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Good News for White Collar Defendants and Their Lawyers – Recent Changes to the Sentencing Guidelines

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In a huge victory for white collar defendants and lawyers alike, the US Sentencing Commission (the “Commission”) recently announced several key amendments to existing federal sentencing guidelines will be effective November 1, 2023. Two of the most significant amendments relate to (1) zero-point offenders and (2) withholding points for acceptance of responsibility.

First, federal criminal defendants with no criminal history points are now entitled to a two-level reduction in their offense level. This is critical to ensure a defendant’s sentencing is proportionate to the alleged offense.

Second, gone are the days when federal prosecutors could arbitrarily withhold a third point for acceptance of responsibility (i.e., Level 16 or above) for defense counsel simply doing their job; whether it was filing pretrial motions, attempting to suppress evidence, or merely exercising valid constitutional challenges, defense counsel will no longer feel their clients’ rights are chilled.

These changes were part of a larger set of changes and are the

culmination of widescale government research to (1) combat the overemphasis on inaccurate and ineffective data in sentencing and (2) resolve circuit splits over interpretations of key components of the guidelines. The amendments attempt to reframe institutional guidance on sentencing to better reflect current legislation on a variety of critical national issues – sexual abuse offenses, simple marijuana possession, firearm offenses just to name a few. In doing so, the Commission hopes to strike a balance between implementing data-driven sentencing policies with a duty to craft penalties that reflect the statutory purposes of sentencing.[1]

1. Zero-Point Offenders

The Commission's data-driven goals are admirable. But in order to implement data-driven initiatives, the Commission needed accurate data: so they got to work.

Since 2016, the Commission has sponsored numerous multiyear recidivism studies with particular emphasis on the interplay between zero-point offenders (offenders with zero criminal history points under the guidelines) and recidivism; the Commission's research demonstrates that zero-point offender recidivated far less than other offenders – 27% versus 42% for one-point offenders and 49% overall).[2]

In response to such statistics (as well as feedback from district courts, expert testimony, and widespread public comment), § 4.C1.1 was amended; now, offenders who did not receive any criminal history points under the sentencing guidelines receive a two offense-level point reduction. The Commission was keen to exclude offenders who committed serious and aggravated offenses from the amendment's leniency: such serious and aggravated offenses include terrorism, sex offenses, serious human rights

offenses, and others.

Taken altogether, the Commission saw the amended § 4C1.1 as necessary to implement Congress's directive in promulgating 28 U.S.C. § 994(j); as amended, §4.C1.1 better reflects the general appropriateness of imposing a sentence in which the defendant is a first-time offender.

2. Withholding Points for Acceptance of Responsibility

Under the prior sentencing guidelines at § 3E1.1, an offender could potentially reduce an additional offense level point if they met certain criteria and upon a subsequent motion by the government (a "§ 3E1.1(b) Motion"). This potentially represented a 3-point reduction in offense levels for offenders – dramatically altering their sentences.

A circuit split emerged over whether a § 3E1.1(b) Motion could be withheld if the offender moved to suppress evidence or raise sentencing challenges. The Circuits' clashing views were predicated on what "preparing for trial meant": if the offender saved the government the hassle of preparing for trial, they were awarded the additional reduction. But if the offender brought a suppression motion or other sentencing challenges, did that qualify as forcing the government to prepare for trial?

The Third, Fifth, and Sixth Circuits held that the government could withhold the § 3E1.1(b) Motion upon an offender's suppression motion; the remaining five circuits held this was impermissible.[3] To make matters more complicated, the First, Third, Seventh, and Eighth Circuits held that the government could withhold its § 3E1.1(b) Motion if the offender raised sentencing challenges; the Second and Fifth Circuits held otherwise.[4]

Ultimately, the Commission's amendment defined what "preparing for trial"[5] meant thereby harmonizing an extensive circuit split with serious ramifications on offenders. By providing such clear direction, offenders not only have greater predictability and incentive in cooperating with authorities but are also no longer chilled from exercising constitutional objections.

In conclusion, the amendments represent a positive step. The Commission has reaffirmed its commitment to data-driven solutions and greater clarity in the sentencing process.

FOOTNOTES

[1] United States Sentencing Commission. 2023 AMENDMENTS TO THE SENTENCING GUIDELINES, POLICY STATEMENTS, AND OFFICIAL COMMENTARY, p. 77. April 27, 2023.

[2] *Id.* At 79.

[3] *Compare United States v. Longoria*, 958 F.3d 372 (5th Cir. 2020), cert. denied, 141 S. Ct. 978 (2021), *United States v. Collins*, 683 F.3d 697 (6th Cir. 2012), *and United States v. Drennon*, 516 F.3d 160 (3d Cir. 2008), *with United States v. Vargas*, 961 F.3d 566 (2d Cir. 2020), *United States v. Price*, 409 F.3d 436 (D.C. Cir. 2005), *United States v. Marquez*, 337 F.3d 1203 (10th Cir. 2003), *United States v. Marroquin*, 136 F.3d 220 (1st Cir. 1998), *and United States v. Kimple*, 27 F.3d 1409 (9th Cir. 1994)

[4] *Compare United States v. Adair*, 38 F.4th 341 (3d Cir. 2022), *United States v. Jordan*, 877 F.3d 391 (8th Cir. 2017), *United States v. Sainz-Preciado*, 566 F.3d 708 (7th Cir. 2009), *and United States v. Beatty*, 538 F.3d 8 (1st Cir. 2008), *with United States v. Castillo*, 779 F.3d 318 (5th Cir. 2015), *and United States v. Lee*,

653 F.3d 170 (2d Cir. 2011).

[5] 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 preparing witnesses for trial, in limine motions, proposed voir dire questions and jury instructions, and witness and exhibit lists. Preparations for pretrial proceedings (such as litigation related to a charging document, discovery motions, and 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.” United States Sentencing Commission, Guidelines Manual, § 3E1.1(b) (Nov. 2012)

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