

To: U. S. Sentencing Commission
1331 Pennsylvania Ave., NW
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#19

Attention: Guideline Comment

From: C. U. R. E. (On behalf of over 72,000 federal prisoners)

C. U. R. E. (Citizens United for the Rehabilitation of Errants) would like to offer the following comments and proposals relevant to the published recommendations of the Commission:

§ 1B1.3, Relevant Conduct: C. U. R. E. objects to the further expansion of "relevant conduct," which is what the Court considers in setting base offense levels and making other important determinations. The Commission does not appear to view its recommended changes as an expansion of the existing guideline. However, particularly in the situation of uncharged conspiracies, it is not fair to the defendant to have a finding made that an act or omission by others was reasonably foreseeable by him, when he, in fact, did not foresee any such act or omission taking place. Holding a person responsible for such behavior of others goes far beyond aiding and abetting and expands the conduct for which the defendant may be responsible by inserting the Commission's proposed amendment into Section 1B1.3(a)(1). When uncharged conduct is considered at all, the defendant's intent should be the governing guide.

§ 2F1.1, Fraud and Deceit: C. U. R. E. objects to the treatment of individuals sentenced for fraud involving financial institutions being differently situated (in this case significantly more stringently) than those frauds that involve other type victims. The Commission is proposing creation of a disparity.

§ 2D1.1, Unlawful Manufacturing, Importing, Exporting, or Trafficking: C. U. R. E. requests modification of the current offense levels for Schedule I or II depressants and Schedule III substances, so as to reflect the same existing level as now for a larger amount of drugs and a corresponding lowering of levels for the amount now listed as the threshold Level 20. There should be a difference in sentence for those selling 100 kilograms of a substance as opposed to 20 kilograms, but the level for 20 kilograms should be lower, as opposed to making a higher level for 100 kilos. The present sentence levels for all drug offenses is too high! These lengthy sentences are accomplishing nothing, except creation of an enormous bill for the American taxpayer and perpetuation of a bureaucracy of prison guards, despite the noble goal envisioned.

§ 2T1.1(b), Offenses Involving Taxation: C. U. R. E. strenuously objects to the treatment of tax evaders differently, depending upon their source of income. Drug defendants have to deal with substantial sentences as it is. To treat one tax evader with a minimum level of 12, but treat another tax evader with a minimum level of 17, just because his criminal activity relates to controlled substances is the equivalent of overkill. Once again, the Commission proposes creating a disparity - exactly what the Guidelines is supposed to eliminate.

§ 3B1.1, Role in the Offense: A. C. U. R. E. strenuously objects to including law enforcement agents as participants to aggravate the defendant's role. Potential abuse of this proposed change should be obvious. The Commentary does not control this abusive potential. Undercover agents would not have to "recruit" other

agents for them to count as participants. By contending that an operation needed more than one agent, each would be counted, as the proposed section now reads. This is particularly deplorable when considering the fact that government informers (who are not government employees, but perform as if they are) are now included and the further fact that law enforcement officers cannot be considered members of a charged conspiracy.

B. C. U. R. E. feels mitigating role adjustments should apply in all cases in which the defendant is substantially less culpable than other defendants in the same case. Certain functions that are minor roles in drug activity should be automatically eligible for mitigating adjustments. The Judge should have discretion to make findings based upon the preponderance of the evidence standard and treat the defendant discretionarily. No defendant should be disqualified from mitigating role adjustment. New Application Note #4 for the Commentary to § 3B1.2 is laudatory, as is proposed amendments to § 2D1.1(b), involving minimal participation, because it is desirable to have different offense level caps for minor role offenders. Each drug should have a different offense level cap, which would limit the sentence imposed. Mandatory minimum penalties should be dropped entirely and criminal history should not affect offense caps.

§ 3C1.2, Reckless Endangerment During Flight: C. U. R. E. objects to the possibility of enhancement based on the wording "substantial risk of death or serious bodily injury," unless intent of the wrongdoer is fully considered. If the escapee had absolutely no intention of hurting anyone, and, in fact, did not injure anyone, he should not have his conduct aggravated for something that never happened.

§ 3D1.2, Multiple Counts: C. U. R. E. recommends no change in the present structure relating to multiple counts.

§ 3E1.1, Acceptance of Responsibility: C. U. R. E. believes that acceptance of responsibility should not be affected by the exercise of the constitutional right to proceed to trial, and that a two level decrease should be available at any time prior to sentencing. Acceptance of responsibility should be limited solely to the offense of conviction and not to related conduct, for which the defendant may not have been charged. Three level reductions should be available for all offense levels over 30 and four level reductions should be available for all offense levels over 40. There should be no penalty for going to trial under any circumstances.

§ 4A1.2, Definitions and Instructions for Computing Criminal History: C. U. R. E. strongly urges not counting convictions that have been reversed, vacated, annulled, set aside, expunged or pardoned. The sentencing authority that made the prior decision to do any of the above, obviously meant that such prior conviction should not have a future detrimental effect on the defendant. By allowing such effect to take place anyway is to mandate invalid convictions affecting future sentences.

§ 4A1.3, Adequacy of Criminal History Category: C. U. R. E. opposes the proposed amendment for this section, simply because complete and total discretion to charge defendants under the Career Criminal sections remains with the prosecution - not the judiciary. To allow one offender with the same criminal history as a second offender the benefits of a departure, because he was not charged under a Career Criminal section is discriminatory. Disparity is what the New Guidelines is supposed to be about and departures should not be magnified by discretionary government charging authority.

§ 4B1.2, Definitions of Terms Used in § 4B1.1: A. "Offense Statutory Maximum" should refer to what the statute says before any enhancement caused by another statute. A prior criminal record should not be used in determining the offense

level under this guideline.

B. C. U. R. E. strongly urges that two prior offenses which are not related be counted as one conviction, if they could have been consolidated for trial as joinable offenses under FRCrP 8(a), for Career Offender purposes. Furthermore, this option should be expanded to include offenses that could have been joined under FRCrP 20(a) and (b) in one jurisdiction. The alternative is potential abuse by prosecutorial manipulation.

C. In order to count, the instant offense should have been committed subsequent to the prior conviction. There should be three separate encounters with the criminal justice system for career criminal status. As it is now, manipulation by an AUSA of his charging authority under either Rule 8 or Rule 20 FRCrP can make a recidivist for career criminal purposes out of a person who really has only one short crime spree in more than one jurisdiction.

Chapter Five, Part A - Sentencing Table: C. U. R. E. favors no change in the present table, which begins with Category I and ends with Category VI for criminal history purposes.

Chapter Five, Part C - Imprisonment: C. U. R. E. favors any enlargement of the number of defendants eligible for alternatives to imprisonment. These alternatives should apply to all defendant's. C. U. R. E. suggests the minimum term for eligibility should be one year and that §5B1.1(a)(2) should be amended accordingly. Probation with confinement conditions should be available to those previously eligible for "split sentences." Split sentences should be available to guideline ranges up to 24 months. The judge at sentencing should have all intermediate options available as alternatives to incarceration.

Chapter Five, Part A - Departures: C. U. R. E. objects to a change in departure that would make it necessary to combine age with another factor to justify departure. Citizens over 60 have no business being in prison. The additional costs to the American taxpayer are enormous. Furthermore, the use of the nebulous term "major drug trafficker" should be avoided entirely, in determining whether an elderly defendant merits a downward departure, if the defendant's risk of recidivism has been reduced and he is to serve a substantial portion of his sentence. Elderly drug traffickers should not be singled out and treated differently than any other elderly defendants.

§ 5K1.1, Substantial Assistance: Under no circumstances, should a government motion be necessary for a court to reward a defendant for "substantial assistance to authorities." The Court should be able to make this finding by itself.

Chapter Six - Sentencing Procedures and Plea Agreements: A. The Commission should not "encourage," it should require the Government in plea discussions prior to Rule 11 colloquy to disclose any and all information that is relevant to the application of sentencing guidelines.

B. If a count is dismissed, C. U. R. E. urges that the conduct underlying that count should not be considered as grounds for an upward departure. Furthermore, if a defendant is acquitted of conduct, under no circumstances should any evidence related to such conduct be used 1) to determine offense level; 2) for selecting a sentence within the guideline range, or; 3) as a basis for an upward departure. The alternative is incarceration, even though the defendant has not been found guilty.

Proposed Amendment to §1B1.10 (Retroactivity of Amended Guideline Range).

C. U. R. E believes that all proposed amendments to the Guidelines which may lower a defendant's sentence should be retroactive and be considered under Title 18 U.S.C. §3582(c)(2). The amended guideline range should not be limited to amendments listed in subsection (d) of §1B1.10. Regardless of the purpose of the amendment or the magnitude of the change in the guideline range or the "difficulty" of applying the amendment retroactively, it should be remembered that the guidelines themselves were conceived to eliminate disparity. It does not behoove the Commission to have two inmates with the same conduct serving different lengths of incarceration, merely because one was sentenced at a different time than the other. The ISM (Inmate Systems Manager) at each BOP facility recomputes release dates on a daily basis. It is in the public interest to have each defendant with similar conduct - similarly sentenced - regardless of sentencing date. By appropriately amending the retroactivity section, this goal can be accomplished.

Commentary to § 2D1.1 - Proposed Additional Paragraphs. C U. R. E. strenuously objects to the "aggregating" of quantities involved in a substantive drug offense together with an attempt or conspiracy involving the same substantive offense. C. U. R. E. also objects to the weight under negotiation in an uncompleted distribution being used to calculate the applicable amount, unless there is a specific finding by the Court that the defendant had the ability to produce the negotiated amount. Agents and informers puff up the amounts negotiated, so as to exceed certain minimum mandatory levels (levels that are unknown to the defendant). To say that the defendant is reasonably capable of producing an amount is not the same as saying that the defendant intended to produce that amount. There should always be "intent" to conduct a crime. Presently, there are many incarcerated individuals, who never had any intention of going through with the details of a government induced reverse sting operation. Yet, they are incarcerated based on these fictitious puffed-up amounts for inappropriate sentence lengths.

§ 5K2.17, Extraordinary Physical Impairment. C. U. R. E. applauds the creation of this new section.

There are additional proposals C. U. R. E. wishes the Commission to consider this year. They include the following.

I. Reinstitute Parole: Neither of the two prime objectives of the New Sentencing Guidelines would be diminished by allowing parole to all first-time non-violent offenders after service of one-third of their sentences.

A. Disparity of prior parole release dates would be avoided by an across-the-board policy.

B. Establishment of the certainty of jail time for even minor offenders would be unaffected.

C. U. R. E. envisions the absence of an arbitrary disenfranchisement of parole or departure for so-called "aggravating factors." Reinstating parole mandates the repeal of mandatory minimum sentencing laws for all crimes and a further expansion of alternatives to incarceration for all offenders. Experts in the field of corrections realize it does not take a lengthy prison sentence to deter future criminal conduct. The lesser recidivism rate for non-violent first-time offenders indicates these people deserve a second chance.

II Institute Superior Programming Achievement As a Release Incentive: Under

the new guidelines, there is no incentive to reward superior deeds to those who are incarcerated. Studies prove that society benefits from an inmate who is able to help himself upon release. If an inmate can earn a degree or learn a vocation, he should be rewarded with a meaningful sentence cut. C. U. R. E. suggests a one year sentence cut for each degree and/or apprenticeship earned by an inmate.

III. Increase Good Time Benefits for Those Under the New Law: Meaningful good time credits must be instituted for all inmates who are non-parolable before prison riots become a certainty and innocent people are hurt.

Presently, those incarcerated under the New Sentencing Guidelines are faced with doing 85% of their time. There is no incentive for good behavior or self-improvement. -For the long-termers that make up a disturbingly large amount of the people entering the system, the handwriting is on the wall - they will spend the majority of their time in prison. It is only a matter of time before this situation deteriorates into chaos. When the higher security level institutions consists of a large majority of inmates with no hope, violence and anarchy will escalate. Try telling a 25 year old non American citizen that he must spend the next 30 or 40 years in prison and that you expect him to spend his time at non-meaningful labor at slave wages and what do you think will be his retort?

IV. Increase Availability of Halfway House, Curfew Parole and House Arrest: Both halfway house and house arrest (also known as curfew parole) should be available for longer periods of time (current maximums: halfway house - six months; house arrest - two months). These options should be available to all federal prisoners according to need because they are proven concepts that work. These programs should be a requirement for long term offenders who need them for an orderly transition to society. C. U. R. E. suggests a combination of these programs be made available for up to two years to those who will be incarcerated for more than five years. The Commission needs to establish set criteria and take the abuse of discretion relating to placement away from the BOP. If implemented, the costs to taxpayers will be reduced from the \$40,000 per year, per inmate range to the \$10,000 per year per inmate range.

C. U. R. E. thanks the Commission for allowing us the opportunity to offer this input.