

NEW YORK COUNCIL OF DEFENSE LAWYERS

c/o Susan Necheles, Esq.
Hafetz & Necheles, LLP
10 E. 40th Street, 48th Floor
New York, NY 10016
(212) 997-7400
Fax: (212) 997-7646

Susan R. Necheles
President
Jonathan Bach
Vice-President
Sean Hecker
Secretary-Treasurer

Board of Directors

Renee Hill
Evan Barr
Richard Strassberg
Michael Grudberg
Kathleen Cassidy
Amy Walsh
Tai Park
Justine Harris
Sarita Kedia
Joanna Hendon

Ex Officio

Roland G. Riopelle

February 19, 2019

United States Sentencing Commission
Office of Public Affairs
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

*Re: Comments of the New York Council of Defense Lawyers
Regarding 2019 Proposed Amendments to the Sentencing Guidelines*

Dear Commissioners:

We submit this letter on behalf of the New York Council of Defense Lawyers (the "NYCDL"). The NYCDL is a professional association comprised of approximately 275 experienced attorneys whose principal area of practice is the defense of criminal cases in federal court. Among its members are former United States Attorneys and Assistant United States Attorneys, including previous Chiefs of the Criminal Divisions in the Southern and Eastern Districts of New York. Its membership also includes current and former attorneys from the Office of the Federal Defender, including the Executive Director and Attorney-in-Chief of the Federal Defenders of New York. The NYCDL's members thus have gained familiarity with the Federal Sentencing Guidelines (the "Guidelines") both as prosecutors and defense lawyers.

We appreciate the opportunity to submit comments to the United States Sentencing Commission (the “Commission”) regarding the proposed amendments to the Guidelines. In the pages that follow, we address a few of these proposed amendments. The contributors to these comments include members of the NYCDL’s Sentencing Guidelines Committee, Catherine M. Foti (chair), Richard F. Albert, Michael F. Bachner, Christopher P. Conniff, Brian E. Mass, Sharon L. McCarthy, and Marjorie J. Peerce. Christopher Pavlacka assisted the Committee in its review and consideration of the proposed amendments.

I. Proposed Amendments in Light of *Koons v. United States*

A. Amendments to §1B1.10(a)(1) and §1B1.10(a)(2)

The Commission has requested comment on whether the language of §1B1.10 should be amended in light of *Koons v. United States*, 138 S. Ct. 1783 (2018). The Commission proposes to amend the language of §1B1.10(a)(1) to confirm that a defendant is eligible for a sentence reduction based on a changed Guidelines range only if the defendant’s original sentence was based on the original Guidelines range. The Commission also proposes to amend the language of §1B1.10(a)(2) to affirmatively state the requirements for eligibility for a sentence reduction, rather than listing exclusions from eligibility. For the reasons set forth below, the NYCDL supports the proposed amendment to §1B1.10(a)(1) as well as the change to §1B1.10(a)(2).

Koons is a companion case to *Hughes v. United States*, 138 S. Ct. 1764 (2018). In *Hughes*, the Supreme Court was presented with the question whether a defendant who is sentenced pursuant to a plea agreement is eligible for a reduction of sentence if the Commission retroactively reduces the applicable Guidelines range. The *Hughes* Court found the defendant eligible to seek a reduction. As *Hughes* made clear, a sentencing court must consult and take into account the Guidelines when fashioning a sentence. *Id.* at 1772; *see also* 18 U.S.C. § 3553(a). Accordingly, “[e]ven if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, then the Guidelines are in a real sense the basis for the sentence.” *Hughes*, 138 S. Ct. at 1775 (quoting *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016)). This point is key: Under *Hughes*, even if the original sentencing judge ultimately deviated from the Guidelines, as long as the judge used the Guidelines as the starting point for the sentence, the defendant is entitled to seek relief based on a subsequently lowered Guidelines range.

On the same day *Hughes* was decided, the Court issued its companion decision in *Koons*. Notwithstanding the holding of *Hughes*, the Court found that the defendant in *Koons* represented “a narrow exception to the general rule” that most sentences will be based on the Guidelines. *Id.* at 1776. According to the *Koons* Court, there are rare instances in which the Guidelines “explicitly call for the [sentencing] ranges to be tossed aside.” *Koons*, 138 S. Ct. at 1788. In those rare instances where “the ranges play no relevant part in the judge’s determination of the defendant’s ultimate sentence”—namely, when the statutory minimum lies above the defendant’s guidelines range—“the resulting sentence is not ‘based on’ a Guidelines range.” *Id.*

The NYCDL believes that all sentences are based on the Guidelines because the Guidelines must be considered by a court before imposing a sentence even if the range must then be set aside because of other statutory mandates, and therefore judges are informed by the Guidelines range in coming to all sentencing decisions. This argument, however, was considered by the Court in *Koons* and rejected, drawing on the distinction between a sentence being based on the general procedural role the Guidelines play in sentencing rather than on the Guidelines “range,” and finding that the sentence must have been based on the latter in order to trigger eligibility for a sentence reduction.

With that understanding, the NYCDL supports the Commission’s proposed amendment to §1B1.10(a)(1). The proposed amendment tracks the language in 18 U.S.C. § 3582(c)(2), *Hughes*, and *Koons*, which provides eligibility for a sentence reduction only if (1) the original sentence was “based on a sentencing range,” and (2) the relevant sentencing range was subsequently lowered by the Commission. 18 U.S.C. § 3582(c). Given the Supreme Court’s decision in *Koons*, the NYCDL believes the Commission has no choice but to amend the Guidelines in this way. The proposed amendment will help clarify the applicability of sentencing reductions and still opens the door to a reduction under Section 3582 for the majority of defendants.

Similarly, the NYCDL supports the Commission’s proposal to amend the language of §1B1.10(a)(2) to set forth factors required for a sentencing reduction, rather than factors that would exclude a defendant from seeking a reduction. Listing required factors will make more transparent a defendant’s eligibility for relief, providing clarity for defendants, attorneys, and courts.

B. Amendments to §1B1.10(b)(1) and §1B1.10(c)

The Commission also has invited comment on proposed revisions to §1B1.10(b)(1) and (c). The Commission has proposed three options for consideration. The options distinguish among *above* defendants—whose original Guidelines ranges were completely above the mandatory minimum, *straddle* defendants—whose original Guidelines ranges straddle the mandatory minimum, and *below* defendants—whose original Guidelines ranges were completely below the mandatory minimum. Based on *Koons*, all three options preclude *below* defendants from receiving a sentence reduction based on lowered guidelines. However, the options differ on how they treat *above* and *straddle* defendants. In particular: Option 1 affords relief under Section 3582 to both *above* and *straddle* defendants; Option 2 affords relief under Section 3582 to neither *above* nor *straddle* defendants; Option 3 affords relief under Section 3582 to *above*, but not *straddle*, defendants.

The NYCDL supports adoption of Option 1. Option 1 is the only option congruent with the wide scope of *Hughes*. *Hughes* held that a sentence is based on the Guidelines range “if the range was a basis for the court’s exercise of discretion in imposing a sentence.” *Hughes*, 138 S. Ct. at 1775. As already described, *Koons* carves out a narrow exception to that general rule: A *below* defendant cannot receive relief under §1B1.10 because his sentence was “not ‘based on’

the lowered Guidelines ranges” as the original sentencing court “did not consider those ranges in imposing its ultimate sentences.” *Koons*, 138 S. Ct. at 1788.

But nothing in *Koons* suggests the same analysis applies for *above* and *straddle* defendants. For both sets of defendants, the Guidelines range plays a part in a court’s determination of a sentence. For *above* defendants, the Guidelines play substantially the same role as they would if a mandatory minimum did not apply. For *straddle* defendants, the Guidelines and the mandatory minimum work in tandem to determine the sentencing range. In either case, the Guidelines range is a basis for the sentence, and under Section 3582, both *above* and *straddle* defendants should be eligible for relief.

Despite *Hughes*’ broad reach, Option 2 precludes relief for *above* and *straddle* defendants, while Option 3 precludes relief for *straddle* defendants, but in either case, for no compelling reason. To be sure, as the Commission notes, under Option 1 *straddle* and *above* defendants will be treated more favorably than *below* defendants and similarly situated defendants being sentenced for the first time. But that is a consequence of *Koons*, *Hughes*, and Section 3582. Indeed, as noted above, the NYCDL believes that Section 3582 compels adoption of Option 1 over Options 2 and 3.

II. Resolution of Circuit Conflict Regarding §1B1.10(b)(2)(B)

The Commission also has invited comments on proposed revisions to application note 3 of the commentary to §1B1.10, predicated upon a circuit split between the Sixth and Eleventh Circuits, on the one hand, and the Seventh and Ninth Circuits, on the other hand. In particular, the proposed application note includes two options when a defendant has received both a substantial assistance departure and at least one other variance or departure and is eligible for resentencing under §1B1.10. Under Option 1, a court, in fashioning a reduction of sentence “comparably less” than the defendant’s amended guidelines, may only consider the substantial assistance departure, as the Sixth and Eleventh Circuits have held. Under Option 2, a court, in fashioning a reduction of sentence “comparably less” than the defendant’s amended guidelines may take into account all the departures and variances the defendant received at sentencing, as the Seventh and Ninth Circuits have held.

The NYCDL believes that a court resentencing a defendant under §1B1.10 should be free to consider all departures and variances the defendant received at the original sentencing, and therefore supports Option 2.

Congress has directed the Commission to “assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would ordinarily be imposed, including a sentence that is lower than that established as a minimum sentence, to take into account a defendant’s substantial assistance.” 28 U.S.C. § 994(n). Following this directive, when promulgating Amendment 759, the Commission found §1B1.10 was adopted to place individuals who provide substantial assistance in a better position than otherwise similarly situated defendants. *See* USSG app. C., amend. 759, at 420 (2011) (Reason for Amendment). Option 2

further the Commission's rationale behind Amendment 759 by continuing to give cooperators the benefits for which they bargained.

By contrast, Option 1 would result in several undesirable consequences. First, Option 1 would reduce benefits to cooperators. *See United States v. D.M.*, 869 F.3d 1133, 1141 (9th Cir. 2017). The NYCDL is concerned that reducing the benefits available to those who provide substantial assistance may work as an incremental deterrent to individuals from cooperating. Charles Doyle, *Federal Mandatory Minimum Sentences: The Safety Valve and Substantial Assistance Exceptions*, Congressional Research Serv. (Oct. 21, 2013), at 3. Cooperators will know that any other departure or variance received at the original sentencing will be of no value at resentencing. Finally, to the extent Option 1 tends to decrease cooperation, it will have a corresponding negative impact on the court system. With defendants less likely to enter into cooperation agreements with the government, more defendants—both those who would otherwise cooperate and those against whom the cooperators would otherwise testify—may drag out their cases, further straining already limited judicial resources.

Second, under Option 1, when the original sentencing judge fails to differentiate between the substantial assistance departure and other departures or variances, the resentencing court will be left to speculate about the bases for the original sentence. *See D.M.*, 869 F.3d at 1141–42. This injects uncertainty into the resentencing process and could leave some defendants who should be eligible for relief without recourse based solely on the original sentencing judge's failure to adequately articulate the bases for the sentence.

Third, under Option 1, defendants who had additional mitigating circumstances strong enough to merit formal downward departures at least as significant as the substantial assistance departure are categorically barred from receiving credit for other departures or variances. *Id.* at 1142. Nothing in §1B1.10 or Section 3582 compels such a drastic consequence for defendants. Option 2 eliminates this disparity by allowing these defendants to receive a sentence reduction.

Moreover, only Option 2 allows the resentencing court to make an individualized determination of the sentence reduction the defendant should receive. Section 3582 requires courts to consider the Section 3553(a) factors in determining if a defendant should be resentenced based on a lowered Guidelines range. The hallmark of sentencing decisions under Section 3553(a) is the "individualized assessment based on the facts presented." *Gall v. United States*, 552 U.S. 38, 50 (2007). The factors listed under Section 3553(a) are myriad, but importantly include "the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1). The Commission expressly recognizes that the Section 3553(a) factors are grounds for downward or upward variances at sentencing. *See Office of Gen. Counsel, U.S. Sentencing Comm'n, Primer: Departures and Variances* 42–50 (Apr. 2018), https://www.ussc.gov/sites/default/files/pdf/training/primers/2018_Primer_Departure_Variance.pdf.

Option 1, by constraining courts only to the substantial assistance departure, deprives the defendant of the opportunity to receive an individualized assessment that Section 3553(a) requires. In particular, under Option 1, the court will not be allowed to take into account

United States Sentencing Commission
February 19, 2019
Page 6

variances in the original sentencing—for instance, a downward variance based on the history and characteristics of the defendant—at resentencing, even though Section 3582(c) expressly requires the resentencing court to take into account the history and characteristics of the defendant, among the other Section 3553(a) factors. To this end, the NYCDL believes that Option 1 is incompatible with the plain text of Section 3582(c).

Option 2 does not suffer from this infirmity, as the resentencing court would be allowed to take into account all departures and variances during resentencing. Especially with respect to variances, this comports with both the language and the spirit of Section 3582(c), which requires courts to engage in the familiar Section 3553(a) analysis—the same analysis that may have led the original sentencing court to vary from the Guidelines.

The NYCDL again thanks the Commission for offering it the opportunity to comment on the proposed amendments. The NYCDL looks forward to continuing dialogue with the Commission as it continues in its efforts to modify and improve the Guidelines.

Very truly yours,

Handwritten signature of Susan R. Necheles in blue ink, followed by a vertical line and the initials 'cbp'.

Susan R. Necheles
President

cc: (by mail) Hon. Charles R. Breyer
Hon. Danny C. Reeves
David Rybicki, Ex Officio
Patricia K. Cushwa, Ex Officio

(By email) Catherine M. Foti, Esq.
(Chair, NYCDL Sentencing Guidelines Committee)