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Legal Sidebar

Does Losing a Motion to Suppress Bar a Sentencing Reduction for Admitting Guilt? Federal Courts Are Split

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The U.S. Sentencing Commission may soon address an issue that has divided the federal courts of appeals impacting the lengths of sentences for some criminal defendants who plead guilty after challenging the evidence against them. If a defendant charged with a criminal offense believes that evidence of his or her criminal wrongdoing was obtained in violation of certain constitutional provisions, the defendant may file a pre-trial "motion a suppress" to prevent the prosecution from using the evidence at trial. One common basis for a motion to suppress, for example, is the Fourth Amendment, which generally shields people and their property from unreasonable searches and seizures by law enforcement. The resolution of a motion to suppress may involve some degree of preparation by the parties, briefing and argument, and deliberation by the court.

If a motion to suppress is denied, a defendant may decide to plead guilty. In the federal system, the U.S. Sentencing Guidelines (U.S.S.G.) provide that a defendant may receive a two-level sentencing reduction for "acceptance of responsibility," or truthfully admitting to the conduct underlying the offense(s) of conviction. Under U.S.S.G. § 3E1.1(b), the Guidelines also authorize a defendant convicted of a relatively serious offense and who qualifies for the acceptance of responsibility reduction to obtain, only upon a government motion, an additional one-level reduction for assisting the government by "timely notifying authorities of his intention to enter a plea of guilty." The reduction is justified, at least in relevant part, because timely notice of an intent to plead guilty frees the government from "preparing for trial."

Federal appeals courts are divided as to whether the government may refuse to move the court for the additional one-point reduction because that the defendant filed a pre-trial motion to suppress: three circuits have held that the government may withhold its reduction motion on this basis, while five have concluded that a motion to suppress is not a valid reason for the government to not move for the one-point reduction.

In 2020, the Supreme Court was asked to resolve this disagreement among the circuits. The Court declined review, prompting Justice Sotomayor to issue a statement, joined by Justice Gorsuch, urging the U.S. Sentencing Commission—which promulgates the Guidelines—to "address this issue in the first instance." In calling on the Commission to act, Justice Sotomayor emphasized that "[t]he effect of a one-

level reduction can be substantial" and "can shift the Guidelines range by years, and even make the difference between a fixed-term and a life sentence." Justice Sotomayor additionally pointed out that the disagreement among the circuits "means that similarly situated defendants may receive substantially different sentences depending on the jurisdiction in which they are sentenced." The Commission has also observed that the position of the three circuits permitting the government to withhold an additional one-level reduction on the basis of a motion to suppress "has had a chilling effect, deterring defendants from pursuing certain evidentiary and sentencing challenges." This extra point implicates a majority of federal sentences: Commission data shows that, in 2022, the additional one-point reduction was awarded in 41,418 of 61,005 (68%) federal sentencing decisions. In April 2023, the Commission proposed an amendment to the Guidelines that preparing for pre-trial proceedings, including a motion to suppress, "ordinarily" does not constitute "preparing for trial" for purposes of the additional one-point reduction.

This Sidebar discusses the issue that has divided the circuits, the Sentencing Commission's response, and considerations for Congress.

Motions to Suppress

Criminal defendants may seek to suppress physical evidence or inculpatory statements if they can show that law enforcement officers have violated certain of their constitutional rights. Defendants may move to suppress evidence based on violations of their Fourth, Fifth, or Sixth Amendment rights. In at least the Fourth Amendment context, suppression of evidence is often referred to as the "exclusionary rule." The legal requirements and justification for suppression vary depending on the constitutional provision at issue. For instance, the Supreme Court has recognized that the suppression of evidence under the exclusionary rule exacts a high societal cost, as the exclusion of evidence diminishes the truth-seeking and law-enforcement objectives of the judicial process and may mean that a guilty person goes free. Thus, the Supreme Court has instructed that the exclusionary rule should be applied only where its "deterrence benefits outweigh its substantial social costs."

The suppression of evidence based on a constitutional violation is an important protection for criminal defendants. A successful motion may lead to the dismissal of charges when critical evidence, such as drugs, firearms, or a confession are deemed inadmissible at trial.

To suppress evidence, a defendant must bring a timely written motion, which must set forth the specific evidence sought to be excluded at trial. Ordinarily, a trial judge will conduct a formal public hearing on the motion in which both the defendant and the government may present evidence, which usually includes testimony by law enforcement officers and sometimes by the defendant. The formal rules of evidence that govern trials do not apply with the same force at suppression hearings, and the judge may consider evidence in reaching her decision that a jury could not consider. A prosecutor's preparation for a suppression hearing, such as interviewing witnesses, often involves some of the same groundwork needed for trial. As such, an evidentiary hearing on a suppression motion may, in some cases, be "the substantive equivalent of a full trial."

Acceptance of Responsibility

In the Sentencing Reform Act of 1984, Congress established the U.S. Sentencing Commission and assigned to the Commission the responsibility to promulgate the Sentencing Guidelines, which contain standardized penalty ranges that, when used by judges at sentencing, would promote greater uniformity in federal sentencing outcomes. The Commission generally adopted an "empirical approach" to the Guidelines that largely memorialized past practice in federal sentencing decisions. The Commission's study of federal sentences in 1985 revealed that 85% of cases involved plea bargaining, that a defendant who pled guilty received on average a sentence that was 30-40% lower than if the guilty plea was not

made and the defendant was convicted at trial, and that a sentencing reduction did not automatically follow a guilty plea.

Informed by this past practice, the Commission rejected an automatic sentencing reduction for a guilty plea: the Guidelines make clear that "[a] defendant who enters a guilty plea is not entitled to an adjustment . . . as a matter of right." Instead, the Guidelines provide judges with the discretion to award a sentencing reduction for admitting responsibility, with commentary identifying a non-exhaustive list of factors that guide judges in determining when such a reduction is appropriate. The factors include:

- "truthfully admitting the conduct comprising the offense(s) of conviction, and . . . any additional relevant conduct" tied to the offense(s) of conviction;
- "voluntary termination or withdrawal from criminal conduct or associations";
- "voluntary surrender to authorities promptly after commission of the offense";
- "voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense";
- "post-offense rehabilitative efforts (e.g., counseling or drug treatment)"; and
- "the timeliness of the defendant's conduct in manifesting the acceptance of responsibility."

This non-exhaustive list of factors reflects that a sentencing reduction for acceptance of responsibility may be justified on various grounds. Guidelines commentary suggests that a defendant with a timely admission of responsibility saves the prosecution from further preparation for trial, conserves limited judicial resources, and allows a system that disposes of most criminal cases by way of plea to function more efficiently. Also, a defendant who expresses remorse might be more likely to be rehabilitated and may present a lower risk of recidivism, and thus may not warrant as much time in prison. Some early Commissioners expressed concern that acceptance of responsibility amounts to a trial penalty in that it induces defendants to forgo the exercise of their right to a jury trial. Then-Judge Breyer, an original Commissioner, pointed out that the Supreme Court had approved sentencing reductions for guilty pleas, however, and accordingly concluded that the Commission should "cover the practice and regulate it."

The Guidelines contain two provisions permitting sentencing reductions for acceptance of responsibility: *first*, under U.S.S.G. § 3E1.1(a), a defendant may receive a two-level sentencing reduction for acceptance of responsibility; and *second*, under § 3E1.1(b), a defendant who qualifies for a two-point reduction under § 3E1.1(a), has an offense level of 16 or greater, and assists the government by notifying authorities of a guilty plea in time to permit the government to "avoid preparing for trial" and to allow the government and the judiciary to "allocate their resources efficiently," may, upon government motion, receive an additional one-point reduction.

The Circuit Split

Federal Courts of Appeals are divided over whether the defendant's pretrial filing of a motion to suppress evidence justifies denying a § 3E1.1(b) reduction. Because suppression hearings require the significant expenditure of government and judicial resources, some Courts of Appeals (the Third, Fifth, and Sixth Circuits) have determined that when a court conducts such a hearing, a defendant should be barred from receiving the maximum credit for acceptance of responsibility. The Sixth Circuit reasoned that the government may properly deny the one-point sentence reduction without infringing on a defendant's constitutional rights because a defendant may waive his right to challenge the admission of evidence in exchange for a lower sentence, just as he may waive his right to a trial.

Other Courts of Appeals (the First, Second, Ninth, Tenth, and D.C. Circuits) have held that a defendant should not (at least ordinarily) be penalized for seeking to uphold his constitutional rights through suppression. The First Circuit held that where a defendant files a non-frivolous motion to suppress, the court may not deny the government's § 3E1.1(b) motion on the basis of the suppression motion even where the government's response overlaps with trial preparation. The Tenth Circuit has similarly held that even where the suppression hearing is lengthy and involves the testimony of most of the government's witnesses, the defendant should not be punished for filing a suppression motion. In a variation, the First Circuit recognized that there may be times when a pretrial motion imposes a heavy burden on the prosecution such that the defendant should not receive the additional one-point reduction.

The Commission's Proposed Amendment on the Acceptance of Responsibility Guideline

On September 29, 2022, the Commission identified as a proposed priority for agency action the resolution of the circuit conflict concerning U.S.S.G. § 3E1.1(b). In subsequent public comments, the Federal Defender Service and the National Association of Criminal Defense Lawyers supported the approach taken by a majority of the circuits. Similarly, the Commission's Probation Officers Advisory Group wrote in favor of an amendment that would "clarify that unsuccessful challenges during suppression hearings do not preclude a defendant from being eligible for an acceptance of responsibility reduction." On October 28, 2022, the Commission issued its list of final priorities, which included resolution of this circuit split.

On February 2, 2023, the Commission announced a proposed amendment to the Guidelines that would define "preparing for trial" within the meaning of U.S.S.G. § 3E1.1(b), specifying that preparing for a motion to suppress "ordinarily" does not constitute "preparing for trial." Some public commentary regarding the proposal—including from an Eleventh Circuit judge, two district court judges, a federal probation office, and the Practitioners Advisory Group—supported the proposed amendment. Other public comments—including from the Department of Justice (DOJ), the National Association of Assistant United States Attorneys, and the Victims Advisory Group—opposed the Commission's proposed approach. DOJ, for example, primarily argued that federal prosecutors retain the discretion to file a motion for an additional one-point reduction, and are not required to file such a motion; moreover, the agency claimed that the proposed "preparing for trial" standard is not workable. On April 27, 2023, the Commission stayed the course, submitting to Congress an amendment that preparing for a motion to suppress "ordinarily" does not constitute "preparing for trial" for purposes of § 3E1.1(b).

Congressional Considerations

Should Congress consider the availability of the additional one-point sentencing reduction for acceptance of responsibility, it has at least two primary options. First, the Commission's submission to Congress of the proposed amendment triggered a 180-day congressional review period. Congress may allow the review period to pass, in which case the amendment becomes effective; or Congress can "modify or disapprove" the amendment. In 1995, for example, a bill passed in the Senate and the House, and signed into law by President Bill Clinton, disapproved two proposed amendments. The 1995 act may serve as precedent for how Congress may reject a proposed acceptance of responsibility amendment. Second, Congress may pass legislation codifying in federal law whether or to what extent the government may withhold the additional one-level reduction for acceptance of responsibility following an unsuccessful motion to suppress.

More broadly, more than 97% of federal criminal cases are resolved by way of plea. Congress may consider the ostensible existence of a "trial penalty," of which acceptance of responsibility is but one part. As discussed above, some have raised concerns that the benefits of a guilty plea unduly encourage defendants to forgo the exercise of constitutional rights, and that proceeding to trial may result in a

withdrawal of a plea offer that in turn may expose the defendant to a higher sentencing outcome. The Supreme Court has recognized this tension but has sanctioned the practice, writing that "[w]hile confronting a defendant with the risk of more severe punishment clearly may have a discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable—-and permissible—attribute of any legitimate system which tolerates and encourages the negotiation of pleas."

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