serious than the conduct contemplated when the money-laundering guidelines were first formulated." *Id.* at 5.

In light of the large number of cases being brought under the money- laundering statute which were outside of the heartland initially conceived by the Sentencing Commission, the commission in 1995 proposed a "comprehensive rewrite of the principle sentencing guideline for money-laundering offenses." U.S. Sentencing Commission, Report to Congress: Sentencing Policy for Money-Laundering Offenses 2 (1997). The commission sought the rewrite because they originally based the "guideline penalties for money-laundering upon . . . the types of conduct about which Congress was most concerned" when it enacted the money-laundering statutes, and the guidelines were now being used for a much wider range of conduct. *Id.* at 3. Obviously, the Sentencing Commission's attempts here indicate that the heartland of the guideline includes the professional money launderer, not an individual who merely engages in a financial transaction with criminally derived proceeds. *See id.* at 4.

3. The Department of Justice's United States Attorney's Manual *actually supports the more narrow interpretation of the money-laundering heartland.*
The executive branch appears to share the legislative and Sentencing Commission perspectives of the narrow parameters of the money-laundering heartland. "The DOJ *United States Attorney's Manual* provides the money-laundering section of the United States Attorney's Office was created to prosecute . . . *only particularly complex and sensitive cases [for money-laundering]*." *Bart*, 973 F. Supp. at 697 (emphasis added). That directive is supposed to "ensure uniform application of the money-laundering statutes." *Id.* DOJ further elucidated this narrow heartland in 1992 when it clarified its policy that it would not prosecute cases where the financial and fraud offenses are so closely connected with the money-laundering statute "that there is no clear delineation between the underlying financial crime and the money-laundering offense." *Id.* (quoting the *United States Attorney's Manual)*. Although the manual may not provide any enforceable rights to criminal defendants, it does support the proposition that the money-laundering heartland includes only the more serious criminal conduct originally referenced by Congress and the Sentencing Commission. *See id.*

4. Even with a "broad" interpretation of the heartland, some crimes are always

beyond the scope of the money-laundering guidelines.
Even if a court accepts the proposition that the heartland of money- laundering cases is broader than the type of conduct described in the legislative history, the scope of the heartland is not limitless. Certain cases would stretch even the most conservative jurist's tolerance for prosecutorial discretion.

While a broad reading of the money-laundering statutes could encompass a wide latitude of underlying conduct, certain cases do not fall within even the widest penumbra of possible money-laundering heartlands. In one case, the court rejected application of the money-laundering statutes for Federal Election Campaign Act (FECA) violations. While this exception is so narrow that it might otherwise avoid mention, it is noteworthy for the rationale the court expressed for when the money-laundering prosecutions fall outside of the heartland *See Ferrouillet*, *supra*, at 10. "The combination of legislative history, the statistical evidence [regarding the types of underlying conduct serving as the basis for money-laundering prosecutions], the lack of other FECA cases prosecuted under the money-laundering statutes as well as the DOJ manual" convinced the court that FECA cases fell outside the heartland. *Id.* The court also noted that "the laundering . . . was not done to legitimize a stream of illegal income into the mainstream economy. Rather, the money-laundering was done solely to conceal the source of a corporate check. Second, the source of the money was corporate funds, not some underlying criminal activity." *Id.*

An Over-Broad Application Will Mean Disproportionate Sentences for Similar Criminal Conduct
An independent ground for seeking a 5K2.0 downward departure in money-laundering cases may exist where a defendant is exposed to a sentence which is disproportionate to the sentence for the underlying conduct, particularly where a co-defendant or co-conspirator has pleaded guilty to a non-money-laundering offense.

In such cases, counsel should consider the possibility of a downward departure motion. As the Sentencing Commission noted in its 1997 report, the high base offense levels in money-laundering cases, coupled with the fact that they "were not tethered to any guideline measurement for the underlying crime's seriousness," have created a system where punishment for money-laundering offenses may be totally disproportionate to the sentence applicable to the underlying crime. United States Sentencing Commission, Report to Congress: Sentencing Policy for Money-Laundering Offenses 4 (1997). As an example, for minor fraud, "sentences for money-laundering offenses [are] substantially greater than those for [the] crimes that produced the proceeds[.]" *Id.* Thus, the guidelines make possible a situation where a person who actually defrauds or embezzles may be sentenced under the more lenient fraud or theft guidelines, but the person who merely engaged in a financial transaction with the proceeds of that crime is subject to the far more substantial money-laundering guidelines.

See, e.g., *Ferrouillet*, *supra*, at 11 (citations omitted). In *Bart*, the court implicitly noted the authority for a 5K2.0 departure in such cases when it held that "the guidelines do not take these government charging choices into account." *Bart*, 973 F. Supp. at 698 (citing *Koon*, 116 S. Ct. at 2044). The court further noted that "if a case has features which would result in irrationality if the guideline sentence was applied, the case is outside the normative heartland and departure is warranted." *Id.* (Citing Paul J. Hofer, Discretion to Depart after *Koon v. United States*, 9 Fed. Sent. Rep. 11 (July/August 1996)).

A Downward Departure Is Available Where the Money-Laundering Guidelines Overstate the Seriousness of the Defendant's Conduct

The Fifth Circuit in *United States v. Walters*, 87 F.3d 663 (5th Cir.), *cert. denied*, 117 S. Ct. 498 (1996), affirmed a downward departure in a money-laundering case because the defendant received no proceeds from the commission of the crime, and the guidelines therefore overstated the seriousness of the defendant's involvement. *Id.* at 671-72. The implications of this case are significant for the defense.

First, *Walters* stands for the proposition that, after *Koon*, district courts have the authority to order a 5K2.0 departure in any case where the money-laundering guideline calculation overstates the seriousness of the defendant's conduct. *Id.* This holding is particularly remarkable because unlike the fraud guidelines, 2F1.1, comment (n. 10), there is no express provision inviting a downward departure on such grounds in the money-laundering guideline.[13]

Second, the holding in *Walters* serves to buttress any of the other 5K2.0 departures suggested in this article. That is, even if a district court does not find that the money-laundering heartland is so narrow as to exclude your client's conduct, it may still find that a *Walters* 5K2.0 departure is appropriate. Certainly, the legislative, Sentencing Commission, and Department of Justice perspectives on the types of cases for which the guideline was designed support the more general argument that the severe offense levels in the money-laundering guidelines serve to overstate the seriousness of the defendant's conduct where that conduct is little more than the underlying predicate act.

Much Needed Amendment

In *Bart*, *Caba*, and *Ferrioullet*, the district courts found that the conduct at issue in each case was not the type of "money-laundering" initially envisioned when the Sentencing Commission set such high offense levels. While the commentary to the guideline and the legislative history always provided support for the type of 5K2.0 departure suggested in this article, recent events, including the commission's 1995 attempted amendment of 2S1.1 and 2S1.2, and the 1997 Sentencing Commission report, have significantly strengthened the argument for defense counsel. Hopefully, a ground-swell of departures will cause the government to alter its charging practices in many of these money-laundering

cases and, possibly, foster passage of the much needed guideline amendment.

Notes

1. For purposes of simplicity, this will be referred to as a 5K2.0 departure.

2. There are countless cases which illustrate that money- laundering sentences have been imposed in circumstances in which the financial transaction was merely part and parcel of the underlying criminal activity. *See, e.g.*, United States v. Paramo, 998 F.2d 1212 (3d Cir. 1995) (cashing of fraudulently obtaining IRS refund check constituted "promotion" because spending proceeds of check promoted the antecedent fraud), *cert. denied*, 114 S. Ct. 1076 (1994); United States v. Montoya, 942 F.2d 1068 (9th Cir. 1991) (deposit of bribe check into bank account constituted "promotion" of the underlying criminal activity), *cert. denied*, 116 S. Ct. 82 (1995); United States v. Sutera, 933 F.2d 641 (8th Cir. 1991) (deposit of three checks which were gambling proceeds into business bank account, which bore the name of its owner, constituted "concealment").

3. Of this section, subparts 5K2.10, 5K2.11, 5K2.12, 5K2.13, 5K2.14, 5K2.15, and 5K2.16 deal with downward departures. The other subparts of this section pertain to upward departures.

4. The salient portions of Judge Biery's opinion in *Bart* were published in this column in the December 1997 issue of The Champion. It is noteworthy that the court's opinion relied on an article written by NACDL member Larry Allen Nathans, previously published in this column in the July 1997 issue of The Champion. *See Bart*, 973 F. Supp. at 697.

5. "Departures based upon race, sex, national origin, creed, religion, socio-economic status, U.S.S.G. 5H1.10; lack of guidance as a youth, U.S.S.G. 5H1.12; drug or alcohol dependence, U.S.S.G. 5H1.4; and economic hardship U.S.S.G. 5K2.12; are forbidden." *See Bart*, 973 F. Supp. at 694 n. 1.

6. "The guidelines list a number of factors which encourage a downward departure including: (1) no intent to injure or kill, U.S.S.G. 5K2.1, 5K2.2(2); (2) victim's wrongful conduct significantly provoked the offense, U.S.S.G. 5K2.10; (3) offense committed to avoid perceived greater harm, U.S.S.G. 5K2.11; (4) coercion or duress, even if insufficient to constitute a complete defense, U.S.S.G. 5K2.12; and (5) diminished capacity not resulting from the use of intoxicants, U.S.S.G. 5K2.13." *See Bart*, 973 F. Supp at 694. Arguably, 5K2.11 encourages departures in these cases because the charged conduct does not "cause or threaten the harm or evil sought to be prevented by the law proscribing the offense at issue."

7. "Discouraged factors include the defendant's family ties and responsibilities, U.S.S.G. 5H1.6; his or her education or vocational skills, U.S.S.G. 5H1.2; and his

or her military, civic, charitable or public service record, U.S.S.G. 5H1.11." *See Bart*, 973 F. Supp. at 694.

8. This was submitted to Congress on May 1, 1998, as Amendment #10. *See* 63 Fed. Reg. 28202, 28208 (1998).

9. In his concurrence in *Koon*, Justice Breyer relied on these same kinds of factors in determining the heartland of the offense at issue in that case. *See Koon*, 116 S. Ct. at 2056.

10. "Another Senator remarked that 'without the means to launder money, thereby making cash derived from a criminal enterprise appear to come from a legitimate source, organized crime could not flourish as it now does.'" *Ferrouillet*, 1997 WL 266627, at 5 (citing money- laundering: hearing before the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. 30 (1985)).

11. Relying on *Skinner* and *Koon*, Judge Weinstein departed downward in a money- laundering case "because of the limited proceeds and relatively small scale of the defendants' operation." *Gamez*, 1 F. Supp. 2d at 183. There, the defendants were automobile salesman who started a business which involved selling cars for exportation to Colombia in exchange for cash payments. Although the defendants conceded that they knew that much of the cash that they were receiving was from an illegal source, they claimed, and the court accepted, that they did not know that the funds represented drug money. *Id.* at 179-80. In fashioning its departure, the court noted that the defendants conduct was much more akin to structuring than to money-laundering, and it thus relied upon 2S1.3, rather than 2S1.1, as a baseline for its guideline calculation (although the court departed downward even further in light of the particular individual circumstances of the defendants). *Id.* at 183.

12. The Working Group's conclusion in this regard is cited in *Ferrouillet*, *supra*, at 6.

13. In fact, it was the fraud commentary that the district court in *Walters* relied upon as the legal basis for the downward departure. The Fifth Circuit held that it did not have to address that potential error since the district court would have had the same authority under 5K2.0, and it was apparent that the district court would have imposed the same sentence irrespective of any legal error. *Walters*, 87 F.3d at 671-72.

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