NEW YORK COUNCIL OF DEFENSE LAWYERS

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March 15, 2019

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

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

Dear Commissioners:

On February 19, 2019, the NYCDL submitted a letter in support of the proposed amendments to the language of §1B1.10 made in light of the *Koons v. United States*, 138 S. Ct. 1738 (2018), and to the language of application note 3 of §1B1.10(b)(2)(B), based on a circuit split. Although the NYCDL maintains its support for the language of application note 3, it now withdraws its support of the amendments made in response to *Koons*.

In its February 19, 2019 letter, the NYCDL said that it "believes that all sentences are based on the Guidelines because the Guidelines must be considered by a court . . . and therefore judges are informed by the Guidelines range in coming to all sentencing decisions." The NYCDL then went on to recognize that the Supreme Court in *Koons* recognized an exception to the concept that the Guidelines range is relevant in all sentencings and based on this understanding lent its support to the proposed amendment which it understood was consistent with *Koons*. In doing so, the NYCDL intended to interpret *Koons* narrowly, recognizing that *Koons* described "those rare instances where 'the ranges play *no relevant part* in the judge's determination of the defendant's ultimate sentence'" (emphasis added). The NYCDL understood that *Koons* stood for the proposition that when it was clear that a *below* defendant's sentencing judge had rejected the Guidelines ranges altogether in fashioning a sentence, those specific *below* defendants were not eligible for relief under Section 3582. The NYCDL believed that this interpretation left open the possibility that a *below* defendant still might be able to demonstrate eligibility for a reduction in a situation where the original sentencing court actually relied on the Guidelines range in coming to its sentencing decision.

The proposed changes in Option 1 to §1B1.10 itself (rather than the commentary) are consistent with that interpretation. Those changes appear to conform the language of §1B1.10 to Section 3582(c), which requires sentences to be based on a Guidelines range to be eligible for relief. Nothing in the statute suggests that if a defendant meets the burden of demonstrating that a Guidelines range was used to determine a sentence, he or she would be precluded from seeking relief. Indeed, the Commission's description of the revisions to subsection (a), on page 3 of the proposed amendments, appeared to support that understanding.

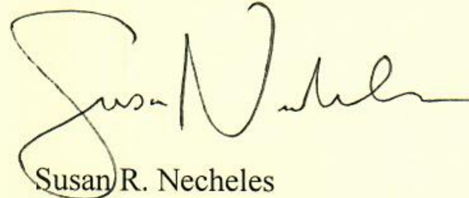
Based on a review of the Federal Public and Community Defenders' and the Practitioner's Advisory Group's submissions, which do not support the amendment, the NYCDL now believes it misunderstood the breadth of the Commission's suggested changes and that the amended commentary might inappropriately be read to go beyond the actual holding of *Koons,* foreclosing relief for all *below* defendants even where the original sentencing court clearly relied on the Guidelines range in determining that defendants' original sentence.

The NYCDL is particularly concerned with the following proposed language to the commentary to §1B1.10(a): "Accordingly, a defendant is not sentenced 'based on a guideline range' if, pursuant to §5G1.1(b), the guideline range that would otherwise have been applied was superseded, and the statutorily required minimum sentence became the defendant's guidelines sentence." We believe this sentence actually may contradict 18 U.S.C. § 3582(c)(2) and the language in *Hughes v. United States* referenced in the prior sentence of the commentary. That sentence provides that a defendant is sentenced " 'based on a guidelines range' only if that range played a relevant part in the framework that the sentencing court used in imposing the sentence." If the court in a *below* defendant's original sentence made clear that the guidelines range played a relevant part in sentencing, notwithstanding the applicability of the mandatory minimum, then a *below* defendant meets the requirements of 18 U.S.C. § 3582(c)(2) and should be eligible to seek a sentencing reduction.

The NYCDL does not know how a court would reconcile these two sentences. However, given what the NYCDL now recognizes as confusion in the language of the proposed commentary and in its own reading of the proposed amendment, it does not believe the amendment should be approved.

The NYCDL maintains its support for Option 2 to application note 3 of §1B1.10(b)(2)(B), for the reasons described in its February 19, 2019 letter.

Very truly yours,



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