

KRAVITCH, Senior Circuit Judge, dissenting:

The majority holds that the district court based its refusal to grant Wright a downward adjustment for acceptance of responsibility upon a finding that Wright did not show remorse, and the majority holds that, even if the district court denied the downward adjustment because Wright asserted a legal challenge to his conviction, the district court did not err. Based upon the record, I cannot conclude that the district court denied Wright a downward adjustment because of a consideration of permissible factors such as his lack of remorse or insincerity, or even because of consideration of those factors along with Wright's legal challenges to the constitutionality of his indictment. Rather, I interpret the record to show that the district court denied the downward adjustment solely because it did not accept Wright's counsel's purely legal argument, which was based upon facts that Wright truthfully had admitted. Because I believe that the majority has misinterpreted the record and, more importantly, has misapplied the law, I respectfully dissent.

I.

Wright admitted immediately upon arrest that he possessed the machineguns, then led the agents to the location of these weapons, and subsequently consented to the search of his residence that resulted in the discovery of an additional machinegun and the three

pipe bombs. After filing a motion to dismiss the indictment on constitutional grounds, Wright timely pleaded guilty to the offenses charged. Wright thus truthfully admitted the conduct comprising the offenses of conviction and did so at the time of his arrest, when he pleaded guilty, and at the time of sentencing. He also cooperated with law enforcement authorities and assured the district court that he had not possessed any weapons since his arrest. It is apparent from these facts that Wright presented "significant evidence" of acceptance of responsibility. See U.S.S.G. § 3E1.1, comment. (nn.1 & 3).

It was within the authority of the district court to conclude that this evidence was "outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility." See U.S.S.G. § 3E1.1, comment. (n.3). In my view, however, the district court in this case did not rely upon permissible considerations in concluding that Wright's conduct was inconsistent with acceptance of responsibility. After listening to Wright testify at the sentencing hearing, the district court stated:

This is a hard issue. I think within Mr. Wright's own frame of reference, he is sincere in a lot of the things that he said, but I just do not think Mr. Wright believes that he was a member of a militia whose mission was to protect the citizens of the State of Georgia against threats from the outside. I think Mr. Wright believes that he was a member of a group that was prepared to respond to whatever they perceived to be a threat or a problem. I'm not convinced by his testimony that they believed that they were carrying out the law as opposed to being ready to resist it. So, I will

overrule the defendant's objection on the point regarding acceptance of responsibility.

(R3:23). Unlike the majority, I read these remarks to indicate that the district court denied Wright a downward adjustment solely because it did not find his constitutional challenge meritorious. The district court apparently (and correctly) understood the Second Amendment to protect only the possession and use of firearms that is reasonably related to an official state militia. The district court further concluded that an official militia must be designed to protect the citizens of Georgia from outside threats and to carry out the law of Georgia and that Wright had made no showing that he belonged to such a group. Wright, in contrast, believed that the Second Amendment protected his conduct, and that belief formed the basis of his constitutional challenge to his conviction.

Contrary to the majority's suggestion, the district court made no finding that the defendant testified untruthfully about his militia involvement or that the defendant failed to show remorse. Rather, before listening to Wright's testimony at the sentencing hearing, the district court stated:

I think what really bothers me in this case is that Mr. Wright has put forward through counsel an assertion that he believed he was entitled to possess all of these weapons, and apparently the pipe bombs as well because he thought he was a member of a militia, and, therefore, he thought he was constitutionally able to have these things. And that assertion that he is making through counsel to me is not credible, and that's what bothers me. . . . It appears to me that what has happened is counsel has identified some of the publications that seem

to be consistent with the idea of defending one's countrymen, and you [counsel] have attempted to assert an argument building on his possession of those items.

(R3:5-6). The district court thus believed that Wright's legal claim that his conduct was protected by the Second Amendment lacked merit.

## II.

Despite the multi-faceted nature of the acceptance of responsibility determination, see U.S.S.G. § 3E1.1, comment. (n.1); United States v. Calhoun, 97 F.3d 518, 531 (11<sup>th</sup> Cir. 1996), and the wide latitude afforded sentencing courts under this section, there are limits to a district court's discretion in deciding whether to grant a downward adjustment for acceptance of responsibility. Although, as we recently made clear, a "district court may consider the nature of [the defendant's legal challenges to his conviction] along with the other circumstances in the case when determining whether a defendant should receive a sentence reduction for acceptance of responsibility," United States v. Smith, 127 F.3d 987, 989 (11<sup>th</sup> Cir. 1997) (en banc) ("Smith"), an otherwise deserving defendant cannot be denied a reduction under § 3E1.1 solely because he asserts a legal challenge to his conviction that is unrelated to factual guilt.

In Smith, we held that a panel of this court had gone "too far" in concluding that "it is impermissible [for a district court]

to consider [a] challenge to the legal propriety of a sentence" in denying a reduction in offense level for acceptance of responsibility. 127 F.3d at 989 (quoting United States v. Smith, 106 F.3d 350, 352 (11<sup>th</sup> Cir. 1997) (as amended) ("Smith I"). The original panel had erred, we concluded, in deciding that a district court categorically may not consider a defendant's legal challenge to a presentence report.<sup>1</sup> Because "frivolous legal challenges could suggest to the district court that the defendant has not accepted responsibility for his conduct" and because Smith's challenges to the probation officer's initial presentence report amounted to factual rather than legal contentions, Smith, 127 F.3d at 989, we concluded that the district court had properly considered Smith's challenges in determining whether he should receive a sentence reduction pursuant to § 3E1.1, id. We did not hold in Smith, nor has this circuit ever held, however, that a district court may rely only upon a defendant's legal challenge, such as a constitutional challenge to the statute defining the criminal conduct or a challenge to the applicability of the statute to his conduct, see U.S.S.G. § 3E1.1 comment. (n.2), in deciding not to grant a downward adjustment for acceptance of responsibility. Indeed, the defendant in Smith had challenged the

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<sup>1</sup> The original panel had held that "[t]o the extent that the court denied Smith a reduction for acceptance of responsibility because Smith's counsel objected to the presentence report on legal grounds, the court erred." Smith I, 106 F.3d at 352.

factual predicate to his conviction, rather than its legal basis, see Smith, 127 F.3d at 989 (“These objections were factual, not legal, and amounted to a denial of factual guilt.”), and thus the Smith court could not have held that a solely legal challenge by a defendant to his conviction may serve as a valid basis upon which to deny a downward adjustment for acceptance of responsibility.

Indeed, because such a holding would create constitutional infirmities in the Sentencing Guidelines, other circuits have concluded that legal challenges alone cannot form the basis for a denial of a downward adjustment for acceptance of responsibility. See United States v. Purchess, 107 F.3d 1261, 1267 (7<sup>th</sup> Cir. 1997) (concluding that “district court should not deny the reduction for acceptance of responsibility because the defendant challenges a legal conclusion drawn from the facts the defendant admits”); United States v. Fells, 78 F.3d 168, 172 (5<sup>th</sup> Cir.) (holding that district court erred in denying reduction for defendant who “freely admitted all the facts but challenged their legal interpretation”), cert. denied, 117 S. Ct. 134 (1996); United States v. Broussard, 987 F.2d 215, 224 (5<sup>th</sup> Cir. 1993) (holding that district court erred in denying acceptance of responsibility adjustment when defendant admitted ownership of guns found in home and went to trial only to argue that statute did not apply to uncontested facts), overruled on other grounds by J.E.B. v. Alabama, 114 S. Ct. 1419 (1994); see also U.S.S.G. § 3E1.1, comment. (n.2) (stating that defendant who

does not plead guilty may nevertheless clearly demonstrate acceptance of responsibility if he goes to trial in order "to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct"); cf. United States v. Perry, 977 F.2d 1230, 1234 (8<sup>th</sup> Cir. 1992) (affirming district court's refusal to grant adjustment for acceptance of responsibility because defendant contested factual guilt).

The other cases cited by the majority to support its conclusion that the district court did not err in denying a departure for acceptance of responsibility based upon Wright's "challenges to the constitutionality of his convictions" are inapposite. In United States v. Henry, 883 F.2d 1010, 1011 (11<sup>th</sup> Cir. 1989), the court held that the acceptance of responsibility provision of the Sentencing Guidelines does not violate the Fifth or Sixth Amendment, even though the provision may result in an unpleasant choice for a criminal defendant between taking the stand to assert his innocence and receiving a lesser sentence for acceptance of responsibility. See United States v. McDonald, 935 F.2d 1212, 1222 (11<sup>th</sup> Cir. 1991) (describing the choice as "either forcing [the defendant] to confess to his own perjury or to forego taking the stand at trial to take advantage of [section 3E1.1]"). The court's conclusion that the very existence of the provision in the Guidelines does not unconstitutionally "chill[] the right of a defendant to defend himself" at trial, Henry, 883 F.2d at 1011,

however, in no way suggests that a district court may refuse to grant a reduction in sentence for acceptance of responsibility solely because the defendant challenged the constitutionality of his conviction.<sup>2</sup>

The majority's reliance upon United States v. Jones, 934 F.2d 1199 (11<sup>th</sup> Cir. 1991), likewise is misplaced. As the portion of the opinion cited by the majority makes clear, the court in Jones ruled that the district court properly refused to grant a departure for acceptance of responsibility where the defendants challenged the factual basis of their guilt. See Jones, 934 F.2d at 1200 (referring to the district court's consideration of "the defendants' denial of culpability at trial") (emphasis added). Indeed, in Jones, in sharp contrast to the case before us, the defendants "ceased their criminal activity only after they were arrested[,] . . . maintained that they were innocent[,] . . . challenged the credibility of the Government's witnesses [at trial,] and urged the jury to find them not guilty." Id. The portion of the opinion cited by the majority merely demonstrates that the Jones court followed Henry in concluding that section 3E1.1 "does not impermissibly punish the defendant for exercising

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<sup>2</sup> United States v. McDonald, 935 F.2d 1212, 1222 (11<sup>th</sup> Cir. 1991), also cited by the majority to support its conclusion that a district court may refuse to grant a downward departure based solely upon the defendant's legal challenges, merely followed Henry in rejecting the defendant's claim that "the sentencing guidelines infringe[d] his right to appeal."



his constitutional right to stand trial." Jones, 934 F.2d at 1200 (citing Henry, 883 F.2d at 1012). Moreover, unlike the majority opinion in the case before us, the court in Jones was careful to limit the authority of the district court to refuse to grant downward departures for acceptance of responsibility. See Jones, 934 F.2d at 1200 ("[A] district court may not refuse to grant a reduction under section 3E1.1 solely because a defendant has chosen to proceed to trial . . . .").

### III.

Because the asserted legal argument did not relate to Wright's factual guilt, see Smith, 127 F.3d at 989, and because, based upon the sentencing colloquy, the district court does not seem to have relied upon any basis other than Wright's legal challenges to the constitutionality of his indictment, I would conclude that the district court erred in denying Wright a downward adjustment for acceptance of responsibility. I therefore would remand the case to the district court for reconsideration of this issue.

Accordingly, I respectfully DISSENT.