THE U.S. SENTENCING COMMISSION SHOULD SOLVE THE §3E1.1 CIRCUIT SPLIT BY ELIMINATING THE POSSIBILITY OF PUNISHING DEFENDANTS FOR EXERCISING THEIR CONSTITUTIONAL RIGHTS

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The newly reformed U.S. Sentencing Commission is preparing to make the first amendments to the criminal sentencing guidelines in five years. In January, the Commission published proposed guideline amendments on various topics, subject to a 60-day period of notice and comment. These proposed amendments include: alleviating the procedure for defendants to move for compassionate release from the Bureau of Prisons, expanding the "safety valve" eligibility for relief from mandatory minimum penalties for drug offenders, reconsidering certain prior offenses as they relate to criminal history rules, and revising §1B1.3 to remove consideration of acquitted conduct when determining a defendant's guideline range unless it was admitted by the defendant during a guilty plea or found by a fact-finder beyond a reasonable doubt.

The Commission's proposed amendment to §3E1.1, the most common downward departure available to defendants who plead guilty, does not resolve the existing circuit split and eliminate suppression hearings as a basis for withholding a reduction to a defendant's offense level at sentencing. We urge the Commission to clearly revise this guideline, such that the government, in any federal circuit, cannot withhold the third-level reduction to functionally punish criminal defendants seeking to vindicate their constitutional rights.

Background

The sentencing guidelines are the driving force in sentencing federal criminal defendants and provide an anchor for judges before fashioning a sentence. Although no longer mandatory, they provide the "lodestone" and starting point for every federal carceral sentence.[3] These guidelines are a mathematical formula, created by the Sentencing Commission, for district courts to calculate federal criminal sentences.[4] There are many factors that can enhance a defendant's sentence upward, and these possible enhancements greatly outnumber the available downward departures that reduce a potential sentence.

Nevertheless, the two most widely used downward departures are provided pursuant to §3E1.1,[5] which encourages a defendant to accept responsibility for their conduct and avoid the risk and uncertainty involved with a trial. If the defendant accepts responsibility, 3E1.1 allows for a

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[3] *Peugh v. United States*, 133 S. Ct. 2072, 2084 (2007); *see Molina-Martinez v. United States*, 136 S. Ct. 1338, 1349 (2016).

[4] U.S. Sentencing Guidelines Manual § 1B1.1 (U.S. Sentencing Comm'n 2015) (instructions for calculating the Guidelines).

[5] USSG §3E1.1

two-point reduction of the offense level. It also allows for an additional 1-point reduction if the defendant accepts responsibility for the conduct in a timely manner that spares the Government from having to prepare for trial. Thus, 3E1.1(a) affects every criminal defendant who pleads guilty, as 97-98% of them do, and is one of the very few downward adjustments in the guidelines.

According to 3E1.1(b), if a defendant timely notifies the prosecution of their intent to plead guilty, "thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently," they receive a one-level reduction to their applicable sentencing guidelines. The federal courts of appeal are split on the interpretation of "preparing for trial," and whether the timely notification departure can be withheld by the government when defendants have filed motions to suppress to which the government has responded.

The U.S. Supreme Court had a chance to address this "an important and longstanding split," in *Longoria v. United States*, but declined, punting the responsibility to the Commission to address what constitutes "preparing for a trial.[6] Although abstaining from a chance to resolve the question, Justice Sotomayor recognized the significance to criminal defendants of withholding the 1-level reduction, acknowledging that for serious offenses, that extra level translates into a major difference in defendant's length of incarceration. Indeed, Justice Sotomayor acknowledged that "[t]he present disagreement among the Courts of Appeals means that similarly situated defendants may receive substantially different sentences depending on the jurisdiction in which they are sentenced."[7] Moreover, the Court's abstention during the time that the Commission lacked a quorum revealed an abdication of its responsibility to resolve circuit conflicts.[8]

Now that the Commission can resolve this longstanding circuit split on a guideline that affects every federal defendant who pleads guilty, it has proposed a revision that does not go far enough.

Proposed Language

The text of the guideline is as follows:

§3E1.1. Acceptance of Responsibility

(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by **2** levels.
(b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level **16** or greater, and upon motion of the government stating that the defendant has assisted

[6]At the time the Supreme Court denied cert and entrusted the Sentencing Commission to address the issue, 6 of the 7 voting members seats were vacant. The votes of at least 4 members are required for the Commission to promulgate amendments to the Guidelines. Longoria v. United States, 591 U.S. _____ (2021) citing U. S. Sentencing Commission, Organization (Mar. 18, 2021), https://www.ussc.gov/about/who-we- are/organization.
[7] *Id.*
[8] *See* Aliza Hochman Bloom, *Misplaced Abstention: How the Supreme Court's Deference to an Incapacitated Sentencing Commission Hurts Criminal Defendants*, N.Y.U. L. REV. FORUM, (May 2022).

> authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by **1** additional level.
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> For the purposes of this guideline, the term "***preparing for trial***" means substantive preparations taken to present the government's case against the defendant to a jury (or judge, in the case of a bench trial) at trial. "Preparing for trial" is ordinarily indicated by actions taken close to trial, such as drafting in limine motions, proposed voir dire questions and jury instructions, and witness and exhibit lists. Preparation for early pretrial proceedings (such as litigation related to a charging document, early discovery motions, and early suppression motions) ordinarily are not considered "preparing for trial" under this subsection. Post-conviction matters (such as sentencing objections, appeal waivers, and related issues) are not considered "preparing for trial."

The proposed amendment adds the highlighted text as an effort to resolve the circuit conflict. It is too complicated and does not eliminate the split.

Why A Motion to Suppress Should Never Be Considered "Preparing for Trial"

The Second and Fifth Circuits have permitted the government to withhold the reduction based on a defendant filing a suppression motion. For over 25 years, the Fifth Circuit has held that the government can deny the one-level reduction delineated in §3E1.1(b) when it has had to prepare for a suppression hearing.[9] In *Longoria*, for example, the court accepted the government's refusal to move for a one-point reduction and its explanation that its preparation for a one-day suppression hearing was tantamount to a trial.[10] Similarly, the Second Circuit has affirmed the Government's denial of this one-point reduction on the basis that it had to litigate a suppression hearing, explaining that "in terms of preparation by the government and the investment of judicial time, the suppression hearing was the main proceeding in this case."[11] More recently, the Second Circuit has required the government to make some showing of extensive preparation when seeking to withhold the benefit of the third point reduction pursuant to § 3E1.1(b).[12]

How And Why to Fix the Circuit Split

[9] *United States v. Gonzales*, 19 F.3d 982, 984 (5th Cir. 1994).
[10] *United States v. Longoria*, 958 F.3d 372, 378 (5th Cir. 2020).
[11] *United States v. Rogers*, 129 F.3d 76, 80-81 (2d Cir. 1997). *Id.* at 80 ("As the district court observed, 'the case was effectively tried with the motion to suppress.' Once that motion was denied, conviction [the defendant' became child's play for the prosecution.").
[12] *United States v. Vargas*, 961 F.3d 566, 584 (2nd Cir. 2020) ("where a defendant has filed a non-frivolous motion to suppress, and there is no evidence that the government engaged in preparation beyond that which was required for the motion, a district court may not rely on the fact that the defendant filed a motion to suppress requiring a lengthy suppression hearing to justify a denial of the third level reduction[.]").

The Commission should amend the language to ***never*** consider a motion to suppress as "trial preparation." Instead, the proposed amendment does not provide a bright line rule for what is "preparing for trial," and instead provides the "ordinary" definition.

> Preparation for early pretrial proceedings (such as litigation related to a charging document, early discovery motions, and early suppression motions) ordinarily are not considered "preparing for trial" under this subsection.

This proposal leaves two ambiguities, including "early" suppression motions and limiting the phrase with "ordinarily," which provides ample room for government attorneys to withhold the downward departure. This proposal also allows judges the flexibility to decide that suppression motions brought later are not entitled to the timely notification credit if they were not filed or argued "early." There are many reasons why it would take an attorney representing a criminal defendant, particularly one detained pretrial awaiting adjudication, to amass the facts and interviews needed to file a complete motion to suppress evidence or statements, which is prepared in anticipation of an evidentiary hearing. And even if these motions are filed "early," in the adjudicative process, the proposed revisions uses the word "ordinarily," inviting the possibility of exceptions. A judge can find that while suppression motions are not "ordinarily" considered trial prep, they are still entitled to reach that conclusion in particular cases, leaving us right back where we started.

From a policy standpoint, the failure to give defendants this 1-level departure because they have filed a suppression motion is deeply problematic. First, it penalizes the defendant for the decision of the attorney. The attorney may be filing the motion to preserve an issue for appeal, to get a preview of the government's case in chief, or to dispel any notion of ineffectiveness. A motion to suppress is almost always an attorney's strategic decision to make a legal argument for excluding evidence or statements.

Second, the filing of the motion to suppress has nothing to do with a defendant's admission of her own guilt, or acceptance of responsibility for having violated the law. Motions to suppress involve constitutional arguments of search and seizure or the right to be free from compelled testimony against oneself. They have to do with police and investigative conduct, not a defendant's admission of responsibility. When a motion to suppress is filed, a defendant is argument that the government violated the defendant's constitutional right and, as a result, evidence seized, or statements made should be suppressed. Indeed, denials of motions to suppress are often quickly followed by guilty pleas because the motion was unrelated to a defendant's claims of innocence or acceptance of responsibility.

In the circuits that permit the government to withhold the one level departure if based on the filing of a suppression motion, even the threat of a prosecutor doing so can have a chilling effect. A typical Fourth Amendment motion to suppress will argue that law enforcement either obtained evidence without a warrant, when no exceptions to the warrant requirement applied, or without sufficient particularized suspicion as required by the Constitution.[13] And a typical Fifth

[13] The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause,

Amendment motion will argue that a defendant's statements to police were obtained in violation of *Miranda*, and therefore should be suppressed.[14] The district court's resolution of suppression motions determines what evidence the government will be permitted to present at trial, and therefore it is critical to the decision of whether a defendant should plead guilty.

As it presently stands, this guideline is being applied in certain circuits to functionally punish criminal defendants seeking to vindicate their constitutional rights. By including "ordinarily" as a caveat, the proposed amendment does not solve this split.

Moreover, what is an "early" motion to suppress? This proposal does not define a length of time before trial after which a defendant's (attorney's) decision to file a suppression motion can be a basis for his more severe carceral sentence. What is early? Is it a specific length of time? Does the "early" stage of the case terminate after Rule 16 discovery? Rule 16 discovery can take drastically varying times to complete. It depends on the district, the resources of the office, and the complexity of the case. Using an ambiguous word like "early" would fail to capture the nuances of each case and how "early" in one case may mean late in another. Moreover, discovery can often come late due to prosecutors failing to tender something when they should have, through the fault of the agents investigating the case, or just because it is newly discovered. The rule is silent on whether such disclosure will revert the case from being late procedurally to now being "early" given that discovery disclosures have not yet been satisfied.

***We Proposed the Following Amendment to the Guideline*:**

> For the purpose of this guideline, the term "***preparing for trial***" means substantive preparations taken to present the government's case against the defendant to a jury (or judge, in the case of a bench trial) at trial. "Preparing for trial" shall only be indicated by actions taken close to trial, such as drafting in limine motions, proposed voir dire questions and jury instructions, and witness and exhibit lists. Preparation for early pretrial proceedings (such as litigation related to a charging document, discovery motions, and suppression motions) shall never be considered "preparing for trial" under this subsection. A motion regarding a constitutional right of the defendant made prior to empanelling a jury shall never be considered "preparing for trial." Post-conviction matters (such as sentencing objections, appeal waivers, and related issues) are not considered "preparing for trial."

Conclusion

In *Longoria*, the Supreme Court abstained from resolving a quarter-century circuit split in interpreting a guideline that affects thousands of criminal defendants pleading guilty every month

supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

[14] The Fifth Amendment prohibits self-incrimination. And since 1966, any statements made by a defendant during custodial interrogation by the police are precluded from use in the prosecutor's case-in-chief, unless the state can prove that the defendant understood his right against self-incrimination and knowingly, voluntarily, and intelligently waived those rights. *Miranda v. Arizona*, 384 U.S. at 444 (1966).

in federal courts. The Commission's proposed revision, while seemingly trying to end the practice of punishing defendants for filing suppression motions, does not go far enough. Guideline 3E1.1 offers a benefit to defendants who accept responsibility for their criminal conduct and save the government's resources by avoiding a trial. Instead of disputing their guilt, they admit to it and thereby relieve the government of its burden. Suppression motions have nothing to do with a defendant's guilt, and no matter how complicated they can be, filing such motions should not subject criminal defendants to losing the benefits intended for their acceptance of responsibility of the criminal conduct.