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Grouping Fraud and Money Laundering Under the Federal Sentencing Guidelines: The Need for Uniformity and Proportionality

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Grouping Fraud and Money Laundering Under the Federal Sentencing Guidelines: The Need for Uniformity and Proportionality

Christopher J. Fernandez*

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I. Introduction

This Note considers the sentencing of two imaginary defendants, Jeff Smith and Patty Brown, to illustrate the developing circuit split on the issue of grouping fraud and money laundering counts. Prior to their arrest, both individuals were misguided entrepreneurs who were using a get-rich-quick scheme devised by a mutual friend. Although the get-rich-quick scheme

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promised a large return, it required a healthy amount of deceitful marketing and mail fraud to separate the potential investors from their hard earned cash. The scheme involved placing advertisements in newspapers that promised investors a large return for a \$10,000 investment in a growing internet company. In reality, there was no investment; it was merely a ponzi scheme.¹ Despite the criminal nature of the scheme, Smith and Brown decided to take their chances and participate. Smith went to New York to implement his scheme. Brown started her scheme in Virginia.

Although both Smith and Brown found many willing investors, their individual successes were short-lived. Police arrested the defendants, but only after each had defrauded fifty victims of \$10,000 a piece. Federal district courts in different jurisdictions convicted Smith and Brown for their respective fraudulent schemes under 18 U.S.C. § 1341.² Additionally, the courts convicted the defendants of money laundering under 18 U.S.C. § 1956(a)(1)(B).³ At sentencing, both courts calculated the amount of money fraudulently obtained and the amount of money laundered as \$500,000.

Though their circumstances were identical, there was one critical difference – the location of their sentencing. The Federal District Court in Albany, New York sentenced defendant Smith; the Federal District Court in Richmond, Virginia sentenced defendant Brown. Because Smith and Brown were convicted and sentenced in different locations, they received different sentences for committing identical crimes.

Initially, Smith's and Brown's sentencing calculations looked identical, and both courts used the same initial guidelines calculations. First, the courts determined the offense level for the mail fraud count under *U.S. Sentencing Guidelines Manual* § 2F1.1 (USSG § 2F1.1 or § 2F1.1).⁴ The base offense

1. A ponzi or pyramid scheme is a fraudulent investment scheme in which no real investment exists. See WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 914 (Frederick C. Mish et al. eds. 1987) (defining ponzi scheme as "an investment swindle in which some early investors are paid off with money put up by later ones in order to encourage more and bigger risks"). The individual who runs such a scheme uses the cash from new investors to pay "dividends" to previous investors, thus creating the illusion of a profitable investment. See *United States v. Mullens*, 65 F.3d 1560, 1563 (11th Cir. 1995) ("As with the typical ponzi scheme, [the defendant] used some of the contributions from later investors to pay off returns promised to earlier investors, thus perpetuating the scheme by leading investors to believe [the investment] was . . . successful, profitable enterprise."). At the same time, the individual who runs the scheme takes cash out of the scheme for personal use. See *id.* ("[The defendant] spent some of the fraudulently acquired money on symbols of success, such as an airplane, fictional glossy brochures, staffed offices, and a country club membership."). When new investors become scarce, the scheme collapses, and the investors lose their money.

2. 18 U.S.C. § 1341 (Supp. 1999).

3. *Id.* § 1956(a)(1)(B).

4. U.S. SENTENCING GUIDELINES MANUAL § 2F1.1 (1999) [hereinafter USSG] (stating that § 2F1.1 applies to counts of fraud).

level was 6.⁵ The specific offense characteristic of \$500,000 increased the offense level by 10 to 16.⁶ Because both Smith's and Brown's schemes involved multiple victims and mass marketing, § 2F1.1(b)(2)-(3) increased the offense level by 4.⁷ The resulting final offense level for the mail fraud count was 20.

Similarly, the courts determined that the base offense level for the money laundering acts was 20 under § 2S1.1.⁸ The specific offense characteristic of \$500,000 increased the offense level by 3.⁹ The resulting final offense level for the money laundering count was 23.

At this point, the courts looked to the grouping rules of § 3D to determine the final combined offense level of the counts.¹⁰ First, the courts turned to § 3D1.1, which sets out the procedures to follow when a court has convicted a defendant of more than one criminal count.¹¹ The courts grouped closely related counts by applying § 3D1.2.¹² The courts then determined the offense level applicable to each Group by applying § 3D1.3.¹³ Finally, the courts turned to § 3D1.4 to compute the final combined offense level.¹⁴ The final combined offense level, along with the defendant's criminal history category, determines the guideline sentencing range.¹⁵ At this critical juncture, the two courts proceeded differently.

In Smith's case, the district court in New York followed Second Circuit precedent¹⁶ and sentenced Smith accordingly. Second Circuit courts do not

5. See *id.* § 2F1.1(a) (setting base offense level at 6).

6. See *id.* § 2F1.1(b)(1) (stating increases in offense level corresponding to amount of monetary loss).

7. See *id.* §§ 2F1.1(b)(2)-(3) (providing two-level increase for scheme to defraud more than one victim and two-level increase for use of mass-marketing).

8. See *id.* § 2S1.1(a)(2) (setting base offense level at 20).

9. See *id.* § 2S1.1(b)(2) (stating increases in offense level corresponding to specific offense characteristic of amount of monetary loss).

10. See *id.* §§ 3D1.1-1.4 (providing rules for grouping and calculating total combined offense level for multiple counts).

11. See *id.* § 3D1.1 (stating procedure for determining final combined offense level for conviction on multiple counts).

12. See *id.* § 3D1.2 (stating that "counts involving substantially the same harm shall be grouped together into a single Group").

13. See *id.* § 3D1.3 (stating procedure to determine offense level for Group of closely related counts).

14. See *id.* § 3D1.4 (stating procedure to determine final combined offense level).

15. See *id.* § 5A (providing sentencing table).

16. See *United States v. Napoli*, 179 F.3d 1, 7 (2d Cir. 1999) (concluding that grouping of fraud and money laundering counts is inappropriate). For a detailed examination of *Napoli*, see *infra* Part II.A.

group together fraud counts and money laundering counts,¹⁷ but instead consider the mail fraud count and the money laundering count as two distinct Groups.¹⁸ Consequently, the court that sentenced Smith applied § 3D1.4 to determine the combined offense level of the two Groups.¹⁹ The court first counted as one unit the Group with the higher offense level, the money laundering Group.²⁰ The court then counted the fraud Group as one additional unit because the fraud Group was three levels less serious than the money laundering Group.²¹ The one additional unit increased the offense level of the more serious Group by two levels, resulting in a final combined offense level of 25.²² For a first time offender, the corresponding sentencing range was fifty-seven to seventy-one months.²³

However, the calculation for Brown in Virginia proceeded in a fundamentally different fashion. In the Fourth Circuit, courts group fraud counts and money laundering counts into a single Group under § 3D1.2(d).²⁴ The court determined the offense level of the single Group by applying § 3D1.3(b).²⁵ Thus, the offense level of the Group was the offense level of the most serious count in the Group.²⁶ Because the money laundering count carries the highest

17. See *Napoli*, 179 F.3d at 13 (stating that grouping of fraud and money laundering counts under USSG § 3D1.3(d) is incorrect as matter of law).

18. See USSG § 3D1.1 (1999) (stating that courts shall group counts into distinct Groups of closely related counts); *id.* § 3D1.2(d) (requiring grouping of certain counts to which same guideline applies).

19. See *id.* § 3D1.4 (stating procedure for determining final combined offense level).

20. See *id.* § 3D1.4(a) (stating that Group with highest offense level counts as one unit).

21. See *id.* (stating that each Group from 1 to 4 levels less serious counts as one additional unit).

22. See *id.* § 3D1.4 (stating that two units results in increasing offense level of most serious Group by 2 levels).

23. See *id.* § 5A (providing sentencing table).

24. See *id.* § 3D1.2(d) (stating that counts shall be grouped "[w]hen the offense level is determined largely on the basis of the total amount of harm or loss"). Fourth Circuit courts group fraud and money laundering counts when both offenses were part of a common scheme. See *United States v. Walker*, 112 F.3d 163, 167 (4th Cir. 1997) (stating that fraud and money laundering are properly grouped under § 3D1.2(d) because money laundering was part of common fraudulent scheme).

25. See USSG § 3D1.3(b) (1999) ("In the case of counts grouped together pursuant to § 3D1.2(d), the offense level applicable to a Group is the offense level corresponding to the aggregated quantity.").

26. *Id.* Because Brown laundered the same \$500,000 that he obtained fraudulently, the aggregated quantity is \$500,000. See *United States v. Walker*, 112 F.3d 163, 166 (4th Cir. 1997) (concluding that aggregated quantity is total amount of money involved in scheme); *United States v. Mullens*, 65 F.3d 1560, 1564 (11th Cir. 1995) (concluding that aggregated quantity is total amount of funds involved in scheme); *cf.* USSG § 3D1.5, *illus.* 2 (1999) (stating that total value of checks is aggregate harm under § 3D1.3(b) for offenses grouped pursuant to

offense level in the Group, the court determined that the total offense level for the single Group was 23. For Brown, a first time offender, the resulting sentence was forty-six to fifty-seven months.²⁷

At first blush, the result that follows from the sentencing courts' different grouping decisions seems rather insignificant. The difference in the final offense level is only 2 levels.²⁸ However, the two-level difference results in a sentencing disparity of up to fourteen months.²⁹ Thus, Smith faces a sentence that is potentially more than a full year longer than Brown, even though the two defendants committed identical offenses.³⁰

As the preceding hypothetical illustrates, something is disturbingly wrong with a sentencing system that produces such a result. However, the purpose of this Note is not to declare that the Federal Sentencing Guidelines (Sentencing Guidelines or Guidelines) are somehow fatally flawed. The purpose of this Note is twofold. First, this Note illustrates why the United States Sentencing Commission (Sentencing Commission) and Congress ought to address the circuit split involving the grouping of fraud and money laundering counts.³¹ Second, this Note reconciles the views of the courts of appeals and proposes a solution that comports with the stated purposes and underlying policies of the Sentencing Guidelines.³² This Note proposes a solution that eliminates the grouping decision from fraud and money laundering cases, yet still provides incremental punishment for significant additional criminal conduct.³³

§ 3D1.2(d)). *But see* United States v. Napoli, 179 F.3d 1, 12 (2d Cir. 1999) (stating that if defendant obtained \$1.6 million by fraud and laundered \$1.3 million of this money, aggregate harm is \$2.9 million); United States v. O'Kane, 155 F.3d 969, 973 (8th Cir. 1998) (stating that defendant who obtained \$304,667 by fraud and launders only \$73,562 "would be punished for laundering the total sum of \$378,229.50").

27. *See* USSG § 5A (1999) (providing sentencing table).

28. *Compare supra* note 22 and accompanying text (stating that final offense level in Second Circuit is 25), *with supra* notes 26-27 and accompanying text (stating that final offense level in Fourth Circuit is 23).

29. *Compare supra* note 23 and accompanying text (stating that sentencing range is fifty-seven to seventy-one months), *with supra* note 27 and accompanying text (stating that sentencing range is forty-six to fifty-seven months).

30. At this juncture, it is interesting to note that if the prosecution had sought only the fraud counts and had not charged the defendants with money laundering, the resulting sentences would be thirty-three to forty-one months, an even lesser sentence. *See* USSG § 5A (1999) (providing sentencing table).

31. *See infra* note 227 and accompanying text (stating that solution is necessary to cure problem of sentencing disparity when money laundering is charged in addition to fraud offense).

32. *See infra* notes 227-43 and accompanying text (providing solution to grouping issue).

33. *See* USSG ch.3, pt. D, introductory cmt. (1999) ("The rules in this Part seek to provide incremental punishment or significant additional criminal conduct."); *infra* Part V.A (proposing solution to question of whether to group fraud and money laundering counts).

Part II of this Note explores the reasoning of the competing United States Courts of Appeals (circuits) that has led to the current split.³⁴ Part II analyzes in some detail one principal case from each of the competing circuits.³⁵ Part III of this Note discusses the impact of the decision to charge money laundering in addition to fraud and concludes that the solution to the grouping split must also address the problems caused by structure of the money laundering guideline.³⁶ Part IV partially reconciles the differences of the competing circuits by analyzing the competing policy interests announced by the Courts of Appeals and comparing these policies with the policies that underpin the Federal Sentencing Guidelines.³⁷ Part V proposes a solution that alters the money laundering guideline so that money laundering's base offense level is that of the underlying offense.³⁸ The solution eliminates the circuit split and furthers the goals of the Sentencing Guidelines.³⁹ Part V also analyzes the effects of the proposed solution on the hypothetical defendants.⁴⁰ Part VI of this Note argues that Congress should take action to reform the money laundering guideline, thus resolving the circuit split.⁴¹

II. Exploring the Reasoning of the Circuit Courts

A. Circuits that Do Not Group Fraud and Money Laundering

The Second Circuit's decision in *United States v. Napoli*⁴² is illustrative of the reasoning of the circuits that do not group fraud and money laundering counts.⁴³ The *Napoli* court made several key points that are common among

34. See *infra* Part II (exploring reasoning of circuits that group and circuits that do not group).

35. See *infra* Part II (analyzing case from each of competing circuits).

36. See *infra* Part III (discussing impact of decision to charge money laundering in addition to fraud).

37. See *infra* Part IV (analyzing competing policy interests of courts of appeals and of Federal Sentencing Guidelines).

38. See *infra* Part V.A (proposing solution).

39. See *infra* Part V.A (proposing solution).

40. See *infra* Part V (analyzing effects of solution on hypothetical defendants).

41. See *infra* Part VI (stating conclusion).

42. 179 F.3d 1 (2d Cir. 1999).

43. See *United States v. Napoli*, 179 F.3d 1, 6 (2d Cir. 1999) (holding that district court was correct to "calculate Napoli's sentence on the basis of separate groups for his fraud and money laundering counts"). In *Napoli*, the Second Circuit considered whether to group fraud and money laundering counts. *Id.* at 6-13. First, the court decided that grouping under USSG § 3D1.2(b) was inappropriate because fraud and money laundering harm different victims. *Id.* at 7-8. Next, the court rejected grouping under USSG § 3D1.2(d). *Id.* at 8-13. The court reasoned that fraud and money laundering counts are not of the same general type because the offense level for fraud is based primarily on the amount of money involved, while the offense level for money laundering is based primarily on the base offense level. *Id.* at 10-11. Further-

the nongrouping circuits.⁴⁴ First, the *Napoli* court concluded that fraud and money laundering harm different victims.⁴⁵ Second, the court found that the total offense level for fraud is based primarily on the total amount of money involved, while the total offense level for money laundering is based primarily on the base offense level.⁴⁶ Third, the court decided that fraud and money laundering counts are not of the same general type because they "translate

more, the court reasoned that the fraud and money laundering guidelines translate the money involved in the particular offense "into specific offense level increases at different rates, and at different monetary division points." *Id.* at 11-12. Finally, the court asserted that "grouping fraud and money laundering counts would produce an anomalous result" in certain cases. *Id.* at 12. In cases in which the defendant launders only a small portion of the fraudulent proceeds, grouping would make the total combined offense level higher than if the counts were not grouped. *Id.* Consequently, the *Napoli* court held that the fraud and money laundering counts "should not be grouped together under subsection (d)." *Id.* at 13.

44. See, e.g., *United States v. Hanley*, 190 F.3d 1017, 1034 (9th Cir. 1999) (concluding that grouping is inappropriate under § 3D1.2(d) because fraud and money laundering measure harm differently); *United States v. O'Kane*, 155 F.3d 969, 974 (8th Cir. 1998) (stating that grouping under § 3D1.2(d) is not appropriate because money laundering has eleven-point higher base offense level than fraud); *United States v. Hildebrand*, 152 F.3d 756, 763 (8th Cir. 1998) (stating that fraud and money laundering counts are not closely related); *United States v. Kneeland*, 148 F.3d 6, 16 (1st Cir. 1998) ("Without making any determination as to whether there are situations in which the offense level for money laundering might be based on the total loss, we are persuaded in this case at least, the offense level for money laundering . . . does not fall within the purview of subsection (d)."); *United States v. Calozza*, 125 F.3d 687, 694 (9th Cir. 1997) (Brewster, J., dissenting) ("Because these two count groups do not involve substantially the same harm, they are treated as separate count groups."); *United States v. Kunzman*, 54 F.3d 1522, 1531 (10th Cir. 1995) (finding grouping of fraud and money laundering counts improper under § 3D1.2(b) or § 3D1.2(d) because of difference "in the nature and measure of harm resulting from these offenses" and because fraud and money laundering have different victims); *United States v. Lombardi*, 5 F.3d 568, 570 (1st Cir. 1993) (refusing to group under § 3D1.2(b) because "the victim of fraud is the insurance company and the victim of money laundering is society"); *United States v. Johnson*, 971 F.2d 562, 576 (10th Cir. 1992) (concluding that fraud and money laundering should not be grouped because measurement of harm for fraud is fundamentally different than measurement of harm for money laundering). The Eighth Circuit concisely stated its reasoning as follows:

While both measures address the relative scope of the illegal activity, they do not measure the same type of harm. And because the base offense level for money laundering are much higher than the base offense level for fraud, . . . it is wrong to assume that the Sentencing Commission intended to equate the amount of fraud loss with the value of money laundered for every fraudulent scheme that includes some form of money laundering. [F]raud and money laundering counts are not so closely related as to permit loss and value grouping under § 3D1.2(d).

Hildebrand, 152 F.3d at 763.

45. See *Napoli*, 179 F.3d at 6 ("Napoli's fraud and money laundering counts involved different harm to different victims.").

46. See *id.* ("[A]lthough fraud and money laundering both measure their respective harms in part on the amount of money, . . . only the offense level for fraud is based 'primarily' on these quantities.").

monetary values into specific offense level increases at different rates."⁴⁷ Fourth, the court asserted that grouping fraud and money laundering counts produces anomalous results in certain cases.⁴⁸

Napoli's conviction arose out of a scheme to defraud buyers of cigarettes on the black market.⁴⁹ Napoli requested large advance payments from overseas buyers of cigarettes.⁵⁰ However, Napoli had no cigarettes and cashed the buyer's checks without any intention of delivering the cigarettes.⁵¹ Napoli laundered the money by depositing the checks at a casino and, after gambling, pocketed the remaining cash.⁵² The court convicted Napoli of twenty-one counts of money laundering in violation of 18 U.S.C. § 1956(a)(1)(B)⁵³ and nine counts of fraud in violation of 18 U.S.C. § 1343,⁵⁴ among other crimes.⁵⁵

As an initial matter, the *Napoli* court rejected grouping under § 3D1.2(b).⁵⁶ The court reasoned that it could not group fraud and money laundering counts because fraud and money laundering harm different victims and § 3D1.2(b) allows for grouping only when the counts involve the same victim.⁵⁷ The victim of fraud is the person who loses money or property as a result of the fraud.⁵⁸ However, the victim of money laundering is society in general because money laundering allows criminals to conceal the source of funds from the

47. *Id.* at 11-12.

48. USSG § 3D1.2 (1999) (stating that "counts . . . shall be grouped together into a single Group . . . [w]hen counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan"); see also *United States v. Napoli*, 179 F.3d 1, 12 (2d Cir. 1999) ("[G]rouping fraud and money laundering counts would produce an anomalous result in an important class of cases.").

49. See *Napoli*, 179 F.3d at 4 (stating that Napoli's scheme was to defraud buyers of cigarettes).

50. See *id.* (stating that Napoli lured buyers into making large deposits).

51. *Id.*

52. *Id.*

53. 18 U.S.C. § 1956(a)(1)(B) (Supp. 1998).

54. *Id.* § 1343.

55. See *Napoli*, 179 F.3d at 3 (stating that Napoli was convicted of twenty-one counts of money laundering and nine counts of wire fraud, among other crimes).

56. See *id.* at 7 (stating that court should not have grouped Napoli's fraud and money laundering counts).

57. See *id.* (stating that § 3D1.2(b) allows for grouping only when counts have same victim); see also USSG § 3D1.2 (1999) ("Counts involve substantially the same harm within the meaning of this rule: . . . [w]hen counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.").

58. See *Napoli*, 179 F.3d at 7 (stating that victims of fraud are those who have lost property as result of fraud).

authorities.⁵⁹ By concluding that fraud and money laundering counts involve different victims, the court decided that grouping under § 3D1.2(b) is never appropriate.⁶⁰

Second, the court addressed the possibility of grouping fraud and money laundering under § 3D1.2(d).⁶¹ Section 3D1.2(d) states as follows:

When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.⁶²

Although at least one circuit has concluded that § 3D1.2(d), like § 3D1.2(b), requires harm to the same victim,⁶³ the *Napoli* court rejected this conclusion by relying on both the plain language of § 3D1.2(d) and the background commentary to § 3D1.2.⁶⁴ The *Napoli* court looked at the language of § 3D1.2(d) and found that, unlike § 3D1.2(a) and § 3D1.2(b), § 3D1.2(d) does not have a same victim requirement.⁶⁵ Furthermore, the background commentary to § 3D1.2 provides that "[c]ounts involving different victims . . . are grouped together only as provided in subsection (c) or (d)."⁶⁶

The *Napoli* court stated that grouping under § 3D1.2(d) "presents a more difficult question,"⁶⁷ but it ultimately decided that grouping fraud and money laundering counts under § 3D1.2(d) is also improper.⁶⁸ The court found grouping under § 3D1.2(d) to be a difficult question because both fraud and money laundering measure harm in monetary terms.⁶⁹ The court, however,

59. See *id.* at 7-8 ("The victim of money laundering is, by contrast, ordinarily society at large.").

60. See *id.* at 8 ("Because we find that *Napoli*'s fraud and money laundering counts involved different harm to different victims, they cannot be grouped under subsection (b).").

61. *Id.*

62. USSG § 3D1.2(d) (1999).

63. See *United States v. Johnson*, 971 F.2d 562, 576 (10th Cir. 1992) (concluding that because fraud and money laundering harm different victims and because harm is of different character, grouping under § 3D1.2(d) is inappropriate).

64. See USSG § 3D1.2, cmt. background (1999) ("Counts involving different victims . . . are grouped together only as provided in subsection (c) or (d)."); *United States v. Napoli*, 179 F.3d 1, 9 (2d Cir. 1999) ("It would be wrong to project a same-victim requirement into 3D1.2(d).").

65. See *Napoli*, 179 F.3d at 9 (stating that subsection (d) has no same victim requirement).

66. USSG § 3D1.2, cmt. background (1999).

67. *United States v. Napoli*, 179 F.3d 1, 8 (2d Cir. 1999).

68. *Id.* at 13.

69. See *id.* at 9 ("[B]oth fraud and money laundering measure some part of their respective harms in terms of monetary values.").

seized upon Application Note 6 to § 3D1.2⁷⁰ which states that "[c]ounts involving offenses to which different offense guidelines apply are grouped under subsection (d) if the offenses are of the same general type."⁷¹ To determine if the fraud and money laundering counts are of the same general type, the court first looked at what factor is most determinative of the total offense level of the fraud and money guidelines.⁷² The court observed that the base offense level for money laundering is either 20 or 23 and the maximum increase in the base offense level is 13.⁷³ Thus, the total offense level is based primarily on the base offense level, not the amount of money involved in the laundering count.⁷⁴ Therefore, the court concluded that the amount of money involved is never as important as the base offense level when determining the final offense level under § 2S1.1.⁷⁵ In contrast, the base offense level for fraud is 6, and the maximum increase in offense level is 18.⁷⁶ Because the increase in the offense level under § 2F1.1 is based solely on the amount of money involved⁷⁷ and the increase can be as much as 400%, the court concluded that total offense level is based primarily on the amount of money involved.⁷⁸ Because the final offense level for money laundering is based primarily on the base offense level and the final offense level for fraud is based primarily on the amount of money involved, the court ultimately decided that fraud and money laundering counts are not of the same general type for the purposes of § 3D1.2(d).⁷⁹

70. See *id.* at 10 (stating that Application Note Six to § 3D1.2 provides that courts should group only counts of same general type).

71. USSG § 3D1.2, cmt. n.6 (1999).

72. See *Napoli*, 179 F.3d at 10 (stating that offenses are of same general type if guidelines base offense level primarily on amount of money involved).

73. See USSG § 2S1.1(a)-(b) (1999) (providing base offense level and specific offense characteristics for money laundering).

74. See *United States v. Napoli*, 179 F.3d 1, 11 (2d Cir. 1999) ("[T]he total offense level will be based primarily on the base offense level.").

75. See *id.* ("Thus, even for the largest money laundering scheme, the total offense level will be based primarily on the base offense level, . . . rather than on the amount of money involved.").

76. See USSG § 2F1.1(a)-(b) (1999) (providing base offense level and specific offense characteristics for fraud).

77. See *id.* §2F1.1(b) (1999) (showing increasing offense levels as monetary loss increases).

78. See *United States v. Napoli*, 179 F.3d 1, 11 (2d Cir. 1999) (stating that final offense levels for larceny, fraud, and embezzlement can range from 333% to 450% of base offense level).

79. See *id.* (stating that fraud and money laundering guidelines are not of same general type because only offense level for fraud is based primarily on amount of money involved).

The *Napoli* court also recognized that Application Note 3 to § 3D1.3 could provide valuable guidance.⁸⁰ Application Note 3 to § 3D1.3 states that the guidelines for property offenses of the same general type produce identical offense levels.⁸¹ Looking at the "tables that translate monetary values into specific offense level[s]," for fraud and money laundering,⁸² the court noted that the tables "translate . . . at different rates, and at different monetary division points."⁸³ The court reasoned that this disparity is further proof that the offenses are of a different general type.⁸⁴ Thus, having identified § 3D1.2(d) as the section best suited for the grouping of fraud and money laundering counts, the court ultimately decided that grouping under § 3D1.2(d) is inconsistent with the intent of the Guidelines.⁸⁵

Finally, with regard to the grouping of fraud and money laundering counts in general, the *Napoli* court demonstrated that grouping would produce an anomalous result in certain cases.⁸⁶ The court illustrated the anomaly with a hypothetical in which the defendant fraudulently obtained \$1,000,000 but laundered only \$100,000.⁸⁷ The court demonstrated that if it did not group the counts, then the total offense level for the fraud count would be 19 and the total offense level for the money laundering count would be 20.⁸⁸ Consequently, under § 3D1.4, the total combined offense level for the two groups would be 22.⁸⁹ However, if a court grouped the counts under § 3D1.2(d), the sentence is calculated by applying the amount of the aggregate harm to the money laundering guideline, § 2S1.1.⁹⁰ Applying the \$1.1 million total to the table in

80. See *id.* at 11 (stating that Application Note 3 to § 3D1.3 is relevant).

81. USSG § 3D1.3, cmt. n.3 (1999) ("Note that guidelines for similar property offenses have been coordinated to produce identical offense levels, at least when substantial property losses are involved."); *Napoli*, 179 F.3d at 11 (quoting Application Note 3 to USSG § 3D1.3).

82. See USSG §§ 2F1.1(b), 2S1.1(b) (1999) (providing tables that give increase in offense level in relation to value of funds or loss involved).

83. *United States v. Napoli*, 179 F.3d 1, 11-12 (2d Cir. 1999).

84. See *id.* at 12 ("These facts suggest, once again, that fraud and money laundering counts are not of the same 'general type.'").

85. See *id.* at 10 ("[G]rouping of these two counts was never intended under subsection (d).").

86. See *id.* at 12 (stating that grouping fraud and money laundering counts would produce anomalous results).

87. See *id.* (stating hypothetical).

88. See *id.* (stating that total offense level for fraud count is 29 and for money laundering count is 20).

89. *Id.*

90. See *id.* ("[T]he defendant would receive a total combined offense level that is equal to that of a money laundering charge for \$1,100,000."). The *Napoli* court's determination that \$1,100,000 was the aggregate harm is inconsistent with other circuits. See *United States v.*

§ 2S1.1(b)(2) results in a total combined offense of 25 for the grouped counts, a full 3 points higher than the ungrouped counts.⁹¹ The court stated that grouping "is meant to protect defendants against arbitrary additions resulting from the government's formal charging decision."⁹² Because grouping actually would increase the defendant's sentence in these types of cases, the court concluded that the Sentencing Guidelines must not have contemplated the grouping of fraud and money laundering counts.⁹³

The Second Circuit, in deciding that fraud and money laundering should not be grouped, joined several other circuits that have reached the same conclusion.⁹⁴ However, a split in authority exists on the grouping issue.⁹⁵ Several other circuits have reasoned that fraud and money laundering counts are grouped properly under §3D1.2.⁹⁶

Walker, 112 F.3d 163, 166 (4th Cir. 1997) (concluding that aggregated quantity is total amount of money involved in scheme); *United States v. Mullens*, 65 F.3d 1560, 1564 (11th Cir. 1995) (concluding that aggregated quantity is total amount of funds involved in scheme); *cf.* USSG § 3D1.5, *illus.* 2 (1999) (stating total value of checks is aggregate harm under § 3D1.3(b) for offenses grouped pursuant to § 3D1.2(d)). Using the rule that the aggregate quantity is the total amount of money involved in the scheme would result in a aggregated quantity of \$1,000,000. Thus, the total combined offense level is 24. *See* USSG § 2S1.1(b)(2)(E) (1999) (stating that increase in offense level is 4 where value of laundered funds is greater than \$600,000, but not greater than \$1,000,000).

91. *See United States v. Napoli*, 179 F.3d 1, 12 (2d Cir. 1999) (stating that total offense level is 25, three points higher than if counts are not grouped).

92. *Id.*

93. *See id.* (stating that grouping would defeat policy of grouping rules that protects defendants from arbitrary charging decisions).

94. *See, e.g., United States v. Hanley*, 190 F.3d 1017, 1034 (9th Cir. 1999) (concluding that grouping is inappropriate under § 3D1.2(d) because fraud and money laundering measure harm differently); *United States v. Hildebrand*, 152 F.3d 756, 763 (8th Cir. 1998) (stating that fraud and money laundering counts are not closely related and should not be grouped); *United States v. Kneeland*, 148 F.3d 6, 16 (1st Cir. 1998).

Without making any determination as to whether there are situations in which the offense level for money laundering might be largely determined on the basis of total amount of harm or loss, we are persuaded that, in this case at least, the offense level for money laundering . . . does not fall within the purview of subsection (d).

Id.; *United States v. Calozza*, 125 F.3d 687, 694 (9th Cir. 1997) (Brewster, J., dissenting) (stating that fraud and money laundering counts do not measure same types of harm); *United States v. Kunzman*, 54 F.3d 1522, 1531 (10th Cir. 1995) (same).

95. *See infra* Part II.B (setting forth reasoning of circuits that group fraud and money laundering counts).

96. *See, e.g., United States v. Smith*, 186 F.3d 290, 297 (3d Cir. 1999) (stating that grouping is required under § 3D1.2(b) because fraud and money laundering harmed same victim and all criminal transactions were part of common scheme); *United States v. Walker*, 112 F.3d 163, 167 (4th Cir. 1997) (stating that fraud and money laundering are properly grouped under § 3D1.2(d)); *United States v. Coscarelli* 105 F.3d 984, 989 (5th Cir. 1997) (holding that fraud

B. Circuits that Group Fraud and Money Laundering

The Seventh Circuit's decision in *United States v. Wilson*⁹⁷ is representative of the decisions from the circuits that have chosen to group fraud and money laundering counts.⁹⁸ The *Wilson* court made several key points that are common among the grouping circuits.⁹⁹ First, the court reasoned that there would have been no money to launder but for the fraud; therefore, the two counts were closely related.¹⁰⁰ Second, the court reasoned that money laun-

and money laundering "are to be grouped together [under § 3D1.2(d)] because . . . offenses' base offense levels are determined largely on the total amount of harm or loss"); *United States v. Wilson*, 98 F.3d 281, 285 (7th Cir. 1996) (concluding that fraud and money laundering counts should have been grouped under subsection (d)); *United States v. Mullens*, 65 F.3d 1560, 1564 (11th Cir. 1995) (stating that grouping is proper under § 3D1.2(d) because "[w]ithout the fraud there would have been no funds to launder").

97. 98 F.3d 281 (7th Cir. 1996).

98. See *United States v. Wilson*, 98 F.3d 281, 285 (7th Cir. 1996) (concluding that court should have grouped fraud and money laundering counts). In *Wilson*, the Seventh Circuit considered whether to group counts of fraud and money laundering. *Id.* at 282-84. The fraud and money laundering convictions arose from a ponzi scheme. *Id.* at 282. The defendant told investors that their funds were being invested while, in actuality, the defendant used the funds to pay dividends to previous investors and for his own personal use. *Id.* First, the court identified the "central purpose of this section [§ 3D1.2(d)]" as being "to combine offenses involving closely related counts." *Id.* (quoting *United States v. Mullens*, 65 F.3d 1560, 1564 (11th Cir. 1995)). The court reasoned that fraud and money laundering were closely related in this case because the money laundering served to conceal the money obtained by fraud. *Id.* at 283. The court found that both offenses were integral to the fraudulent scheme. *Id.* Furthermore, because the money laundering perpetuated the fraudulent scheme, the court concluded that both offenses had the same victim. *Id.* at 283-84. Consequently, the court concluded that "fraud and money laundering therefore should have been grouped as indicated by subsection (d)." *Id.* at 284.

99. See, e.g., *United States v. Smith*, 186 F.3d 290, 297 (3d Cir. 1999) (stating that grouping is required under § 3D1.2(b) because fraud and money laundering harmed same victim and all criminal transactions were part of common scheme); *United States v. Emerson*, 128 F.3d 557, 564 (5th Cir. 1997) (stating that fraud and money laundering "counts must be grouped under § 3D1.2(d) because the money laundering served the necessary purpose of concealing the fraud"); *United States v. Walker*, 112 F.3d 163, 167 (4th Cir. 1997) (stating that fraud and money laundering are properly grouped under § 3D1.2(d)); *United States v. Coscarelli*, 105 F.3d 984, 989 (5th Cir. 1997) (holding that fraud and money laundering "are to be grouped together [under § 3D1.2(d)] because . . . the offenses' base offense levels are determined largely on the total amount of harm or loss"); *United States v. Mullens*, 65 F.3d 1560, 1564 (11th Cir. 1995) (stating that grouping is proper under § 3D1.2(d) because "[w]ithout the fraud there would have been no funds to launder"); *United States v. Leonard*, 61 F.3d 1181, 1186 (5th Cir. 1995) (finding that fraud and money laundering have same victim and are properly grouped under § 3D1.2(d) if "the money laundering activities of the defendants perpetuate the underlying crime").

100. See *United States v. Wilson*, 98 F.3d 281, 282-83 (7th Cir. 1996) ("All of the money that Wilson laundered was money defrauded from his investors, so '[w]ithout the fraud there would have been no funds to launder.'" (quoting *United States v. Mullens*, 65 F.3d 1560, 1564 (11th Cir. 1995))).

dering and the fraud are inexorably related when they are integral parts of a single fraudulent scheme.¹⁰¹ Third, the *Wilson* court concluded that fraud and money laundering have the same victim when the money laundering serves to conceal the fraud.¹⁰²

In *Wilson*, the defendant was a security broker who used a ponzi scheme to defraud forty-eight victims of more than three million dollars.¹⁰³ Wilson told investors that he was placing their funds in certificates of deposit, annuities, and mutual funds.¹⁰⁴ Wilson, however, deposited the money into his personal checking account and used the money for his personal expenses and to pay interest and dividends to other investors.¹⁰⁵ After he was discovered, Wilson pled guilty to mail fraud and money laundering charges.¹⁰⁶

At sentencing, the fraud charge and the money laundering charges each produced a total offense level of 23.¹⁰⁷ Because the district court did not group the fraud and money laundering counts, it applied § 3D1.4¹⁰⁸ to arrive at a total combined offense level of 25.¹⁰⁹ Had the district court grouped the fraud and money laundering counts pursuant to § 3D1.2, the total combined offense level would have been 23.¹¹⁰

To begin its analysis, the *Wilson* court identified the "central purpose" of § 3D1.2 as "'to combine the offenses involving closely related counts'"¹¹¹ and asserted that "Wilson's convictions for fraud and money laundering without question meet this criteria."¹¹² The court then proceeded by addressing the several reasons supporting its initial assertion that fraud and money laundering

101. See *id.* at 283-84 ("[T]he money laundering in this case served to perpetuate the very scheme that produced the laundered funds.").

102. See *id.* at 283 ("[T]here is intuitive force to the argument that the victim of the fraud is also the victim of the transaction designed to hide or 'cleanse' the funds of which she was defrauded.").

103. *Id.* at 282.

104. *Id.*

105. *Id.*

106. *Id.*

107. See *id.* ("The charges of mail fraud and of money laundering each produced an offense level of 23 under Guidelines sections 2F1.1 and 2S1.1 respectively.").

108. See USSG § 3D1.4 (1999) (providing for two-level increase in group with highest offense level to achieve total combined offense level of two equally serious Groups). Thus, the total combined offense level for two Groups, each having an offense level of 23, would be 25, rather than 46.

109. See *United States v. Wilson*, 98 F.3d 281, 282 (7th Cir. 1996) (stating that district court did not group counts and that total combined offense level was 25).

110. See *id.* at 284 (stating that court should have grouped pursuant to § 3D1.2(d) and that two-level increase pursuant to § 3D1.4 was erroneous).

111. *Id.* at 282 (quoting *United States v. Mullens*, 65 F.3d 1560, 1564 (11th Cir. 1995)).

112. *Id.*

counts are closely related and, thus, properly grouped under § 3D1.2(d).¹¹³ First, the court reasoned that the laundered money was the same money that the defendant fraudulently obtained from the investors.¹¹⁴ Second, the court recognized that the money laundering was necessary to conceal the fraud and to allow the scheme to continue to operate.¹¹⁵ In other words, the court found that both money laundering and fraud were essential to the success of the underlying fraudulent scheme.¹¹⁶ Third, the court noted that § 3D1.2(d) identifies both fraud and money laundering counts as among those appropriate for grouping.¹¹⁷ The court found that although grouping is not automatic for listed offenses, grouping is appropriate if the offenses are "of the same general type" and the offense level "is determined largely on the basis of total

113. See *id.* at 282-84 (stating reasons why fraud and money laundering counts are closely related); USSG § 3D1.2(d) (providing for grouping of counts "[w]hen the offense level is determined largely on the basis of the total amount of harm or loss, . . . or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior").

114. See *United States v. Wilson*, 98 F.3d 281, 282-83 (7th Cir. 1996) ("[W]ithout the fraud there would have been no funds to launder." (quoting *United States v. Mullens*, 65 F.3d 1560, 1564 (11th Cir. 1995))). The *Wilson* court based its reasoning on *Mullens*. *Id.* at 282-83. In *Mullens*, the defendant operated a sham investment corporation that was in reality a ponzi scheme. *United States v. Mullens*, 65 F.3d 1560, 1562 (11th Cir. 1995). After *Mullens* pleaded guilty to fraud and money laundering counts, the district court grouped the counts under § 3D1.2(d). *Id.* at 1563. The *Mullens* court concluded that grouping was proper because fraud and money laundering convictions are closely related. *Id.* at 1563-64. Both the fraud and money laundering counts "were integral cogs in a continuing scheme." *Id.* at 1564. Furthermore, the *Mullens* court recognized that "[w]ithout the fraud there would have been no funds to launder." *Id.*

115. *Wilson*, 98 F.3d at 283.

116. See *id.* ("[B]oth the fraud and money laundering were integral cogs in continuing the scheme." (quoting *United States v. Mullens*, 65 F.3d 1560, 1564 (11th Cir. 1995))).

117. See *id.* (noting that subsection (d) identifies offenses to be grouped under that subsection); see also USSG § 3D1.2(d) (1999) ("Offenses covered by the following guidelines are to be grouped under this subsection."). Courts have construed the language of § 3D1.2 as not requiring grouping of offenses merely because they are on the list of offenses to be grouped despite the "are to be grouped" language of the statute. See *Wilson*, 98 F.3d at 283 ("Grouping may not be automatic for these offenses simply because they are listed."); see also *United States v. Zanghi*, 189 F.3d 71, 85 (1st Cir. 1999) (concluding that counts listed on same row are to be grouped, while counts not on same row may be grouped under § 3D1.2(d)); *United States v. Williams*, 154 F.3d 655, 657 (6th Cir. 1998) (concluding "no automatic grouping of counts simply because those counts are on the 'are to be grouped' list"); *United States v. Kneeland*, 148 F.3d 6, 16 n.4 (1st Cir. 1998) ("That money laundering may be properly grouped [with fraud] under subsection (d) in some situations is apparent from the fact that U.S.S.G. § 2S1.1 is included in the list of offenses, set forth in subsection (d), that may be grouped under this subsection."); *United States v. Taylor*, 984 F.2d 298, 303 (9th Cir. 1993) (stating that grouping of counts under § 3D1.2(d) is "not appropriate when the guidelines measure harm differently").

amount of harm or loss' as subsection (d) envisions."¹¹⁸ Finally, the court rejected the view that fraud and money laundering have different victims.¹¹⁹ Although the court conceded that fraud and money laundering may have different victims when viewed in the abstract, on the facts of this case, the court decided it was best to view the money laundering as harming the victim of the underlying fraud.¹²⁰ Consequently, the court reasoned that when the money laundering serves to perpetuate the fraudulent scheme, the two activities cannot be neatly separated and, thus, harm the same victims.¹²¹

The *Wilson* court's conclusion is typical of the grouping circuits. The grouping circuits tend to conclude that if it is difficult to separate the money laundering from the fraudulent scheme, it is proper to group the fraud and money laundering counts.¹²² Thus, after providing several interrelated reasons, the court concluded that §3D1.2(d) required that the fraud and money laundering counts be grouped.¹²³

The Seventh Circuit's logic in *Wilson* is not fully representative of the reasoning of the grouping circuits. For instance, in *United States v. Emerson*,¹²⁴ the Seventh Circuit concluded that grouping is automatic when a defendant is convicted under the promotion prong of the money laundering statute, 18 U.S.C. § 1956(a)(1)(A)(i).¹²⁵ The *Emerson* court stated that the government

118. *Wilson*, 98 F.3d at 283 (quoting *United States v. Adams*, 74 F.3d 1093, 1102 n. 12 (11th Cir. 1996)). For additional sources that agree with the *Wilson* court, see *supra* note 99.

119. See *Wilson*, 98 F.3d at 283-84 (stating that victim of money laundering is same as victim of fraud).

120. See *id.* ("[T]here is intuitive force to the argument that the victim of the fraud is also a victim of the transaction designed to hide or 'cleanse' the funds of which she was defrauded.").

121. See *id.* (concluding that fraud and money laundering have same victims when money laundering perpetuates underlying fraud).

122. See, e.g., *United States v. Smith*, 186 F.3d 290, 297 (3d Cir. 1999) (stating that grouping is required because "all transactions were connected to the kickback scheme"); *United States v. Powers*, 168 F.3d 741, 752 (5th Cir. 1999) (stating that fraud and money laundering offenses must be grouped because those crimes "involved multiple acts that were linked by a common illegal objective or part of a common scheme"); *United States v. Emerson*, 128 F.3d 557, 566 (7th Cir. 1997) (stating that grouping is required because defendant "embarked upon hid money laundering scheme with the intent of promoting his mail fraud swindle").

123. See *United States v. Wilson*, 98 F.3d 281, 284 (7th Cir. 1996) (stating that fraud and money laundering counts should have been grouped under § 3D1.2(d)).

124. 128 F.3d 557 (7th Cir. 1997).

125. 18 U.S.C. § 1956(a)(A)(i) (Supp. 1999); see also *United States v. Emerson*, 128 F.3d 557, 565 (7th Cir. 1997) (stating that fraud and money laundering charges should be grouped when money laundering conviction is under promotion prong of statute). In *Emerson*, the Seventh Circuit considered whether to group fraud and money laundering counts under § 3D1.2(d). *Id.* at 564-65. In concluding that it must group the fraud and money laundering counts, the court emphasized that it had convicted the defendant under the promotion prong of

must prove that the defendant laundered funds with the intent of promoting the illegal scheme to obtain a conviction under 18 U.S.C. § 1956(a)(1)(A)(1).¹²⁶ Therefore, the *Emerson* court reasoned that the nature of the money laundering charge itself may lead to the conclusion that fraud and money laundering are closely related.¹²⁷ Thus, although the grouping circuits give various reasons for doing so, all of them conclude that courts should group fraud and money laundering counts under § 3D1.2.

III. The Impact of the Decision to Charge Money Laundering

Looking at the development of the money laundering guidelines assists in determining why circuit courts have struggled with the grouping of fraud and money laundering charges.¹²⁸ The money laundering statutes were part of the Anti-Drug Abuse Act of 1986.¹²⁹ Because the United States Sentencing Commission (Sentencing Commission) did not have the benefit of judicial interpretations when it drafted the guidelines for money laundering in 1987, it drafted the guidelines on the premise that they would apply only in limited circumstances, namely when the financial transactions "encouraged or facilitated the commission of further crimes."¹³⁰

the money laundering statute. *Id.* at 565. Because the government proved that the defendant laundered the proceeds of his mail fraud scheme with the intent of promoting that illegal scheme," the counts were closely related. *Id.* Thus, the court concluded that when the government charges a defendant under the promotion prong of the money laundering statute, the underlying fraud counts is properly grouped with money laundering count under § 3D1.2(d). *Id.*

126. See *Emerson*, 128 F.3d at 565 ("[T]he evidence at trial demonstrated that Emerson laundered the proceeds of his mail fraud scheme with the intent of promoting that illegal scheme.").

127. See *id.* (stating that fraud and money laundering charges should be grouped when money laundering conviction is under promotion prong of statute); see also *United States v. Walker*, 112 F.3d 163, 167 (4th Cir. 1997) (finding fraud and money laundering counts closely related). The *Walker* court stated as follows:

Walker's money laundering was part of his fraudulent scheme because the funds were used to make fictitious interest payments. In effect, Walker conceded the offenses were closely related when he pleaded guilty to money laundering under the particular provision of the statute that forbids conducting financial transactions involving the proceeds of a specified unlawful activity with the intent to promote the carrying on of [the] specified unlawful activity.

Walker, 112 F.3d at 167.

128. See USSG § 2S1.1 (1999) (providing money laundering guideline); U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: SENTENCING POLICY FOR MONEY LAUNDERING OFFENSES, INCLUDING COMMENTS ON DEPARTMENT OF JUSTICE REPORT 3-5 (1997) (discussing development and structure of current money laundering sentencing guidelines), available at <http://www.ussc.gov/legist.htm> [hereinafter SENTENCING COMMISSION REPORT] (last visited Apr. 15, 2001).

129. See Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-1818 (1986).

130. SENTENCING COMMISSION REPORT, *supra* note 128, at 3-4 (quoting USSG § 2S1.1, cmt. background).

Not long after the new guidelines had been in place, the Sentencing Commission received numerous negative comments on the operation of the money laundering guidelines.¹³¹ As a result, the Sentencing Commission undertook two studies, one in 1992 and a second in 1995, to focus on two troublesome types of cases including the type of case in which both fraud and money laundering were charged as separate offenses.¹³² The Sentencing Commission found the following:

The Commission's long-term analysis of money laundering cases also demonstrated that the intended relationship between the harm caused and the measurement of the offense seriousness under the money laundering sentencing guidelines has become distorted. Individuals who engaged in essentially the same offense conduct received substantially higher or lower sentences, depending on whether they were charged, convicted, and sentenced under the underlying offense-related statute, or the money laundering statute, or both To illustrate this phenomenon, consider that, under the current sentencing guidelines, a first-time offender who fraudulently obtains \$20,000 of insurance payments and conducts routine financial transactions with the proceeds may be incarcerated for an 8- to 14-month period if charged and sentenced only for mail fraud. In contrast, that same offender would be subject to a 33- to 41-month period of incarceration if charged and sentenced for money laundering.¹³³

The Sentencing Commission also found that sentencing disparities occurred as a matter of course, depending on whether or not money laundering was charged in addition to the fraud count.¹³⁴ The Sentencing Commission found that the decision to charge money laundering in addition to an underlying fraud-related offense would raise the sentence 85 to 95 percent of the time.¹³⁵ This telling statistic may explain why courts have had such a difficult time interpreting the grouping rules when the counts include fraud and money laundering.

In an attempt to remedy the problem of disparate results that occur when money laundering is charged with fraud,¹³⁶ the Sentencing Commission proposed a comprehensive rewrite of § 2S1.1 to Congress in 1995.¹³⁷ These

131. *Id.* at 5.

132. *See id.* (stating that Sentencing Commission reported on sentencing disparity in cases where both fraud and money laundering were charged).

133. *Id.* at 7-8 (footnotes omitted).

134. *Id.* at 8.

135. *Id.*

136. *See id.* (stating that potential for disparate results reinforces need for fundamental revisions).

137. *See* Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25,074, 25,085-86 (1995) (proposed May 10, 1995) (proposing new money laundering guide-

revisions would have tied the money laundering offense level to the offense level of the conduct that produced the funds.¹³⁸ Congress, however, disapproved of the guideline revisions, leaving the money laundering guidelines as they were when first promulgated in 1987.¹³⁹ As a result, the current state of affairs is an environment where disparity and disproportionality result from the inconsistent use of money laundering charges and its inflexible guideline structure.¹⁴⁰

The Third Circuit's decision in *United States v. Smith*¹⁴¹ is an example of the extreme measures to which courts may resort to deal with the harshness of the money laundering guideline as compared to the fraud guideline.¹⁴² Although grouping was not at issue in *Smith*, the opinion represents a judicial backlash against operation of the money laundering guideline in fraud cases.¹⁴³

line). Recently, the Sentencing Commission has again proposed an amendment to USSG § 2S1.1 that closely resembles the 1995 proposed guideline. 66 Fed. Reg. 8012-16 (2001). The amendment is not yet in final form, but the Department of Justice has already voiced its opposition. Unites States Sentencing Commission, 2001 Public Hearing 3 (March 19, 2001), available at <http://www.ussc.gov/hearings/Pubhrng2001.htm> (last visited Apr. 15, 2001). The Department of Justice's concerns are similar to those voiced by the House Judiciary Committee when it disapproved the 1995 amendment. Compare *id.* (stating that proposed guideline would lower sentences for most serious forms of money laundering), with H.R. REP. NO. 104-272, at 4 (1995) ("[S]tiff sentences, which treat the act of money laundering itself as a serious offense should be preserved.").

138. SENTENCING COMMISSION REPORT, *supra* note 128, at 2 (stating that offense level of underlying crime be used as starting point for money laundering offense level).

139. See Federal Sentencing Guidelines, Amendment, Disapproval, Pub. L. 104-38 (1995) (disapproving Sentencing Commission's proposed changes to money laundering guideline); SENTENCING COMMISSION REPORT, *supra* note 128, at 2 (reporting disapproval by Congress in 1995 of Sentencing Commission's proposed amendment affecting money laundering guideline).

140. See SENTENCING COMMISSION REPORT, *supra* note 128, at 9 (stating that inconsistent use of money laundering charges is resulting in sentencing disparity and disproportionality).

141. 186 F.3d 290 (3d Cir. 1999)

142. See *United States v. Smith*, 186 F.3d 290, 300 (3d Cir. 1999) (stating that defendant's behavior was not within "heartland" of money laundering guideline). In *Smith*, the Third Circuit decided that the sentencing court erred in refusing to depart from USSG §§ 3D1.3-1.4. *Id.* at 300. USSG § 3D1.3 instructs the sentencing court to calculate the offense level of a Group using the highest offense level corresponding to a count in the Group. *Id.* at 297. The court reasoned that the money laundering statutes address only serious criminal activity such as significant drug trafficking operations and organized crime. *Id.* at 298-99. Therefore, the court concluded that money laundering activity that occurs incidental to routine fraud cases is outside the "heartland" of the money laundering statute. *Id.* at 300. Consequently, the court decided that "the overarching directive to match the guideline to the offense conduct which formed the basis of the underlying conviction" mandated the court to apply the fraud guideline instead of the money laundering guideline. *Id.* (quoting *United States v. Kuku*, 129 F.3d 1435, 1440 (11th Cir. 1997)).

143. See SENTENCING COMMISSION REPORT, *supra* note 128, at 8 ("Judicial dissatisfaction with the broad reach of the money laundering guidelines has often resulted in a determination that the actual conduct for which the defendant was convicted was outside the 'heartland' of the

Therefore, this Note examines the reasoning of the *Smith* court to better illustrate the sentencing disparity that the money laundering guideline causes.¹⁴⁴ A fuller understanding of the sentencing disparity that the money laundering guideline causes is necessary to construct an effective solution to the grouping split.¹⁴⁵

In *Smith*, the defendant was convicted of participating in an embezzlement and kickback scheme.¹⁴⁶ Defendant Smith worked as a sales representative for a corporation, GTECH, that provided lottery services to a number of states.¹⁴⁷ In the course of seeking lucrative state contracts, GTECH hired consultant companies to help introduce GTECH to influential state politicians.¹⁴⁸ While trying to land contracts in New Jersey and Delaware, Smith used two consulting firms, Benchmark Enterprises, Inc. and Sambucca Consultants, Inc., owned by co-defendants.¹⁴⁹ During this time, Benchmark made a series of kickback payments totaling \$169,500 to Smith, and Smith awarded a contract worth \$10,000 monthly to a third company owned by two co-defendants who did no actual work for GTECH.¹⁵⁰

Smith was convicted on one count of conspiracy to defraud and fifteen counts of money laundering, among other counts.¹⁵¹ The court grouped all of the counts into a single group under § 3D1.2(b) because the counts involved a common criminal objective and the same victim.¹⁵² Neither party challenged the grouping in this case.¹⁵³ However, the defendants challenged the calculation of the final combined offense level under § 3D1.4.¹⁵⁴ The defendants contended that the sentencing court erred when it did not depart from the rule in § 3D1.4 requiring the group's offense level be determined by the count in

money laundering guidelines . . . thereby justifying a substantial downward departure." (footnote omitted)).

144. See *id.* ("[D]isparate sentencing persists as a result of the structure of the current money laundering guidelines.").

145. See *id.* (noting that disparate sentencing persists as result of money laundering guideline, and such disparate sentencing reinforces need for fundamental revisions).

146. See *United States v. Smith*, 186 F.3d 290, 292 (3d Cir. 1999) (stating that multiple defendants were convicted of "charges arising out of an embezzlement/kickback scheme"). For simplicity, this Note focuses on defendant Smith's sentence to illustrate the sentencing disparity between the fraud and money laundering guidelines.

147. *Id.* at 293.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 296-97.

152. See *id.* at 297 (stating grouping was appropriate under § 3D1.2(b)).

153. *Id.*

154. *Id.*

the group with the highest offense level.¹⁵⁵ The district court used the money laundering guideline to calculate the offense level for the single Group and arrived at a total offense level of 25.¹⁵⁶ This guideline choice resulted in a sentencing range of fifty-seven to seventy-one months.¹⁵⁷ Had the district court used the fraud guideline, the offense level would have been 13.¹⁵⁸ Thus, the resulting sentencing range would have been twelve to eighteen months, a difference of at least thirty-nine months.¹⁵⁹

The *Smith* court agreed with the defendants and directed the district court to calculate the final combined offense level of the group using the fraud guideline.¹⁶⁰ The court reasoned that the "heartland" of USSG § 2S1.1 is money laundering activity that is connected with more serious crimes like large-scale drug trafficking.¹⁶¹ Furthermore, the court asserted that applying the money laundering guideline to this case would let "the tail wag the dog."¹⁶² The court reasoned that the "overarching directive to match the guideline to the offense conduct which formed the basis for the underlying conviction" was controlling.¹⁶³ Consequently, the court directed the district court to apply the fraud guidelines instead of the money laundering guideline on resentencing.¹⁶⁴

Thus, the dilemma which courts face is multifaceted.¹⁶⁵ First, courts must grapple with the money laundering charge itself and decide whether the charge reflects the type of conduct that Congress intended to punish.¹⁶⁶ The

155. See *id.* ("[T]he sentencing judge was instructed by USSG § 3D1.4 to use the highest offense level corresponding to the counts in the unit.").

156. See *id.* ("The sentencing judge chose the laundering violation level."); *id.* at 297 n.3 (stating *Smith's* sentence was based on an offense level of 25).

157. *Id.* at 297.

158. See *id.* at 297 n.2 (stating that fraud guideline would have produced offense level of 13).

159. See USSG ch. 5, pt. A (1999) (providing sentencing table). Thirty-nine is the difference between the minimum of the fifty-seven to seventy-one month range and the maximum of the twelve to eighteen month range.

160. See *id.* at 300 ("[W]e direct the use of the fraud guidelines rather than that for money laundering.").

161. See *id.* ("[T]he heartland of U.S.S.G. § 2S1.1 is the money laundering activity connected with extensive drug trafficking and serious crime.").

162. See *id.* (stating that use of money laundering guideline in this case would let "the tail wag the dog").

163. *Id.*

164. *Id.*

165. See *supra* notes 131-35 and accompanying text (describing impact of the charging decision).

166. See SENTENCING COMMISSION REPORT, *supra* note 128, at 11 ("[M]oney laundering charges ' . . . should not be used in cases where the money laundering activity prosecuted is minimal or incidental to the underlying crime.'" (quoting DEPARTMENT OF JUSTICE, REPORT FOR

current money laundering guideline results in arbitrary charging decisions that have too great an effect on the ultimate sentence in fraud cases.¹⁶⁷ Second, courts that find the money laundering charge appropriate must struggle with the grouping decision.¹⁶⁸ Because most courts read the money laundering guideline expansively,¹⁶⁹ the grouping conflict results in a pervasive problem of inconsistent sentences for identical criminal conduct.¹⁷⁰ Therefore, the solution to the problems that arise from sentencing fraud and money laundering counts must address the grouping decision. Additionally, the solution to the grouping split should remedy the adverse effects of the charging decision.

IV. Comparing the Policies of the Sentencing Guidelines with the Policies that Underlie the Decisions of the Circuit Courts

A. The Policies of the Sentencing Guidelines

The policies of the Sentencing Guidelines are threefold.¹⁷¹ First, the Sentencing Guidelines seek to combat crime with a fair and effective sentencing system.¹⁷² This policy statement is of little guidance because notions of fairness and effectiveness are far ranging. The second objective is to seek reasonable uniformity in sentencing for those who commit similar offenses.¹⁷³ The uniformity policy informs the search for a solution to the fraud and money laundering split.¹⁷⁴ Because the split creates sentencing disparity, the unifor-

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167. See SENTENCING COMMISSION REPORT, *supra* note 128, at 7 ("Individuals who engaged in essentially the same offense conduct received substantially higher or lower sentences, depending on whether they were charged, convicted, and sentenced under the underlying offense-related statute, or the money laundering statute, or both.") (footnote omitted).

168. See SENTENCING COMMISSION REPORT, *supra* note 128, at 7 n.16 ("This situation is further complicated by the inconsistent application of the multiple count and grouping guidelines (USSG §§ 3D1.1-3D1.5).").

169. See *id.* at 5 ("One of the most salient conclusions of the Commission's multi-year study was 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.").

170. See *supra* notes 1-30 and accompanying text (illustrating effect of grouping decision on sentencing in fraud and money laundering cases).

171. See USSG ch. 1, pt. A, introductory cmt. (1999) (stating that Congress had three objectives in enacting Sentencing Reform Act of 1984).

172. See *id.* ("The Act's basic objective was to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system.").

173. See *id.* (stating that policy is to seek "reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders").

174. See *United States v. Ferrouillet*, No. 96-198, 1997 WL 266627, at *8 (E.D. La. May 20, 1997) (stating that "[i]nvoking the money laundering statute" in fraud case "could directly

mity policy charges Congress and the Sentencing Commission to resolve divisive split among the circuit courts.¹⁷⁵ Third, the Sentencing Guidelines seek proportionality in sentencing by imposing appropriately more severe sentences for more serious criminal conduct.¹⁷⁶ The current state of affairs in fraud and money laundering cases implicates the proportionality policy.¹⁷⁷ The disparate sentencing of defendants charged with fraud and money laundering casts the proportionality policy into disarray because the impact that the additional money laundering conduct has on the overall sentence varies from jurisdiction to jurisdiction.¹⁷⁸

In addition to the policy objectives that inform analysis of the guidelines as a whole,¹⁷⁹ the Sentencing Guidelines also advance policy justifications for the grouping rules.¹⁸⁰ First, the grouping rules seek to limit the effect that the formal charging decision has on the ultimate sentence by preventing multiple punishment for similar offenses.¹⁸¹ Only offenses that represent additional criminal conduct result in a sentence enhancement.¹⁸² Second, the grouping rules promote the policy of incremental punishment.¹⁸³ Incremental punishment, like proportionality, means that significant criminal conduct, in addition

controvert the . . . objectives of the [Sentencing] Commission, uniformity and proportionality in sentencing").

175. See SENTENCING COMMISSION REPORT, *supra* note 128, at 10 (stating that Sentencing Commission's objective, in part, in reforming money laundering guideline is to avoid sentencing disparity); H.R. REP. NO. 104-272, at 17 (1995) ("[O]ne of the fundamental goals of the Sentencing Reform Act- avoiding unwarranted sentencing disparity for similar offense conduct- has not been achieved to the extend [sic] it should in this area.").

176. See USSG ch. 1, pt. A, introductory cmt. (1999) (stating goal to achieve "proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity").

177. Cf. *supra* notes 156-59 and accompanying text (discussing impact of court choosing money laundering guideline in sentencing fraud and money laundering cases).

178. Cf. SENTENCING COMMISSION REPORT, *supra* note 128, at 2 (stating that purpose of Sentencing Commission's proposed amendment to money laundering guideline was to make penalties "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").

179. See *supra* notes 171-78 (discussing policies of Sentencing Guidelines).

180. See USSG ch. 3, pt. D, introductory cmt. (1999) (stating reasoning behind grouping rules).

181. See *id.* (stating that purpose of grouping rules is "to limit the significance of the formal charging decision and to prevent multiple punishment for substantially identical offense conduct").

182. See *id.* (stating that purpose of grouping rules is to prevent convictions on multiple counts from resulting in "sentence enhancement unless they represent additional conduct that is not otherwise accounted for by the guidelines").

183. See *id.* ("The rules in this Part seek to provide incremental punishment for significant additional criminal conduct.").

to a given offense, increases the sentence over and above the sentence that a court would have imposed for the given offense alone.¹⁸⁴ Third, it is the policy of the grouping rules to group both counts that are interrelated and counts that deal with repetitive or ongoing conduct.¹⁸⁵

The question of whether fraud and money laundering counts are closely related within the meaning of the grouping rules is an argument that is based on policy issues.¹⁸⁶ When courts group criminal counts, the guidelines treat the counts as a single offense.¹⁸⁷ It is clear that the structure of both the money laundering guideline and the fraud guideline allows the Guidelines to deal effectively with repetitive or ongoing behavior.¹⁸⁸ For fraud counts, the structure of the guideline allows for easy treatment of multiple fraud counts because the specific offense characteristic section provides increases in offense level as the amount of monetary loss increases.¹⁸⁹ Similarly, the structure of the money laundering guideline, provides for increasing offense levels as the value of the laundered funds increases.¹⁹⁰ Thus, the challenge that the courts face in making the grouping decision is in determining whether the apparent similarities of two offenses means that they are related within the spirit of the grouping rules.¹⁹¹

A sensible solution to the grouping question must further both the general policy objectives of the Sentencing Guidelines and of the grouping rules.

184. *Id.*

185. *See id.* (stating that closely interrelated counts and counts that deal with ongoing and repetitive behavior are grouped).

186. *Cf. id.* (stating that closely related offenses are grouped).

187. *See id.* (stating that "counts that are grouped together are treated as constituting a single offense for the purposes of the guidelines").

188. *See* USSG § 2F1.1(b)(1) (1999) (providing incremental increases in offense level as value of monetary loss increases); *id.* § 2S1.1(b)(2) (providing incremental increases in offense level as value of laundered funds increases).

189. *See id.* § 2F1.1(b)(1) (providing incremental increases in offense level as value of monetary loss increases).

190. *See id.* § 2S1.1(b)(2) (providing incremental increases in offense level as value of laundered funds increases).

191. *Compare, e.g.,* United States v. Napoli, 179 F.3d 1, 6 (2d Cir. 1999) (concluding that district court was correct to "calculate Napoli's sentence on the basis of separate groups for his fraud and money laundering counts") and United States v. Kunzman, 54 F.3d 1522, 1531 (10th Cir. 1995) (stating that grouping of fraud and money laundering counts is improper under § 3D1.2(b) or § 3D1.2(d) because of difference "in the nature and measure of harm resulting from these offenses" and because fraud and money laundering have different victims), with United States v. Coscarelli, 105 F.3d 984, 989 (5th Cir. 1997) (holding that fraud and money laundering "are to be grouped together [under § 3D1.2(d)] because . . . [these] offenses' base offense levels are determined largely on the total amount of harm or loss") and United States v. Wilson, 98 F.3d 281, 283-84 (7th Cir. 1996) (concluding that fraud and money laundering counts should have been grouped because fraud and money laundering part of same scheme and have same victim).

Furthermore, the solution must consider the policy choices inherent in Congress's decision to disapprove the Sentencing Commission's proposed comprehensive revision to the money laundering guideline in 1995.¹⁹² When it rejected the Sentencing Commission's complete revision to the money laundering guideline, the House Judiciary Committee voiced specific policy concerns.¹⁹³ The Judiciary Committee stated the following:

Prosecutors would be deprived of an important law enforcement tool if the Commission's money laundering amendment took effect. The current money laundering penalties are a critical means of attacking criminal enterprises that engage in a wide variety of illegal activities, and whose very

192. See H.R. REP. NO. 104-272, at 4 (1995) (stating reasons for recommending disapproval of Sentencing Commission's proposed changes to money laundering guideline).

193. See *id.* (stating reasons for recommending disapproval of Sentencing Commission's proposed changes to money laundering guideline); Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25074, 25085-86 (1995) (proposed May 10, 1995) (stating proposed guideline) The proposed guideline reads as follows:

§2S1.1 Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity

(a) Base Offense Level (Apply the greatest):

(1) The offense level for the underlying offense from which the funds were derived, if the defendant committed the underlying offense (or otherwise would be accountable for the commission of the underlying offense under 1.3 (Relevant Conduct)) and the offense level for that offense can be determined; or

(2) [12] plus the number of offense levels from the table in §2F1.1 (Fraud and Deceit) corresponding to the value of the funds, if the defendant knew or believed that the funds were the proceeds of an offense involving the manufacture, importation, or distribution of controlled substances [or listed chemicals; a crime of violence; or an offense involving firearms or explosives, national security, or international terrorism]; or

(3) [8] plus the number of offense levels from the table in §2F1.1 (Fraud and Deceit) corresponding to the value of the funds.

(b) Specific Offense Characteristics

(1) If the defendant knew or believed that (A) the financial or monetary transactions, transfers transportation, or transmissions were designed in whole or in part to conceal or disguise the proceeds of criminal conduct, or (B) the funds were to be used to promote further criminal conduct, increase by 2 levels.

(2) If subsection (b)(1)(A) is applicable and the offense (A) involved placement of funds into, or movement of funds through or from, a company or financial institution outside the United States, or (B) otherwise involved a sophisticated form of money laundering, increase by 2 levels.

Application Notes

....

2. If the defendant is to be sentenced both on a count for an offense from which the funds were derived and on a count under this guideline, the counts will be grouped together under subsection (c) of §3D1.2 (Groups of Closely-Related Counts).

Id.

existence depends on their ability to deposit and launder the proceeds from these activities. Consequently, stiff sentences, which treat the act of money laundering itself as a serious offense, should be preserved.¹⁹⁴

The Judiciary Committee's report makes apparent Congress's desire to provide incremental punishment for the additional money laundering conduct.¹⁹⁵

To understand the effect that the Sentencing Commission's proposed guideline would have had on a typical case involving fraud and money laundering counts, it is best to return to the opening hypothetical.¹⁹⁶ Recall that federal district courts in different jurisdictions convicted Smith and Brown for their respective fraudulent schemes under 18 U.S.C. § 1341.¹⁹⁷ Both courts calculated the amount of money fraudulently obtained at \$500,000. Additionally, the courts convicted the defendants of laundering \$500,000 under 18 U.S.C. § 1956(a)(1)(B).¹⁹⁸ The fraud count yielded an offense level of 20.¹⁹⁹ The Sentencing Commission's disapproved guideline would have used 20 as the base offense level for money laundering.²⁰⁰ The specific offense characteristic of knowledge would have increased the offense level by 2 levels.²⁰¹ The disapproved guideline would have grouped the charges under §3D1.2(b).²⁰² Under § 3D1.3(a), the final offense level for the Group would have been 22.²⁰³ Thus, under the disapproved guideline the final offense level would have been less than that of both the grouping and nongrouping circuits under the current Sentencing Guidelines.²⁰⁴

194. H.R. REP. NO. 104-272, at 4 (1995).

195. *See id.* (stating that money laundering penalties are important tool in combating criminal enterprises); USSG ch. 3, pt. D, introductory cmt. (1999) ("The rules in this Part seek to provide incremental punishment for significant additional criminal conduct.").

196. *See supra* notes 1-30 and accompanying text (describing this Note's hypothetical).

197. 18 U.S.C. § 1341 (Supp. 1999).

198. *Id.* § 1956(a)(1)(B).

199. *See supra* notes 5-7 and accompanying text (showing calculation of offense level for fraud count).

200. *See supra* note 193 (providing disapproved guideline which states that base offense level is "[t]he offense level for the underlying offense from which the funds were derived").

201. *See* 18 U.S.C. § 1956(a)(1)(B) (Supp. 1999) (stating that knowledge is element); Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25074, 25085 (proposed May 10, 1995) (stating that base offense level is "[t]he offense level for the underlying offense from which the funds were derived").

202. *See supra* note 193 (providing disapproved guideline which states that money count is to be grouped with underlying offense).

203. *See* USSG § 3D1.3(a) (1999) (stating that offense level for Group is offense level of most serious count in Group).

204. *See supra* notes 22-28 and accompanying text (stating that final offense level for nongrouping circuit was 25 and final offense level for grouping circuit was 23).

When Congress disapproved the Sentencing Commission's proposed guideline, it was concerned with the guideline's lenity.²⁰⁵ Accordingly, any proposal to change the money laundering guideline must address Congress's desire to provide significant punishment for money laundering offenses.²⁰⁶ Thus, the challenge is to find a solution to the grouping split that reduces the undesirable effects of the charging decision, yet maintains stiff penalties for money laundering offenses, especially those that "obscure the origins of illicit funds" and are associated with drug trafficking or substantial criminal enterprises.²⁰⁷

B. The Policies Furthered by the Nongrouping Circuits

One common theme of the nongrouping circuits is that fraud and money laundering measure different types of harm.²⁰⁸ Some of the nongrouping circuits reason that fraud and money laundering measure different types of harm because fraud and money laundering harm different victims.²⁰⁹ Addi-

205. See H.R. REP. NO. 104-272, at 4 (1995) (stating that "stiff sentences, which treat the act of money laundering itself as a serious offense, should be preserved").

206. See *id.* (stating that "stiff sentences, which treat the act of money laundering itself as a serious offense, should be preserved").

207. SENTENCING COMMISSION REPORT, *supra* note 128, at 10.

208. See, e.g., *United States v. Hanley*, 190 F.3d 1017, 1074 (9th Cir. 1999) (concluding that grouping is inappropriate under § 3D1.2(d) because fraud and money laundering measure harm differently); *United States v. O'Kane*, 155 F.3d 969, 974 (8th Cir. 1998) (stating that grouping under § 3D1.2(d) is not appropriate because money laundering has eleven-point higher base offense level than fraud); *United States v. Hildebrand*, 152 F.3d 756, 763 (8th Cir. 1998) ("While both measures address the relative scope of the illegal activity, they do not measure the same type of harm."); *United States v. Kneeland*, 148 F.3d 6, 15 (1st Cir. 1998) (stating that "subsection (d) does not encompass Kneeland's fraud and money laundering convictions because the offense level for money laundering is generally not determined on the basis of total harm"); *United States v. Calozza*, 125 F.3d 687, 694 (9th Cir. 1997) (Brewster, J., dissenting) ("Because these two count groups do not involve substantially the same harm, they are treated as separate count groups."); *United States v. Kunzman*, 54 F.3d 1522, 1531 (10th Cir. 1995) (stating that grouping of fraud and money laundering counts is improper under § 3D1.2(b) or § 3D1.2(d) because of difference "in the nature and measure of harm resulting from these offenses" and because fraud and money laundering have different victims); *United States v. Lombardi*, 5 F.3d 568, 570 (1st Cir. 1993) (refusing to group under § 3D1.2(b) because "the victim of fraud is the insurance company and the victim of money laundering is society"); *United States v. Johnson*, 971 F.2d 562, 576 (10th Cir. 1992) (concluding that fraud and money laundering should not be grouped because measurement of harm for fraud is fundamentally different than measurement of harm for money laundering).

209. See, e.g., *United States v. Napoli*, 179 F.3d 1, 3 (2d Cir. 1999) (stating that fraud and money laundering have different victims); *United States v. Kunzman*, 54 F.3d 1522, 1531 (10th Cir. 1995) (stating that grouping of fraud and money laundering counts is improper under § 3D1.2(b) or § 3D1.2(d) because fraud and money laundering have different victims); *United*

tionally, many of the nongrouping circuits reason that the fraud and money laundering guidelines measure harms of a different nature.²¹⁰ Thus, the nongrouping circuits seek to further the policies of proportionality and incremental punishment by interpreting the grouping rules consistently with these policies.²¹¹ The nongrouping circuits, by not grouping the charges, turn to § 3D1.4 to account for the additional harm.²¹² Section 3D1.4 subjects the defendant to additional, incremental punishment for the additional criminal conduct by increasing the total combined offense level as the number of Groups increases.²¹³ Finally, the nongrouping circuits seek to limit the significance of the formal charging decision.²¹⁴ Thus, the policies that the nongrouping circuits further by choosing not to group fraud and money laundering counts are the very policies that the Sentencing Guidelines purport to further.²¹⁵

C. The Policies Furthered by the Grouping Circuits

In contrast to the nongrouping circuits, the grouping circuits have decided that fraud and money laundering are closely interrelated within the meaning of the grouping rules.²¹⁶ Some of the grouping circuits reason that fraud and

States v. Lombardi, 5 F.3d 568, 570 (1st Cir. 1993) (refusing to group under § 3D1.2(b) because "the victim of fraud is the insurance company and the victim of money laundering is society").

210. See, e.g., United States v. Hanley, 190 F.3d 1017, 1034 (9th Cir. 1999) (concluding that grouping is inappropriate under § 3D1.2(d) because fraud and money laundering measure harm differently); *Napoli*, 179 F.3d at 3 (stating that fraud and money laundering measure harm in different ways); United States v. Johnson, 971 F.2d 562, 576 (10th Cir. 1992) (concluding that fraud and money laundering should not be grouped because measurement of harm for fraud is fundamentally different than measurement of harm for money laundering).

211. See United States v. O'Kane, 155 F.3d 969, 971 (8th Cir. 1998) (stating that incremental punishment is guiding for interpreting grouping rules); *Lombardi*, 5 F.3d at 571 (stating that additional punishment for money laundering is result "of a deliberate policy choice by Congress").

212. See USSG § 3D1.4 (1999) (providing rules for determining final combined offense level when there are multiple Groups).

213. See *id.* (providing increase in total combined offense level based on number and severity of Groups).

214. See *Napoli*, 179 F.3d at 12 (stating that effect of decision not to group "is meant to protect defendants against arbitrary additions resulting from the government's formal charging decision"); see also USSG ch. 3, pt. D, introductory cmt. (1999) (stating that policy of grouping rules is to limit significance of charging decision).

215. See USSG ch. 1, pt. A, introductory cmt. (1999) (noting policy of proportionality in sentencing); *id.* ch. 3, pt. D, introductory cmt. (stating policy of incremental punishment and policy of limiting significance of charging decision).

216. See *id.* ch. 3, pt. D, introductory cmt. ("When offenses are closely interrelated, group them together for purposes of the multiple-count rules, and use only the offense level for the

money laundering are interrelated because they harm the same victim.²¹⁷ Additionally, some of the grouping circuits conclude that fraud and money laundering involve substantially the same harm because both measure harm in terms of monetary amounts.²¹⁸ Finally, most of the grouping circuits conclude that fraud and money are interrelated because the act of money laundering furthers the fraudulent scheme.²¹⁹ Whatever the reasoning, the decision to group the charges reflects the desire of the grouping circuits to minimize the impact of

most serious offense in that group."); *see also, e.g.*, *United States v. Smith*, 186 F.3d 290, 297 (3d Cir. 1999) (deciding that grouping is required under § 3D1.2(b) because fraud and money laundering harmed same victim and all criminal transactions were part of common scheme); *United States v. Emerson*, 128 F.3d 557, 564 (5th Cir. 1997) (declaring that fraud and money laundering "counts must be grouped under § 3D1.2(d) because the money laundering served the necessary purpose of concealing the fraud"); *United States v. Walker*, 112 F.3d 163, 167 (4th Cir. 1997) (stating that fraud and money laundering are closely related and properly grouped under § 3D1.2(d)); *United States v. Coscarelli*, 105 F.3d 984, 989 (5th Cir. 1997) (holding that fraud and money laundering "are to be grouped together [under § 3D1.2(d)] because . . . [these] offenses' base offense levels are determined largely on the total amount of harm or loss"); *United States v. Mullens*, 65 F.3d 1560, 1564 (11th Cir. 1995) (stating that grouping is proper under § 3D1.2(d) because "[w]ithout the fraud there would have been no funds to launder"); *United States v. Leonard*, 61 F.3d 1181, 1186 (5th Cir. 1995) (stating that fraud and money laundering have same victim and are properly grouped under § 3D1.2(d) when "the money laundering activities of the defendants perpetuate the underlying crime").

217. *See, e.g.*, *United States v. Smith*, 186 F.3d 290, 297 (3d Cir. 1999) (deciding that grouping is required under § 3D1.2(b) because fraud and money laundering harm same victim); *United States v. Wilson*, 98 F.3d 281, 283 (7th Cir. 1996) ("[T]here is intuitive force to the argument that the victim of the fraud is also the victim of the transaction designed to hide or 'cleanse' the funds of which she was defrauded."); *United States v. Leonard*, 61 F.3d 1181, 1186 (5th Cir. 1995) (noting that fraud and money laundering have the same victim).

218. *See United States v. Coscarelli*, 105 F.3d 984, 989 (5th Cir. 1997) (holding that fraud and money laundering "are to be grouped together [under § 3D1.2(d)] because . . . [these] offenses' base offense levels are determined largely on the total amount of harm or loss"); *see also* USSG ch. 3, pt. D, introductory cmt. (1999) (discussing grouping of counts that base offense level primarily on amount of money involved). The comment states as follows:

If the offense guidelines in Chapter Two base the offense level primarily on the amount of money or quantity of substance involved (e.g., theft, fraud, drug trafficking, firearms dealing), or otherwise contain provisions dealing with repetitive or ongoing misconduct (e.g., many environmental offenses), add the numerical quantities and apply the pertinent offense guideline, including any specific offense characteristics for the conduct taken as a whole.

Id.

219. *See, e.g., Smith*, 186 F.3d at 297 (deciding that grouping is required under § 3D1.2(b) because fraud and money laundering were part of common scheme); *United States v. Walker*, 112 F.3d 163, 167 (4th Cir. 1997) (finding that fraud and money laundering counts were properly grouped because money laundering furthered fraudulent scheme by making fictitious interest payments); *United States v. Emerson*, 128 F.3d 557, 564 (5th Cir. 1995) (stating that fraud and money laundering "counts must be grouped under § 3D1.2(d) because the money laundering served the necessary purpose of concealing the fraud").

the charging decision.²²⁰ The decision to group limits the significance of the charging decision by eliminating the possibility that § 3D1.4 will increase the total combined offense level.²²¹ Once a court decides to group fraud and money laundering, the grouping rules treat the fraud and money laundering counts as one offense.²²² Consequently, the grouping circuits further the policy of preventing multiple punishment for the same offense.²²³ Additionally, the grouping circuits further the policy of proportionality in sentencing, in spite of the decision to group the fraud and money laundering counts, because the money laundering count's offense level typically increases the Group's offense level.²²⁴ Thus, grouping punishes money laundering conduct by giving a more severe sentence than would be given in cases in which only fraud is charged.²²⁵ Like the nongrouping circuits' decision, the grouping circuits' decision to group fraud and money laundering finds support in the policies that underpin the Sentencing Guidelines.²²⁶

220. See USSG ch. 3, pt. D, introductory cmt. (1999) (stating that policy of grouping rules is to limit effect of formal charging decision).

221. *Id.* § 3D1.4 (providing for total combined offense level more severe than most serious Group if other Groups have similar offense levels); *id.* § 3D1.3(b) ("In the case of counts grouped together pursuant to § 3D1.2(d), the offense level applicable to the Group is the offense level corresponding to the aggregated quantity."); *id.* § 3D1.3(a) (stating that offense level for counts grouped under § 3D1.2 (a)-(c) is offense level of most serious count in group).

222. See *id.* at ch. 3, pt. D, introductory cmt. ("In essence counts that are grouped together are treated as constituting a single offense for purposes of the guidelines.").

223. See *id.* (stating that grouping prevents multiple punishment for substantially identical offense conduct).

224. See *id.* § 3D1.3 (providing procedure for determining offense level of Group of closely related counts). Under § 3D1.3(a), the offense level of the Group is the offense level of the most serious count in the Group. *Id.* § 3D1.3(a). Because money laundering counts usually have a higher offense level than fraud counts, the offense level of the Group is usually the offense level of the money laundering count. *Cf.* SENTENCING COMMISSION REPORT, *supra* note 128, at 8 (stating that "election to pursue a money laundering charge in addition to an underlying fraud-related offense would raise the guideline penalty in 85 to 95 percent of the cases"). Section 3D1.3(b) calculates the offense level of the Group by applying the aggregated amount of money involved in the counts of the Group to the guideline that yields the highest offense level. USSG § 3D1.3(b) (1999). The money laundering guideline normally yields the highest offense level. *Cf.* SENTENCING COMMISSION REPORT, *supra* note 128, at 8 (stating that choosing money laundering guideline normally results in higher penalty); see also USSG ch. 1, pt. A, introductory cmt. (1999) (stating that proportionality in sentencing is goal of guidelines); *id.* at ch. 3, pt. D, introductory cmt. ("The rules in this Part seek to provide incremental punishment for significant additional criminal conduct.").

225. See SENTENCING COMMISSION REPORT, *supra* note 128, at 8 (stating that "election to pursue a money laundering charge in addition to an underlying fraud-related offense would raise the guideline penalty in 85 to 95 percent of cases").

226. See *supra* notes 208-15 and accompanying text (illustrating that policy goals of Sentencing Guidelines support reasoning of nongrouping circuits).

*V. A Proposal for Proportionality and Fairness**A. The Solution*

The current guideline regime provides no clearly correct way to treat fraud and money laundering counts under the grouping rules. Therefore, the solution to the grouping split should eliminate the grouping decision altogether. This Note's solution to the fraud and money laundering circuit split is embodied in a proposed money laundering guideline.²²⁷ The proposed money laundering guideline to replace current § 2S1.1 reads, in pertinent parts, as follows:

§ 2S1.1 *Laundering of Monetary Instruments*

(a) Base Offense Level (Apply the greater):

- (1) The total offense level of the underlying offense, including specific offense characteristics, if the defendant is accountable for the underlying offense. "Underlying offense," as used in this guideline, means the offense that the laundering of monetary instruments facilitated or the offense that generated the funds that were subsequently laundered.
- (2) If the offense level of the underlying offense cannot be determined, the offense level is 8 plus the number of offense levels from the table in § 2F1.1.

(b) Specific Offense Characteristics:

- (1) If the defendant knew or believed that the funds were the proceeds of an offense involving the manufacture, importation, or distribution of controlled substances [or listed chemicals]; a crime of violence; or an offense involving firearms, explosives, or national security, increase by 4 levels.
- (2) If convicted under 18 U.S.C. §§ 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A), increase by 2 levels.
- (3) If sophisticated means are employed to conceal the source of the funds, increase by 2 levels.

227. Of course, a new money laundering guideline will impact many types of cases, not just those that include fraud and money laundering counts. It is beyond the scope of this Note, however, to discuss the impacts on other types of cases. Nonetheless, given the tremendous criticism that courts and practitioners have directed at the money laundering guideline, it would be unwise and impractical to address the fraud and money laundering split without remedying the flaws in the money laundering guideline. See SENTENCING COMMISSION REPORT, *supra* note 128, at 5 (stating that Congress, judges and practitioners have criticized operation of money laundering guidelines). Furthermore, any attempt to address cases only in which money laundering is charged in addition to an underlying fraud count would be too complex and confusing because separate guidelines and rules would have to be developed to deal with such a situation. See USSG ch. 1, pt. A, introductory cmt. (1999) ("The larger the number of subcategories of offense and offender characteristics included in the guidelines, the greater the complexity and the less workable the system.").

- (4) Increase the offense level as follows, according to the value of funds laundered:

	Value (Apply the Greatest)	Increase in Level
(A)	\$100,000 or less	add 1
(B)	More than \$100,000	add 2
(C)	More than \$500,000	add 3
(D)	More than \$1,000,000	add 4
(E)	More than \$2,000,000	add 5
(F)	More than \$6,000,000	add 6
(G)	More than \$10,000,000	add 7
(H)	More than \$35,000,000	add 8

Commentary

Application Note:

1. If there is more than one underlying offense, choose the offense that produces the highest offense level.
2. Counts subject to this guideline are to be grouped with counts of the underlying offense according to § 3D1.2(c).
3. The value of the funds laundered, for purposes of subsection (b)(3) is not the value of the funds involved in the underlying offense unless those funds are actually laundered within the meaning of 18 U.S.C. 1956.²²⁸

228. Compare proposed guideline with USSG § 2S1.1 (1999) (setting forth money laundering guideline). Section 2S1.1 states the following:

§ 2S1.1. Laundering of Monetary Instruments:

- (a) Base Offense Level:
 - (1) 23, if convicted under 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A);
 - (2) 20, otherwise.
- (b) Specific Offense Characteristics
 - (1) If the defendant knew or believed that the funds were the proceeds of an unlawful activity involving the manufacture, importation, or distribution of narcotics or other controlled substances, increase by 3 levels.
 - (2) If the value of the funds exceeded \$100,000, increase the offense level as follows:

	Value (Apply the Greatest)	Increase in Level
(B)	More than \$100,000	add 1
(C)	More than \$200,000	add 2

The operation of the proposed guideline is simple. The base offense level of the money laundering count is the total offense level of the underlying fraud count.²²⁹ Subsection (a)(2) provides a fallback base offense level for cases in which court cannot calculate the underlying offense level.²³⁰ The amount of funds that comprise the money laundering activity increases the offense level according to the table in subsection (b)(3).²³¹ In cases in which the defendant intends to further the underlying crime through money laundering, subsection (b)(1) increases the offense level by 2 levels.²³² In cases in which the defendant launders funds by sophisticated means, subsection (b)(2) increases the offense level by 2 levels.²³³ Finally, Application Note 2 instructs the court to group the money laundering count with the underlying count.²³⁴

This Note's solution furthers the policies of the Sentencing Guidelines by reducing the effect of the charging decision and by providing for incremental punishment, uniformity, and proportionality.²³⁵ The proposed guideline's

(D)	More than \$350,000	add 3
(E)	More than \$600,000	add 4
(F)	More than \$1,000,000	add 5
(G)	More than \$2,000,000	add 6
(H)	More than \$3,500,000	add 7
(I)	More than \$6,000,000	add 8
(J)	More than \$10,000,000	add 9
(K)	More than \$20,000,000	add 10
(L)	More than \$35,000,000	add 11
(M)	More than \$60,000,000	add 12
(N)	More than \$100,000,000	add 13

Id.

229. See *supra* notes 227-28 and accompanying text (setting forth proposed money laundering guideline).

230. See *supra* notes 227-28 and accompanying text (setting forth proposed money laundering guideline).

231. See *supra* notes 227-28 and accompanying text (setting forth proposed money laundering guideline).

232. See *supra* notes 227-28 and accompanying text (setting forth proposed money laundering guideline).

233. See *supra* notes 227-28 and accompanying text (setting forth proposed money laundering guideline).

234. See *supra* notes 227-28 and accompanying text (setting forth proposed money laundering guideline).

235. See *supra* notes 171-95 (discussing policies of Sentencing Guidelines and of Congress).

variable base offense level reduces the effect of the charging decision.²³⁶ Thus, unlike the present day guidelines, the proposed guideline would permit a money laundering charge in addition to a relatively minor fraud conviction to have only a relatively mild impact on the sentence.²³⁷ Second, the proposed guideline provides for incremental punishment by ensuring that the act of money laundering always provides for a more severe sentence than the underlying act alone.²³⁸ This approach is in keeping with the clear intent of Congress to severely punish money laundering.²³⁹ Third, the proposed guideline furthers the goal of uniformity by eliminating the present day circuit split.²⁴⁰ Last, the proposal advances the goal of proportionality by imposing more severe sentences as the seriousness of the money laundering conduct increases.²⁴¹ The proposal provides for a more severe sentence if the defendant is convicted under §§ 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A) because these sections have an additional intent element.²⁴² The proposal also provides for a

236. A money laundering charge under the proposed guideline would have a small impact in cases involving small scale fraud and increasing impact as the amount of funds laundered increases. For instance, in a case where all \$600,000 defrauded is laundered by ordinary means, the effect would be a total offense level that is three levels more severe than if fraud alone were charged. In contrast, a scheme that launders \$2,500,000 by sophisticated means would be subject to a 7 level increase over the fraud charge alone.

237. Because the base offense level for the money laundering count reflects the total offense level of the underlying crime, a money laundering count in a fraud case involving \$170,000, would increase the total offense level by only two levels. *But cf.* *United States v. Smith*, 186 F.3d 290, 297 (3d Cir. 1999) (demonstrating that adding money laundering charge to fraud case involving \$169,500 would increase total offense level by twelve levels).

238. At a minimum, the proposed money laundering guideline adds one to the total offense level. At a maximum, the proposed guideline adds twelve levels.

239. *See* USSG § 2S1.1, cmt. background (1999) ("In keeping with the clear intent of the legislation, this guideline provides for substantial punishment.").

240. *See supra* notes 227-28 and accompanying text (setting forth proposed money laundering guideline). Application note two of the proposed guideline states "[c]ounts subject to this guideline are to be grouped with counts of the underlying offense according to § 3D1.2(b)." *Id.*

241. *See* USSG ch. 1, pt. A, introductory cmt. (1999) (stating that guidelines further goal of proportionality through "a system that imposes appropriately different sentences for criminal conduct of differing severity").

242. *See id.* § 2S1.1, cmt. background ("A higher base offense level is specified if the defendant is convicted under 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A) because those subsections apply to defendants who encouraged or facilitated the commission of further crimes."); 18 U.S.C. §§ 1956(a)(1)(A), (a)(2)(A), (a)(3)(A) (stating intent requirements for these sections); *see also* *United States v. Emerson*, 128 F.3d 557, 565-66 (7th Cir. 1997) (discussing difference between promotion and concealment prongs of money laundering statute). For a more detailed look at the promotion and concealment provisions of the 18 U.S.C. § 1956, *see* generally Jimmy Gurule, *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 (1995).

higher offense level when a defendant uses sophisticated means to conceal the source of the funds.²⁴³ Thus, the proposed guideline punishes money laundering activity by effectively increasing the offense level of the underlying crime in proportion to the seriousness of the money laundering conduct.

Because Congress disapproved the Sentencing Commission's amendment to § 2S1.1, it would be unwise to resubmit a substantially similar proposal.²⁴⁴ Accordingly, this Note's proposal is sufficiently different than the Sentencing Commission's amendment to § 2S1.1.²⁴⁵ More important, this Note's proposal is responsive to incremental punishment concerns voiced by the Judiciary

243. See *supra* notes 227-28 and accompanying text (setting forth proposed money laundering guideline). Subsection (b)(2) of the proposed guideline states "[i]f sophisticated means are employed to conceal the source of the funds, increase by 2 levels." *Id.*

244. See Federal Sentencing Guidelines, Amendment, Disapproval, Pub. L. 104-38, (1995) (disapproving Sentencing Commission's proposed money laundering guideline).

245. Compare proposed guideline, *supra* notes 227-28 and accompanying text, with Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25,074, 25,085-86 (1995) (proposed May 10, 1995) (setting forth Sentencing Commission's proposed amendment to § 2S1.1). The Commission's proposal reads as follows:

§2S1.1 Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity

(a) Base Offense Level (Apply the greatest):

(1) The offense level for the underlying offense from which the funds were derived, if the defendant committed the underlying offense (or otherwise would be accountable for the commission of the underlying offense under 1.3 (Relevant Conduct)) and the offense level for that offense can be determined; or

(2) [12] plus the number of offense levels from the table in §2F1.1 (Fraud and Deceit) corresponding to the value of the funds, if the defendant knew or believed that the funds were the proceeds of an offense involving the manufacture, importation, or distribution of controlled substances [or listed chemicals; a crime of violence; or an offense involving firearms or explosives, national security, or international terrorism]; or

(3) [8] plus the number of offense levels from the table in §2F1.1 (Fraud and Deceit) corresponding to the value of the funds.

(b) Specific Offense Characteristics

(1) If the defendant knew or believed that (A) the financial or monetary transactions, transfers transportation, or transmissions were designed in whole or in part to conceal or disguise the proceeds of criminal conduct, or (B) the funds were to be used to promote further criminal conduct, increase by 2 levels.

(2) If subsection (b)(1)(A) is applicable and the offense (A) involved placement of funds into, or movement of funds through or from, a company or financial institution outside the United States, or (B) otherwise involved a sophisticated form of money laundering, increase by 2 levels.

Application Notes

....

2. If the defendant is to be sentenced both on a count for an offense from which the funds were derived and on a count under this guideline, the counts will be grouped together under subsection (c) of §3D1.2 (Groups of Closely-Related Counts).

Id.

Committee when it disapproved the Sentencing Commission's proposed guideline in 1995.²⁴⁶ The proposal responds to Congress's concern by always providing for punishment under the money laundering guideline that is more severe than the punishment that the underlying offense's guideline alone provides.²⁴⁷ Therefore, the money laundering count always increases the offense level of the fraud and money laundering Group.²⁴⁸ By contrast, the Sentencing Commission's proposed amendment to § 2S1.1 gives an offense level equal to the underlying offense unless a specific offense characteristic in subsection (b) is applicable.²⁴⁹

B. Applying the Proposed Solution

Another look at this Note's hypothetical explains the operation of the proposed guideline and contrasts its operation with the current guidelines.²⁵⁰ Additionally, the operation of the proposed guideline reinforces the underlying policy choice that informed the drafting of the proposal.²⁵¹ Recall that federal district courts in different jurisdictions convicted Smith and Brown for

246. See H.R. REP. NO. 104-272, at 4 (1995) (stating reasons for recommending disapproval of Sentencing Commission's proposed changes to money laundering guideline).

247. See *supra* notes 227-28 and accompanying text (setting forth proposed money laundering guideline). Subsection (b)(3) of the proposed guideline always provides for additional punishment based on the amount of funds that a defendant launders. *Id.*

248. See USSG § 3D1.3(a) (1999) (stating that offense level for § 3D1.2(a)-(c) Group is offense level of count with highest offense level). Under the proposed guideline, because the money laundering count's offense level is always higher than the offense level of the underlying offense, the offense level of the Group is always higher than the offense level of the fraud count. See *supra* notes 227-28 and accompanying text (setting forth proposed money laundering guideline).

249. See Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25,074, 25,085 (proposed May 10, 1995) (providing Commission's proposed money laundering guideline). The proposed guideline states the following:

(b) Specific Offense Characteristics

- (1) If the defendant knew or believed that (A) the financial or monetary transactions, transfers transportation, or transmissions were designed in whole or in part to conceal or disguise the proceeds of criminal conduct, or (B) the funds were to be used to promote criminal conduct, increase by 2 levels.
- (2) If subsection (b)(1)(A) is applicable and the offense (A) involved placement of funds into, or movement of funds through or from, a company or financial institution outside the United States, or (B) otherwise involved a sophisticated form of money laundering, increase by 2 levels.

Id.

250. See *supra* notes 1-30 and accompanying text (describing this Note's hypothetical).

251. See *supra* notes 236-49 and accompanying text (stating policies furthered by proposed money laundering guideline).

their respective fraudulent schemes under 18 U.S.C. § 1341.²⁵² The courts also convicted the hypothetical defendants of money laundering under 18 U.S.C. § 1956(a)(1)(B).²⁵³ At sentencing, both courts calculated the amount of money fraudulently obtained and the amount of money laundered as \$500,000.

Under the proposed guideline, courts determining the offense level for the mail fraud count under USSG § 2F1.1 proceed as under the current guideline.²⁵⁴ The base offense level is 6.²⁵⁵ The specific offense characteristic of \$500,000 increases the offense level by 10 levels.²⁵⁶ Because each defendant's scheme involved multiple victims and mass marketing, USSG § 2F1.1(b)(2)-(3) increases the offense level by 4 levels.²⁵⁷ The resulting final offense level for the mail fraud count is 20.

The calculations for the money laundering count are completely different under the proposed guideline.²⁵⁸ The base offense level is that of the underlying fraud count, 20.²⁵⁹ Subsection (b)(3) of the proposed guideline adds 2 levels.²⁶⁰ No other enhancements apply. Thus, the total offense level for the money laundering count is 22.²⁶¹

The court then groups the fraud count with the money laundering count under § 3D1.2(b).²⁶² According to § 3D1.3(a), the offense level for the Group

252. 18 U.S.C. § 1341 (Supp. 1999).

253. *Id.* § 1956(a)(1)(B).

254. USSG § 2F1.1 (1999) (stating that § 2F1.1 applies to counts of fraud under 18 U.S.C. § 1341).

255. *See id.* § 2F1.1(a) (setting base offense level at 6).

256. *See id.* § 2F1.1(b)(1) (listing increases in offense level corresponding to specific offense characteristic of amount of monetary loss).

257. *See id.* § 2F1.1(b)(2)-(3) (providing two-level increase for scheme to defraud more than one victim and two-level increase for use of mass-marketing).

258. *Compare id.* § 2S1.1 (providing money laundering guideline), with *supra* notes 227-28 and accompanying text (setting forth proposed money laundering guideline).

259. *See supra* notes 227-28 and accompanying text (setting forth proposed money laundering guideline). Subsection (a)(1) of the proposed guideline states that the base offense level for the money laundering count is the total offense level of the underlying act. *Id.*

260. *See id.* (setting forth proposed money laundering guideline). Subsection (b)(3) of the proposed guideline provides a 2-level increase for \$500,000 of laundered funds. *Id.* Note that one penny more results in a 3-level increase. *Id.*

261. Recall that under the present day money laundering guideline, the total offense level for the money laundering count was 23. *See supra* notes 8-9 and accompanying text (showing calculation of offense level for money laundering count under current § 2S1.1).

262. *See* USSG § 3D1.2 (1999) (providing for grouping of counts "[w]hen one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts"); *see also supra* notes 227-28 and accompanying text (setting forth proposed money laundering guideline). Application note 2 of

is the offense level of the most serious count.²⁶³ Therefore, the offense level for the Group is 22.²⁶⁴ The corresponding sentence for a criminal history category of I is forty-one to fifty-one months.²⁶⁵

Compare this sentence with the sentences present day courts in the non-grouping and grouping circuits would have given.²⁶⁶ Courts in the nongrouping circuits would have given a sentence of fifty-seven to seventy-one months based on an offense level of 25.²⁶⁷ Courts in the grouping circuits would have given a sentence of forty-six to fifty-seven months based on an offense level of 23.²⁶⁸ The proposed guideline eliminates the sentencing disparity and provides an offense level that reflects the seriousness of the underlying criminal conduct.

The hypothetical sentencing under the proposed guideline reveals and reinforces the policy choices that shaped this Note's solution.²⁶⁹ First, it is apparent that the proposed guideline reduces the impact of the decision to charge money laundering.²⁷⁰ By reducing the impact of the charging decision, the proposed guideline remedies a pervasive problem that the grouping split exacerbates – the lack of proportionality and uniformity that arises from inconsistent charging decisions with respect to money laundering charges.²⁷¹ Second, the proposed guideline provides for incremental punishment by providing a total combined offense level that is greater than that of the underlying fraud count.²⁷² Finally, the hypothetical illustrates that the proposed

the proposed guideline states that money laundering counts are to be grouped with underlying count according to § 3D1.2(b). *Id.*

263. See USSG § 3D1.3(a) (1999) (stating that offense level for Group is offense level of count in Group with highest offense level).

264. See *id.* (stating that offense level for Group is offense level of count in Group with highest offense level).

265. See *id.* § 5A (providing sentencing table).

266. See *supra* notes 1-30 and accompanying text (stating sentences for hypothetical defendants).

267. See *supra* notes 17-23 and accompanying text (stating sentence for defendant Smith).

268. See *supra* notes 254-65 and accompanying text (illustrating operation of proposed guideline by working through hypothetical sentencing).

269. See *supra* notes 24-27 and accompanying text (stating sentence for defendant Brown).

270. See *supra* notes 266-68 and accompanying text (illustrating that proposed guideline results in lesser sentence than under current guideline).

271. See SENTENCING COMMISSION REPORT, *supra* note 128, at 8 (stating that lack of uniformity and proportionality is "problem that is neither hypothetical nor isolated in occurrence. In fact, the Commission's analysis of money laundering sentences reflects that disparate sentencing persists [when money laundering is charged in addition to fraud] as a result of the structure of the current money laundering guidelines.").

272. See USSG ch. 3, pt. D, introductory cmt. (1999) ("The rules in this Part seek to provide incremental punishment for significant additional criminal conduct.").

guideline is easy to apply because it eliminates the grouping decision.²⁷³

VI. Conclusion

Congress can and should resolve the circuit split that has arisen over the grouping of fraud and money laundering charges.²⁷⁴ To arrive at this conclusion, this Note first demonstrated that the circuit conflict is resulting in disparate sentences for defendants who have committed identical crimes.²⁷⁵ Second, this Note explored the reasoning of both the nongrouping circuits and the grouping circuits.²⁷⁶ Third, this Note discussed the impact of the decision to charge money laundering in addition to a fraud count.²⁷⁷ Fourth, this Note discussed the policies of the grouping and nongrouping circuits, of the Sentencing Guidelines and of Congress when it rejected the Sentencing Commission's proposal to rewrite the money laundering guideline.²⁷⁸ Finally, this Note demonstrated that a simple and workable solution is possible.²⁷⁹ Consequently, this Note urges that the Sentencing Commission and Congress take immediate action to resolve the circuit conflict that has arisen over the grouping of fraud and money laundering counts by substantially rewriting the money laundering guideline.

When Congress created the Sentencing Guidelines, it intended to limit the discretion of the trial court and to reduce the confusion inherent in the old system.²⁸⁰ Although many sections of the current Sentencing Guidelines arguably have had a good deal of success in achieving Congress's goals, the grouping of fraud and money laundering charges is an example of where the Sentencing Guidelines have fallen well short of Congress's goals. Unless Congress passes an amendment that provides guidance on the fraud and

273. See *supra* notes 254-65 and accompanying text (illustrating operation of proposed guideline by working through hypothetical sentencing).

274. See *supra* Part I (describing sentencing disparity that results from circuit split); *supra* part V (outlining solution to grouping split).

275. See *supra* Part I (demonstrating sentencing disparity between grouping and nongrouping circuits).

276. See *supra* Part II (exploring reasoning of nongrouping and grouping circuits).

277. See *supra* Part III (discussing impact of decision to charge money laundering).

278. See *supra* Part IV (discussing policies of nongrouping and grouping circuits, of Congress, and of Sentencing Guidelines).

279. See *supra* Part V (providing proposal that solves fraud and money laundering issue and showing operation of this proposal).

280. See USSG ch. 1, pt. A, introductory cmt. (1999) ("It [Congress] sought to avoid the confusion and implicit deception that arose out of the pre-guidelines sentencing system which required the court to impose an indeterminate sentence of imprisonment and empowered the parole commission to determine how much of the sentence an offender actually would serve in prison.").

money laundering issue, defendants will continue to face sentences that are uncertain²⁸¹ and, perhaps, out of proportion to their criminal acts.²⁸²

281. See *supra* Part I (illustrating sentencing disparity between grouping and nongrouping circuits).

282. See SENTENCING COMMISSION REPORT, *supra* note 128, at 7 (providing Commission's analysis of use of money laundering statute). The report states the following:

The Commission's long-term analysis of money laundering cases also demonstrated that the intended relationship between the harm caused and the measurement of the offense seriousness under the money laundering sentencing guidelines has become distorted. Individuals who engaged in essentially the same offense conduct received substantially higher or lower sentences, depending on whether they were charged, convicted, and sentenced under the underlying offense-related statute, or the money laundering statute, or both.

Id. (footnote omitted).