United States Court of Appeals
for the Third Circuit

THEODORE A. MCKEE
CHIEF JUDGE

20614 U.S. COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA 19106-1790

TEL:215/597-9601
FAX:215/597-0104
Chambers_of_Chief_Judge_Theodore_McKee@ca3.uscourts.gov

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Honorable Patti B. Saris
Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002-8002

Retroactivity of Amendments to Drug Quantity Table

Dear Judge Saris:

I am writing to comment on the making proposed changes to the drug quantity table in the Guidelines retroactive. I am writing based upon my own views, interest and involvement in sentencing and not as the Chief Judge of the Third Circuit. I have not consulted any judicial colleagues to ascertain their views on this issue and the opinion I am expressing is solely my own.

I believe that the amendments to the table are motivated by efforts to make the resulting sentencing scheme more fair and more just. I therefore think it fair to assume that limiting the change by not making it retroactive would also limit the fairness of the resulting sentences and sentencing scheme. To the extent that the changes are both necessary and appropriate, and I think they are both, the only reason to deprive those who have already been sentenced of the change would seem to be rooted in considerations of logistics and practicality as well as public safety. Though such concerns have a visceral appeal, for the reasons I will explain, I do not believe they are sufficiently realistic or of such gravamen to limit the fairness of the sentencing scheme that will result from changes in the drug quantity table.

Considerations of logistics and practicality may at first seem quite meritorious because of the large numbers of defendants who will potentially seek relief based on changes to the drug quantity table. However, we have been here before. When similar changes to the Guidelines or the sentencing scheme have been made retroactive in the past, United States Attorneys and Federal Public Defenders worked together with the applicable Probation office to implement a process which allowed for the vast majority of petitions for relief to be resolved by agreement with limited inconvenience or disruption to the courts or the offices involved. This was the experience in the district I am most familiar with (the

Eastern District of Pennsylvania), and I have been informed that the experience there was not qualitatively different from the experience of most jurisdictions around the country. Sometimes, necessity truly can be the mother of invention, *and* of cooperation. Moreover, even if this were not the case, I would have great concern over any scheme of implementation that weighed convenience so heavily that it outweighed fairness and justice. Most of the judges I have spoken with about such issues agree that whatever inconvenience results is well worth achieving a greater measure of fairness in sentencing. It is one of the things that makes me so proud to be a member of the judiciary.

Second, there is the concern of public safety; a concern that cannot (and should not) be minimized or ignored. If there were sound evidence that a policy of shortening sentences of sentenced defenders increased the likelihood that they would reoffend, it would be very difficult to support a policy of general retroactivity. However, to my knowledge, the data is to the contrary. Unless I am mistaken, and there are people at the Commission far more knowledgeable than me about this, the studies show no statistically significant correlation in new offenses when comparing those defendants who serve their entire sentence with those who have their sentences shortened. Indeed, when I served on the Criminal Law Committee of the Judicial Conference, we were told of studies that suggested that unnecessary incarceration could actually increase the likelihood of recidivism. I do not think that limiting retroactive application of the changes can be justified by concerns of public safety and, as I have just suggested, an argument can be made that reducing unnecessary incarceration promotes public safety.

I believe the Department of Justice is taking the position that the changes should only apply to defendants whose Criminal History Category falls below a certain threshold., and or, whose offense of conviction does not include certain factors that would suggest the offender is a greater risk to safety. I think this concerns, it does not resolve them. Restricting the change to only those defendants with lower CHC scores may well exacerbate the racial disparity that is already far too prevalent in sentences of offenders, without a counterbalancing increase in public safety. To the extent that changing the drug quantity table is the result of concerns of racial disparity, limiting the reach of the changes to persons with lower CHC as a matter of categorical policy would reintroduce the very disparity that the Commission is trying so diligently to avoid. Here again, if this limitation could be justified on public safety grounds, it may be appropriate. However, I think that the same concern can be addressed by individualized examination of persons petitioning for release based on the new guideline quantities. Once again. cooperation among the applicable Probation Office, Public Defender and U.S. Attorney can establish a process that allows pertinent information about a given offender to be examined and – in many cases – an agreement reached on a recommendation to the court. This has worked before and I see no reason why it should not be allowed to work again. This is far more cumbersome, time consuming and tedious than drawing an arbitrary line that would exclude all those on the wrong side of the divide (some appropriately, and some inappropriately); but it is

also infinitely more fair. And, we are in the fairness business, not the efficiency business. To the extent that making the changes retroactive imposes greater burdens, I think most involved in the criminal justice system accept such burdens as part of our job description. Inconvenience and inefficiency are sometimes the dues we pay to get to the fairness that we all claim we want. Here, the countervailing consideration of public safety can be addressed without imposing a categorical limitation that restricts the reach of the fairness I think the Commission is trying to achieve.

Finally, there is the cost. Although considerations of dollars and cents should not reign supreme when policies that implicate social justice are discussed, I am not so naïve as to be unable to appreciate the impact that fiscal considerations have. My understanding is that not limiting the reach of the changes could reap billions of dollars of increased savings in a time when all are concerned about governmental spending and fiscal austerity. This seems yet another reason to refrain from limiting the temporal reach of the amendments unless public safety demands the extra expense of reducing the numbers of offenders who would be reached by the amendments. As I have already noted, I do not believe studies support the argument that the increased cost is necessary to protect the public. Indeed, one could forcefully argue that the public is better protected by freeing more resources that can be spent in ways other than incarcerating offenders whose additional time in confinement does not equate with increased public safety.

Despite the objections of some involved, I cannot help but think that if the appropriate "players" from the appropriate offices are allowed to once again come together with an eye toward agreeing on those whose petitions for relief are meritorious, such a process can work just as it has in the past and a greater measure of individualized justice can be achieved with no diminution in public safety.

Thank you for allowing me to comment on this.

Sincerely,

Ted McKee