

## CLIENT ALERT

### I Can't Get No (Retroactive) Relief

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#### **In *Koons*, the Supreme Court Clarified the Relationship between Statutory Mandatory Minimums and Retroactive Changes to Sentencing Guidelines Advisory Ranges, but Questions Remain**

On Monday, June 4, 2018, the Supreme Court, in *Koons v. United States*, clarified that when a District Court bases a sentence on statutory mandatory minimums and substantial assistance departures—and not the U.S. Sentencing Commission Guideline's advisory range—petitioners who would otherwise be eligible to benefit from retroactive changes to the Guidelines cannot have their sentences reduced.

The five petitioners in *Koons* pleaded guilty to drug conspiracy offenses after cooperating with the government. The District Court calculated the petitioners' sentencing range according to the Guidelines, but found that the high end of this advisory range fell below the mandatory minimum sentences. The District Court then disregarded the Guidelines' advisory range. It instead departed downwards from the mandatory minimums by using the Section 5k1.1 "substantial assistance factors" to account for the cooperation the petitioners had provided the government. Years later, the Sentencing Commission retroactively lowered the base offense levels for certain drug crimes, including the crime to which petitioners pled. The case before the Supreme Court concerned whether the petitioners were eligible to benefit from the retroactive Guidelines amendment.

The Supreme Court held that the petitioners' sentences were "based on" the mandatory minimum sentence and the substantial assistance they provided the government, not on the Guidelines sentencing ranges, and thus because the advisory range played no part in the District Court's sentencing framework the petitioners were not eligible to benefit from the revised Guideline calculations. The Court reasoned that the Guidelines range is advisory, while the mandatory minimums (and any departures from the minimums) are statutorily required. Moreover, the Court noted that the District Court calculated the advisory range and then entirely disregarded it. This was an appropriate step because the Guidelines themselves call for the advisory range to be disregarded in determining the Guideline sentence in instances—like this one—where the maximum Guidelines range is below the statutorily required minimum sentence. The Court also found that the fact that the District Court calculated the Guidelines range did not mean that it based the sentence on it, likening the situation to a homebuilder who considers one design but ultimately uses an "entirely different" one. However, the Court specifically noted that it did not reach the question of whether District Courts are prohibited from considering the advisory range when calculating a downward departure, even though some courts have held that such consideration is prohibited.

Ultimately, in a situation similar to the one faced by the *Koons* petitioners, where the advisory Guidelines range was completely disregarded and fell below the statutory mandatory minimum, the most concrete step that practitioners can take based on the *Koons* decision is to calibrate clients' expectation regarding the finality of a sentence. Practitioners with upcoming sentencings should tread carefully, but they can consider advocating for a downward departure that is based on the 5k1.1 factors *and* the advisory range, as the Court did not foreclose the possibility that District Courts could base downward departures in part on the

advisory range. If a District Court did so it may preserve the possibility that petitioners could benefit from future retroactive changes to the Guidelines.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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