Public Affairs

From: Wiley Y. Daniel
Sent: Friday, July 04, 2014 5:09 PM
To: Public Comment
Subject: Guideline Reduction and Retroactivity Comments

Dear Members of the Sentencing Commission,

The purpose of this email is to provide my comments about important matters that are currently before the Commission.

By way of background, I have served as a United States District Judge since 1995. From 2008 through the end of 2012 I was Chief Judge of the District of Colorado. Since January 1, 2013, I continue to serve as a Senior Judge.
From May 2009 to April 2011 I was President of the Federal Judges Association, an organization that represents over 75% of the Article III
judges. Perhaps of greatest importance for purposes of my comments is the
fact that in my almost 19 year tenure as a district judge, I have presided over thousands of criminal proceedings including, without limitation, straight forward, complex multi-defendant proceedings, and two federal death penalty cases that proceeded to verdict in both the guilt and penalty phases. I have sentenced thousands of defendants and understand the sentencing laws as they existed when the guidelines were mandatory and since they became advisory in 2005. When I was Chief Judge, I regularly consulted with our District's United States Attorney, the Federal Public Defender, and the leadership of the Criminal Justice Act Panel to ensure that there were coordinated efforts to promote fairness and justice for all who were a part of the criminal justice system in the District of Colorado.

With the foregoing background in mind, I now wish to provide my comments about the pending matters. It is my understanding that the Commission has proposed lowering drug guidelines by two levels and is now considering whether to make the change retroactive. While I am strongly in favor of the guideline reduction and retroactivity, I oppose the Department of Justice's position that urges the Commission to use categorical carve-outs to exclude certain prisoner types if retroactivity is adopted. For instance, DOJ wants the Commission to eliminate prisoners with gun bumps or
924(c) convictions; enhancements for obstruction of justice, threats of violence or aggravating role; and anyone in Criminal History Categories III-VI. If adopted by the Commission, these carve-outs would arbitrarily eliminate 30,000 of the 50,000 prisoners the Commission thinks would be eligible to seek a sentence reduction. The better, wiser and more just course of action is to reject DOJ's proposal and allow experienced judges to sort out those who might pose a threat to public safety if released early, much as the federal judiciary did following the decision to make crack minus two and FSA reductions retroactive. As Chief Judge, I was instrumental in establishing fair and effective procedures, after consulting with the U.S. Attorneys Office, the Federal Public Defender and the CJA Panel, to ensure that there were proper procedures in place to consider sentencing reduction requests from prisoners.

Again, I support the Commission's drug guideline reduction and urge the Commission to make it retroactive. The Commission's impact analysis demonstrates that over 50,000 persons would be eligible for reductions averaging 23 months. The expected bed years saved would be 83,525. Also, significant monetary savings would occur in the range of $880 million to
$2.4 billion over the life of the amendment. Of equal importance is the Commission's finding that early release does not increase recidivism rates.
As a point of personal comment, I must tell you that one of my clear observations over the past almost 20 years is that many of the system's drug related punishments have been excessive (in part caused by the mandatory minimums and

the mandatory guidelines) and resulted in too many defendants remaining in jail for sentences that were too long and out of proportion to the crimes they committed.

Here are further observations that I urge you to consider:

1. I support the Judicial Conference retroactivity position that calls for a set-off to give probation and court officers a chance to prepare for the motions given the intense resource pressure posed by a large number of petitioners likely to apply for sentence reductions.

2. Adoption of the guideline reductions and retroactivity is required as a matter of fundamental fairness and justice.

3. For the reasons previously noted above, the Commission should not adopt categorical exclusions which are imperfect and improper proxies for dangerousness; instead, federal judges can and will do a much better job.
In that regard, there is simply no principled way such exclusions can distinguish those who would pose a threat to public safety if released and those who would not.

4. Federal judges are in the best position to determine who should and should not be released based on the facts, circumstances and merits of the cases.

5. Excluding some prisoners based on enhancements or criminal history would double count those sentences. Those with enhancements will still serve their enhancements except that their underlying base offense level will be reduced.

6. Judges, prosecutors, probation officers and federal defenders have been through retroactivity twice before and the strong collaboration and lessons they learned will ensure that fair and appropriate procedures are established. The bottom line is that the system has done this before and will do it again in a fair, balanced and wise fashion. One of my proudest moments as a sitting judge was when I granted a sentencing reduction and early release to an inmate who had been convicted of crack cocaine offenses and how well he did following his release. He wrote me a letter of thanks and appreciation and the Denver Post wrote a story about the positive outcome that transpired.

7. Recidivism rates among those released early are indistinguishable from rates of those who served their full term.

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