Public Affairs

From: Raymond P. Moore
Sent: Sunday, July 06, 2014 5:52 PM
To: Public Comment
Subject: Guideline Reduction Retroactivity Comments

Dear Sentencing Commission:

I submit this email as my comments with respect to potential retroactivity of a currently proposed guideline amendment which would reduce the base offense level in drug cases by two points. My understanding is that the Department of Justice has recently - indeed, quite late in the comment period - urged the Commission to use categorical carve outs to limit the effect of retroactivity of this amendment in the event the Commission opts for retroactivity. I speak with respect to such carve outs and respectfully disagree with the DOJ. I urge the Commission to make the proposed amendment retroactive (assuming the amendment goes into effect) and to resist any artificial carve outs which would categorically serve to limit the availability of retroactivity only to select federal inmates.

I begin by noting that I am in complete agreement with the positions taken by the Criminal Law Committee of the Judicial Conference of the United States. Were it not for the fact that I do not feel that the Committee had an adequate opportunity to review and comment upon the DOJ proposal, I would not make individual comments. But given my feelings, I feel compelled to make some brief, individual comments.

I start with the proposition, admittedly assumed, that the Commission has determined that the proposed amendment better serves the overall purposes of sentencing than does the drug table contained within the current guideline. If this is the case, then I cannot understand a position that would carve some inmates out from access to the proposed guideline. The proposed guideline does not differentiate or distinguish among future defendants in terms of access to its benefits. That being the case, I see little wisdom in carve outs which would apply only to those defendants previously sentenced. If the Commission has determined that the purposes of sentencing are better served by the proposed guideline amendment, then let those purposes of sentencing be better served uniformly. An arbitrary line in time where criminal history category (for example) matters on one side but not the other is neither fair nor just. And it hardly comports with the principles of uniformity and avoidance of disparity upon which the guidelines are built.

Equally important to me is the fact that the proposed carve outs simply make no sense.

I begin with the proposition that those in criminal history categories I and II should potentially be eligible for retroactive application, but those in criminal history categories III or higher should not. As the Commission undoubtedly knows, one can have a single conviction - for murder
- and be within criminal history category II since a substantial sentence of incarceration yields only 3 criminal history points. On the other hand, someone with three minor theft offenses can easily fall into category III if he received probation on two and 60 days on the third. How a carve out could be proposed which would make the murderer eligible, but the petty thief not, simply baffles me.

And similar questionable outcomes exist with respect to other carve outs as well. In the case of a firearms adjustment, some may be the product of sheer chance as one prosecutor seeks a weapons enhancement under the guidelines based on a Pinkerton or conspiracy theories and another does not. Yet two defendants, neither of which in fact personally possessed a firearm, can be treated quite differently if the carve outs are adopted with the outcome being based solely on the skill or tendencies of particular prosecutors. Similarly, I strongly suspect that obstruction adjustments given because a defendant lied to law enforcement and "significantly" impeded an investigation (§3C1.1, App. Note 4(G)) and those not given because the lie did not "significantly" impede (§3C1.1, App. Note

5(B)) have not been so precisely and consistently applied that retroactivity decisions, consistent with fundamental fairness, should be based thereon.

I can only assume that the structure of the proposed carve outs has something to do with recidivism. But if so, the data is hardly supportive.
My review of the data contained in the Commission's May 2014 report, Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The
2007 Crack Cocaine Amendment, suggests that the Commission found that those retroactivity reductions in the case of crack resulted in lower recidivism rates than a comparison group not receiving such reductions - regardless of criminal history category analyzed. (See report at 6.) Equally interesting, the Commission found that contrary to what may have been feared, recidivism rates for those with weapon involvement were not different to a statistically significant degree from those of the of the comparison group.
And in fact, the recidivism rate for those in the retroactivity group with weapon involvement was only 1.5% greater than those in the comparison group without any weapon involvement - again a statistically insignificant difference. (See report at 6-7.)

I could go on, but the Commission is undoubtedly aware of its own data. So, instead, I turn to the very policy interests identified by the DOJ in the written Statement of Sally Quillian Yates as factors to consider in deciding whether to apply the proposed amendment retroactively: "public safety, individual justice for offenders and public trust and confidence in the federal criminal justice system."

I submit to you that public safety is not served the proposed carve outs.
If the Commission's data on recidivism is correct, denial to some of retroactive benefits of a proposed guideline amendment only defers until tomorrow matters of public safety and perhaps increases future recidivism rates while doing so. And regardless of the "truth" of the numbers, public safety is not sacrificed by rejecting carve outs. Federal judges would decide, just as they do daily, how best to protect the public in the case of an individual defendant.

I submit that individual justice for offenders is not advanced by carve outs either. Carve outs are the antithesis of individual justice. Offenders are cast into categories, some of which are entitled to relief and others of which are not. Individual justice is achieved by allowing a federal judge to consider each offender's case individually and to base his or her decision on both the person and the facts before the judge.

Finally, I submit that public trust and confidence in the federal criminal justice system is not enhanced by having current views of the overall principles of sentencing (in the form of the guideline amendment) apply to some, but not to others. Nor is it enhanced by having artificial lines in time or between criminal history categories determine substantive impacts on sentencing. We are a nation of laws. What we hear from the public most often is that the rules and laws of the country should apply equally to all, that there are not favored and disfavored groups. Those principles are served, and trust and confidence preserved, by having sentences determined by federal judges in public proceedings, not by arbitrary carve outs by category.

The courts have successfully dealt with these issues before. They can do so again.

I thank you for your time and consideration.

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Raymond P. Moore
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District of Colorado