

United States District Court  
Eastern District of Michigan  
Detroit 48226

034-95

Julian Abele Cook, Jr.  
Chief Judge

February 28, 1995

U.S. Sentencing Commission  
One Columbus Circle, NE  
Suite 2-500, South Lobby  
Washington, D.C. 20002-8002

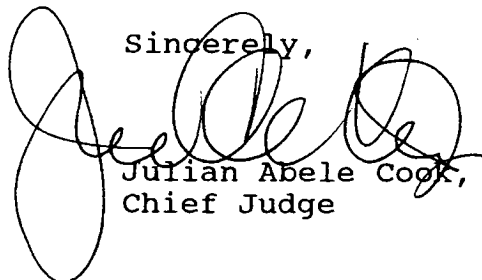
RE: Proposed Guideline Amendments  
for 1995

Dear Commissioners:

The attached comments are being submitted on behalf of the Judges of the United States District Court for the Eastern District of Michigan. Each year, since the inception of the sentencing guidelines, this Bench has accepted the invitation of the United States Sentencing Commission to offer comment on those issues in the proposed amendments which we feel will effect the sentencing practices of the Judges in this District.

If there are any questions regarding any of the comments submitted, please feel free to contact me.

Sincerely,



Julian Abele Cook, Jr.  
Chief Judge

## RECOMMENDATION

6. Option 1 is preferred, which amends the statutory index to reference guidelines in Chapter Two when death results from the underlying offense. This reference will only apply if it is found beyond a reasonable doubt that death resulted from the offense. A preponderance of the evidence standard is far too low for such serious penalties as death or life imprisonment.

## RECOMMENDATION

8. Because firearms are rarely utilized in crimes of forgery or counterfeiting, discretion should be left to the court to decide if an upward departure is warranted. There should be no specific offense characteristic for firearm possession. Option 2 is preferable.

## RECOMMENDATION

9. Option 2 would be preferred since it creates more options for the court to choose, based on the actual conduct of the defendant.

## RECOMMENDATION

11. A two level enhancement already exists at section 2D1.2 for distribution of controlled substances involving a protected location or an underage or pregnant individual. This enhancement appears sufficient.

The guideline should not be amended to provide a lower offense level if the protected location is selected by law enforcement or its agents. Instead, there should be a provision for a downward departure in an amount selected by the court.

## RECOMMENDATION

15. The probation department sees no good reason to amend section 2K2.1 to provide for an enhancement for a conviction under 18 U.S.C. s 922(v). Application note 16 now recommends an upward departure if the offense involved multiple military-style assault rifles. The commission could add to that note their approval of departures for semi-automatic weapons, if the court believes a higher sentence is warranted.

## RECOMMENDATION

19. The current offense levels for firearm violations appear adequate. No good reason has been advanced as to why they should be increased.

It is recommended that the definitions and counting of prior convictions for crimes of violence and drug trafficking be the same as those used in Career Offender. There would be disparities if the narrower definition in 18 U.S.C. § 924(e) was used. That is, if one state imposes a ten year maximum for the same conduct that in another jurisdiction carries a five year maximum, the Career Offender definition would count both; the 924(e) definition would not. Furthermore, there seems no reason to extend the definition of a crime of violence to comport with the 924(e) definition.

• **RECOMMENDATION**

25(A). The option preferred is to create a departure policy statement in Chapter Five, in order to leave more discretion with the court. However, should the Commission see fit to provide a Chapter Three adjustment, a two level enhancement would be sufficient.

## RECOMMENDATION

26(A). Since the sentencing court will have to decide if the new statutory sentencing enhancement applies to each defendant when it is alleged that he or she is a member of a "criminal street gang", it should be left to the court to determine the extent of the enhancement. It is preferable that this be accomplished by the creation of a departure policy statement.

## RECOMMENDATION

27(A). Since there seems to be no particular information to suggest that the current guidelines do not provide sufficiently stringent punishment for a defendant convicted of a crime of violence against an elderly victim, the applicable guidelines should not be changed.

27(B). If a defendant has previously been convicted for a crime of violence against an elderly victim, his enhanced punishment would be best determined through a provision recommending an upward departure.

## RECOMMENDATION

28. Since § 5G1.1 already provides instructions regarding mandatory statutory penalties, there is no good reason to replace the current career offender provisions. At the most, an application note referring to 18 U.S.C. § 3559 would suffice.

## RECOMMENDATION

29. The current § 5C1.2 appears to be working well, and should not now be altered. If there is any information suggesting that there is a problem, then it should be continued as a temporary amendment.

## AMENDMENTS RELATING TO DRUG OFFENSE GUIDELINES

### APPROACH 1

This approach, which includes proposed amendments 33 through 42, is not recommended because of the extreme changes involved, and without supporting information, such as the Commission's report to Congress on the 100 to 1 ratio between cocaine and cocaine base. Additionally, there have been some recent amendments promulgated which may ameliorate the problems with the drug guidelines, but they haven't been in effect long enough to measure their effectiveness.

Notwithstanding the above, some of the proposed amendments do beg comments, if only for future consideration by the Commission. It should be kept in mind, however, that these comments are generally based only on perceived concerns of some probation officers.

## RECOMMENDATION

33. There seems to be no good reason put forward by the Sentencing Commission why the guideline ranges should necessarily include any mandatory minimum sentence. The Sentencing Commission was charged by Congress to independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of Title 18, United States Code. If the Commission's studies show that a person with no criminal history, who is convicted of distributing 1 kilogram of heroin, should receive a sentence of between 70 and 87 months, then the guideline range should reflect that. U.S.S.G. § 5G1.1 would, of course, supersede the initial range, stating that any statutorily required minimum sentence must be imposed.

Having stated the above, it is recommended that if one option is to be chosen, Option C would be favored. This option would provide a guideline range of 70 to 87 months for the defendant described above, after adjusting for a four level role increase and a three level decrease for acceptance of responsibility. It would produce a sentence, however, of 120 months due to the statutorily required minimum sentence.

## RECOMMENDATION

34. Because of several areas of concern, such as the application of substantial assistance departures for high level dealers, the impact of drug quantity should be limited for those defendants qualifying for a mitigating role adjustment. An offense level of no more than 28 should apply to those qualifying defendants.

## RECOMMENDATION

37. Since there seems to be no good reason to use a one plant to one kilogram ratio, and there seems to be considerable reason to use 100 grams per plant, no matter how many plants are involved, detaching the one kilogram equivalent for one marijuana plant in cases of over 50 plants is desirable.

## RECOMMENDATION

38. We have been very concerned about the use of the 100 to 1 ratio for cocaine to cocaine base. It is believed that the ratio should be changed, however a new ratio could not be decided upon without at least first reviewing the Commission's report to Congress.

## RECOMMENDATION

40. There have been no significant problems noted with not using purity. U.S.S.G. § 2D1.1, comment. (n.9), which now provides for an upward departure for unusually high purity, is sufficient and allows the court to retain some discretion. It would be suggested that application note 9 be amended to reflect the appropriateness of a downward departure in those cases where the purity is unusually low.

## RECOMMENDATION

### APPROACH 2

Approach 2 is also not recommended. Although at first glance this approach appeared desirable, further study revealed what seems to be gross problems.

43. Under either option, no matter what base offense level is chosen, a defendant with a large amount of drugs will generally have the same or slightly higher guideline range than he would under the current drug guidelines. However, a defendant with a small amount of drugs will have a significantly higher guideline range, for no apparent good reason.

For example, compare defendant A who was involved in a conspiracy extending over six months, with defendant B who was arrested after one sale to an undercover agent. Further suppose that defendant A had five grams of cocaine base over the period of the conspiracy, and defendant B had five grams of cocaine powder on the one occasion; a base offense level of 26 applies to both; both are in Criminal History Category I; and both receive a three level adjustment for acceptance of responsibility.

Defendant A, under the current guidelines, would have a range of 46 to 57 months, but a statutorily required minimum sentence of 60 months. Under option 1 he would have a range of 57 to 71 months (60 to 71 months because of the statutorily required minimum sentence). Option 2 would result in the same range as under the current guidelines.

Defendant B, for whom no statutorily required minimum sentence applies, would have a range of 6 to 12 months under the current guidelines. The use of either option however, would result in a range of 46 to 57 months.

## RECOMMENDATION

46. This proposed amendment to § 5G1.3 does not simplify application of this guideline, nor does it appear to sufficiently increase the court's discretion. It remains complicated, confusing and difficult to understand. The Commission should simplify § 5G1.3(c), the most problematic section, by stating that the sentencing court may impose the sentence for the instant offense to run concurrently or consecutively.