

National CURE
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March 2, 1998

United States Sentencing Commission
#1 Columbus Circle, NE
Suite 2-500
Washington DC 20002-8002

Attention: ~~Public Comment~~

CURE respectfully offers its comments to the proposed Guideline Amendments issued on January 14, 1998:

Amendment 1: The Commission proposes two options to clarify the definition of "loss" with respect to sentencing for theft, fraud and tax crimes. Although Option #1 treats very low level losses more leniently than now, any losses over \$10,000 for theft, \$5,000 for fraud and \$40,000 for taxes are treated more harshly. The penalties under Option #2 are treated more sternly than those under Option #1, with increased sentences for even very low level losses. The Commission justifies the increased sentences that either of these two options would create by stating it would "achieve better proportionality with the guideline penalties for other offenses of comparable seriousness."

CURE's position is that "offenses of comparable seriousness" (if one can realistically equate offenses such as tax evasion with offenses such as property destruction) should have their penalties reduced to the current theft, fraud and tax penalties rather than vice versa. The proposed options would result in sentences that significantly exceed anybody's concept of "inflation." CURE strenuously opposes any such increase in sentences for these non-violent crimes.

Amendment 2[A and B]: The problem CURE has with Amendment #2 is the same problem we have with Amendment #1. Presently, it takes a \$20,000 theft/fraud to receive a four level increase. The amount of loss under the proposed amendment so as to receive a four level increase would be reduced to \$12,500 with correspondingly large sentence enhancements for all other low scale offenses. The Commission insinuates that all losses over \$2,000 (or as an option - \$5,000) is no longer a low level loss, but should be deemed a medium level loss deserving greater punishment than is presently considered necessary.

CURE disagrees with this presumption. Contrary to one of the Commission's justifications for this change - to "achieve increases in severity for larger-scale referring guideline offenses" - larger scale offenses (those involving over \$20,000,000 in losses) show no increase in base offense level. It is only medium level offenses - \$2,000 to \$20,000,000 - for which the Commission deems sentence inflation a necessity. The elimination of "more than minimal planning" as a criteria for a downward sentence departure is just another elimination of judicial discretion that CURE opposes. A starting point of \$5,000 is preferable to \$2,000 as the "cutting point" for incremental increases for these relatively minor crimes.

[C]: CURE opposes any change in the present pornography enhancement if the present minimum retail value of the "loss" is not exceeded.

[D]: CURE opposes any change in the present copyright infringement enhancement if the fraud loss of \$5,000 is not exceeded.

[E]: CURE opposes the \$2,000 threshold for an initial increase in offense level for computer invasion (a crime most often committed by juvenile hackers). Trespass (including computer trespass) should have a \$5,000 threshold.

[F]: CURE agrees that the property destruction guideline should be consolidated with the theft guideline, but only

if the threshold for incremental additions begins at \$5,000.

[G]: CURE agrees that the bank gratuity and principal gratuity guidelines can be consolidated.

Amendment 3[A and B]: CURE favors any and all amendments that lessen prosecutors' charging selection. For this reason, CURE favors consolidation of the theft, fraud and property destruction guidelines. To eliminate inequities, a minimum base offense level of four (4) should be used for the consolidated guideline.

[C]: CURE favors judicial discretion via an encouraged upward departure as opposed to a required enhancement for violation of a judicial order.

[G]: CURE opposes an increase in the floor level of this offense. No justification for this proposed increase appears anywhere in the text.

[H]: CURE opposes Option #1, which adds a two level enhancement for those involved with "chop shops" because, once again, no justification for such an increase is stated by the Commission.

Amendment 4: CURE makes the following comments regarding the proposed amendments to the definition of "loss." CURE suggests amalgamation of Options #1 and #2 would be preferable to the adoption of either proposed option as currently specified. Although CURE favors the "maximum discretion to sentencing judges and minimal guidance" that Option #1 envisions, CURE also favors "the possibility of limiting the relevant harm...to economic harm" that Option #2 raises. Whether the harm caused is "intended" or "actual," CURE suggests that a person should only be punished for a consequence "that realistically could have occurred." CURE particularly disfavors any added non-economic provisions used as an invitation for departures, since such departures, at least in the examples enumerated in the proposal, are always foreseen as upward and simply encourage prosecutorial "piling on." CURE strenuously opposes any new rules that would include intended loss amounts that were unlikely or impossible because the only "victims" were government agents. Case law excluding losses caused by sting operations have been correctly decided and should not be circumvented by the Commission.

CURE favors the "reasonable foreseeability" standard of causation. We believe that such a standard would necessarily limit "consequential damages." CURE favors the use of "fair market value" in determining loss, but only if it exceeds "black market value." CURE favors inclusion of interest in calculating loss only when it was bargained-for. CURE favors application of any and all payments by a Defendant as credit against loss for all theft/fraud offenses - no matter who discovered the crime or when it was discovered. CURE favors an invited downward departure when a Defendant demonstrates intent to make additional payments, but is apprehended before he can do so. "Misapplied" funds not actually lost should not count as losses. CURE believes fluctuations in value of collateral should affect loss whether the value increases or decreases, since such fluctuation is "reasonably foreseeable." CURE believes repaid funds to Ponzi scheme victims should be credited when determining amount of loss. CURE believes a Defendant's gain is irrelevant to the concept of victim's loss and should never be used in a loss calculation. CURE believes current rules should be changed to provide that loss is to be based only on actual loss and exclude entirely intended loss. CURE further believes that "risk of loss" has no business being included in loss calculation. CURE emphasizes that where there is no loss, there is no crime.

Amendment 5[A]: CURE does not believe that the theft, fraud and tax tables should be revised to increase penalties. We do not object to the removal of enhancements for more than minimal planning.

[B]: CURE welcomes the addition of a two (2) level reduction for cases involving limited planning if the theft/fraud loss tables are amended.

[C]: CURE strenuously opposes any enhancement for "sophisticated concealment" or "sophisticated means." Prosecutors apply the buzz-word "sophisticated" to any conduct beyond the mentality of a third grader. Unless the vagueness of the word "sophisticated" can be appropriately limited, Option #2 is more favorable than Option #1, but neither option is appealing. After all, when does criminal conduct not include the taking of deliberate steps to

make the offense difficult to detect? Is such conduct really so "sophisticated" so as to allow prosecutors to push for an enhancement? CURE thinks not! Hiding assets and transactions are part and parcel of any criminal conduct and should be recognized as nothing extraordinary.

[D]: CURE has no objection to this proposed amendment.

Amendment 6: CURE believes that current fraud guidelines adequately address telemarketing fraud and that no additional amendments, commentary or departure provisions are necessary to provide appropriate punishment.

Amendment 7[A]: CURE favors a wider definition of aberrant behavior beyond "a single act" and for this reason opposes the proposed change.

[B]: CURE takes no position on this proposed change.

[C]: CURE favors the adoption of Option #2 and agrees with the 1st and 2nd Circuits that "violation of a judicial order" refers to an order issued to a specific person or party.

[D]: CURE takes no position on this proposed change.

[E]: CURE opposes this amendment. An enhancement should not apply to an imposter who can't possibly possess the "special skill" for which the abuse of trust enhancement was designed.

[F]: CURE favors the adoption of Option #2 and agrees with the 2nd and 7th Circuits that obstructing justice in one's case is just that - obstructions directly connected to the Defendant's offense of conviction - not other cases, whether closely related or not!

[G]: CURE favors adoption of this proposed amendment.

[H]: CURE strenuously urges adoption of Option #2. Confinement at home or in a halfway house imposed upon revocation of probation or post-conviction supervision should never count as an additional term of imprisonment for the purpose of computing criminal history.

[I]: CURE urges adoption of Option #4. If a person suffers from diminished capacity deserving of a departure, the nature of the offense is irrelevant to whether the Defendant actually has such an affliction.

Amendment 8[A]: CURE believes the current penalties for second degree murder are adequate and that the Sec. 2A1.2 base offense level should not be increased.

[B]: CURE believes the current penalties for voluntary manslaughter are adequate and that the Sec. 2A1.3 base offense level should not be increased, further upward departures should not be encouraged and periods of post-incarceration supervised release should be left to judicial discretion.

[C]: CURE believes that the current penalties for involuntary manslaughter are adequate and that the Sec. 2A1.4 base offense level should not be increased, further upward departures should not be encouraged and supervised release should be left to a judge's determination. CURE emphasizes that prison does not provide the solution to an accidental death.

Amendment 9: CURE takes no position on this proposed amendment - except to comment that the DOJ proposal simplistically suggests upward departure where the loss can't be calculated. CURE believes that the loss for this type of computer offense will almost always be incalculable.

Amendment 10: CURE takes no position on this proposed amendment.

Amendment 11[A]: CURE opposes this amendment, but realizes the Commission has no choice but to conform to the statute's mandate.

[B]: CURE opposes this amendment and further believes an "actual knowledge" standard should be required to hold the transferor equally responsible as the transferee of a prohibited firearm, rather than apply a "reasonable cause to believe" standard.

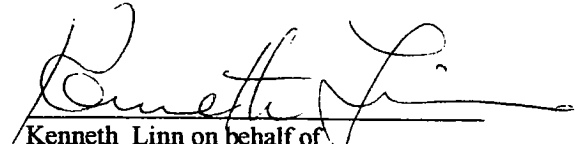
Amendment 12[A]: CURE takes no position on this proposed amendment.

[B]: CURE favors adoption of this proposed amendment. "Just punishment" is irrelevant as a factor in supervised release.

[C]: CURE favors adoption of this proposed amendment and agrees that the guidelines for probation and supervised release are discretionary and that such determinations should be left to a judge.

CURE thanks the Commission for consideration of the comments herein to the proposals currently under review.

DATED, this 2nd day of March, 1998.


Kenneth Linn on behalf of
Citizens for the Rehabilitation of Errants
(CURE)