UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

ANDREW S. HANEN
U.S. DISTRICT JUDGE

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June 9, 2014

Judge Patti B. Saris
Chair - United States Sentencing Commission
United States Courthouse
One Courthouse Way, Room 6130
Boston, MA 02210

Via-Electronic Mail

Re: Retroactivity of Guideline Changes

Dear Judge Saris:

I want to weigh in on the upcoming discussion that the Commission is going to have concerning making the newly proposed drug trafficking guidelines retroactive. I am strongly opposed for four reasons.

First of all, in theory at least, all of us have always had the freedom to fashion an appropriate sentence. If we, as judges, felt a sentence within the Guideline range was appropriate, we could give a guideline sentence. If a judge felt, given the nature and circumstances of the crime, the history and characteristics of the defendant and the remainder of the § 3553(a) factors, a different sentence, either higher or lower than that suggested by the Guidelines, was warranted, that judge not only had the freedom to fashion such a sentence, but also had the duty to fashion such a sentence. Therefore, in all probability I would resentence those individuals to exactly the same sentence I gave previously.

Second, the reasoning that existed for making the crack guidelines retroactive do not exist in this instance. It has always been my understanding that the crack cocaine guidelines were changed and then applied retroactively because of the realization that the biggest concentration of crack convictions emanated from the inner city areas. That being the case, the Guidelines were, as a practical matter, working to cause a racial disparity in sentencing—the very ill (or at least one of the very ills) the Guidelines were designed to prevent. In fact, in its report to Congress, the

Sentencing Commission said: "The overwhelming majority of offenders subject to the heightened crack cocaine penalties are black, about 85 percent in 2000. This has contributed to a widely held perception that the current penalty structure promotes unwarranted disparity based on race. Although this assertion cannot be scientifically evaluated, the Commission finds even the perception of racial disparity problematic because it fosters disrespect for and lack of confidence in the criminal justice system." This situation does not exist with these most recent amendments. There is simply no racial, gender, or any other protected category that necessitates retroactivity.

There were apparently two primary reasons for these amendments. The first reason given for these amendments was the fact that some originally thought that setting the guidelines above the mandatory minimums would help foster guilty pleas and cooperation. That thinking has changed, and the current thinking is that it is no longer necessary to have the guidelines exceed the mandatory minimums in order to encourage pleas and cooperation. A change in the thought process behind a theory behind a guideline is certainly no reason to apply something retroactively. Again, this has nothing to do with whether the original sentence was just or whether it complied with § 3553(a). While some judges might suggest that the changes are supportable because the Guideline penalties were too high or various drugs were not satisfactorily differentiated, it was always within the discretion of that individual judge to correct that perceived problem when sentencing. For example, many judges I know view certain drug crimes differently when the case involves heroin or methamphetamine. Additionally, any argument that certain mandatory minimum laws are too high is clearly irrelevant. Again, a change in thinking (by some) is not a reason for retroactivity.

Third, the next reason given for the changes is prison overcrowding. This has nothing to do with whether a sentence was appropriate or just and as such is no reason to apply the changes retroactivity. I will concede that this is the only area that one can say will be affected by a retroactive application. No doubt lowering sentences will hasten relief to the overall numbers in the Bureau of Prisons. Again, there is no judicial/justice custom, goal or ideal that is furthered by a retroactive application. What retroactive application will do is temporarily add a significant cost burden to the judiciary in addition to that already bourne by the Bureau of Prisons. The burden will be on us not only in intellectual terms, but also in terms of overhead costs and increased workload on our office staffs and probation officers. Currently, I am a single judge sitting in a two judge division, my co-judge having taken senior status. I have 50% of my former co-judge's criminal docket, 100% of my own docket and 100% of my predecessor's criminal docket. If made retroactive, I could easily have to resentence well over 500 individuals. (I do not have exact numbers at my fingertips, but this Division handled approximately 550 drug cases just between 2010–2013. Obviously, there are hundreds, if not thousands, of others in the years preceding 2010. I have no way, short of reviewing every file, to calculate how many of these cases had multiple defendants but a large percentage did. Also, I do not have the means or the time to calculate how many defendants have already been released.) I would not flinch from the task of resentencing twice that many individuals if it was necessitated by a legal concept or because someone's rights have been affected, but the decision to lower these Guidelines was not about right or wrong or whether a sentence was just or not; it was solely about dollars and cents. The costs involved in resentencing 500 (and probably many, many more) inmates would not only be substantial, but in theory it would

also be wasted, because unless some unusual circumstance exists, as least for the individuals I have sentenced, I will give them the same sentence I gave them the first time. (See point #1.)

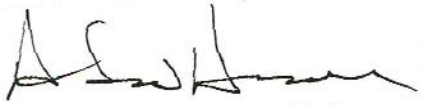
The last reason these changes should not be made retroactive is that everyone you have sentenced, regardless of the crime of conviction, will file a § 2255 once they hear about retroactivity. The fact that they were not convicted of a drug offense will make no difference. I only had one or two crack cases and I resentenced them automatically, but I cannot begin to tell you how many cases, motions, or requests we had following the decision to apply to the crack guideline retroactively. Not one of those making those motions had a case involving crack, and many were in jail for non-drug related offenses, like immigration offenses. If someone was reducing sentences retroactively, they wanted to be in on it. I might add that the motions for resentencing are already arriving.

If it is eventually decided that these amendments will become retroactive, I hope the powers that be are going to arrange for funding for probation officers and support personnel that will be needed to help accomplish this task. If these amendments are made retroactive, we will need some judge from a non-border state to move to each division on the border to handle the regular docket while those of us stationed on the border spend our time resentencing drug traffickers.

Please feel free to share this letter with the other Commissioners. I am copying Judge Ricardo Hinojosa in his capacity as my Chief Judge, but I have not sent this letter to the other Commissioners as I thought that decision should be left to you.

Thank you for your consideration.

Very truly yours,



Andrew S. Hanen
United States District Judge

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cc: Chief Judge Ricardo Hinojosa
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Via-Electronic Mail