Statement of Thomas W. Patton
Before the United States Sentencing Commission
Public Hearing on Acceptance of Responsibility
February 8, 2018

My name is Thomas W. Patton and I am the Federal Public Defender for the Central District of Illinois and a member of the Federal Defender Sentencing Guideline Committee. I would like to thank the Commission for holding this hearing and giving me the opportunity to testify on behalf of the Federal Public and Community Defenders regarding the proposed amendments to acceptance of responsibility guideline and whether a defendant's challenge to an allegation of relevant conduct should be considered in determining whether the defendant should receive a sentence reduction under §3E1.1. We applaud the Commission for proposing changes to the current guidelines that would reduce disparate application of §3E1.1 and ameliorate the negative effect that some court decisions have on the legitimacy of the guidelines' reliance on relevant conduct.

First, as discussed in the Defender's previous comments (relevant portions attached), the current rule generates unwarranted disparity because courts take vastly different approaches to whether an unsuccessful factual or legal challenge to relevant conduct is a "false denial" or "frivolous" and warrants a denial of a reduction for acceptance of responsibility. In some courts, any challenge that is unsuccessful is deemed sufficient to deny acceptance of responsibility. For example, the Eighth Circuit recently ruled that the district court did not err in denying a reduction for acceptance of responsibility because the defendant made multiple unsuccessful challenges to relevant conduct in the PSR. The court offered no explanation as to why an unsuccessful challenge should be deemed "frivolous."[1] "In contrast, other courts have granted an adjustment for acceptance of responsibility even though the defendant unsuccessfully challenged relevant.[2]

[1] *United States v. Davis*, 875 F.3d 869, 875 (8th Cir. 2017). The Eighth Circuit previously ruled that it need not decide "whether the objection [] [was] in fact frivolous" and acknowledged that it "regularly affirm[s] denials of acceptance-of-responsibility reductions on the basis that the defendant falsely denied – rather than frivolously contested – relevant conduct." *United States v. Godfrey*, 863 F.3d 1088, 1096 (8th Cir. 2017) (*citing United States v. Mahone*, 688 F.3d 907, 911 (8th Cir. 2012)).

[2] *See e.g., United States v. Eccles*, 705 Fed.Appx. 468, 468 (7th Cir. 2017) (challenged whether 2.5 kilograms of cocaine was relevant conduct); *United States v. Lobo*, 2017 WL

Second, the chilling effect in some districts of losing a reduction in sentence because of an unsuccessful challenge to relevant conduct also undermines the Commission's efforts and the court's ability to maintain proportionality in sentencing. If defense counsel chooses not to challenge relevant conduct because his or her client will lose acceptance points if the challenge is unsuccessful, then the court is placed in the position of imposing a sentence without deciding whether it truly accounts for the full range of the defendant's conduct and results in a sentence that is the same, greater, or less than conduct of similar severity.

Third, a court's willingness to deny a person a reduction for acceptance of responsibility merely because the lawyer raised an unsuccessful challenge to relevant conduct undermines the legitimacy of the guideline's inclusion of relevant conduct. Relevant conduct is included in the guidelines because the Commission concluded that a "charge offense system has drawbacks" with the "most important [being] the potential it affords prosecutors to influence sentences by increasing or decreasing the number of counts in an indictment." USSG Ch.1, Pt. A. 4(a). A guideline that discourages challenges to relevant conduct by permitting denial of a reduction under §3E1.1 also has significant drawbacks because it gives prosecutors and probation officers a significant opportunity to influence sentences by including relevant conduct in a presentence report, but not giving the defense a meaningful opportunity to litigate the factual or legal accuracy of the relevant conduct.

To resolve the problems caused by the current rule, the best approach is for the Commission to remove from §3E1.1 all references to relevant conduct. If the Commission, however, opts to retain relevant conduct in §3E1.1, then we support Option 2 of the proposed amendment, which would allow a defendant to "make a challenge to relevant conduct without affecting his ability to obtain a reduction, unless the challenge lacks an arguable basis either in law or in fact." The Commission also should provide additional clarifying language: "the fact that a challenge is unsuccessful does not by itself establish that the challenge lacked an arguable basis in either law or fact." The "frivolous" standard has failed to provide adequate guidance, resulting in different standards in different jurisdictions and unwarranted disparity and disproportionate sentences. Because Option 1 retains that standard by replacing "frivolous" with "non-frivolous," it will not solve the current problems.

2838187 (S.D.N.Y. June 30, 2017) (challenged 4 proposed sentencing enhancements in a drug case).

Excerpt from October 10, 2017 Defender comments

Proposed Amendment #4: Acceptance of Responsibility

We are pleased that the Commission has proposed amendments that respond to concerns about how some courts interpret commentary in §3E1.1 to deny a reduction in sentence for acceptance of responsibility when a defendant pleads guilty, accepts responsibility for the offense of conviction, but unsuccessfully challenges relevant conduct.[1] Of the two options the Commission proposes, Option 2 ("a defendant may make a challenge to relevant conduct without affecting his ability to obtain a reduction, unless the challenge lacks an arguable basis either in law or in fact") is significantly more likely to resolve the problem rather than Option 1 ("a defendant may make a non-frivolous challenge to relevant conduct without affecting his ability to obtain a reduction"). If the Commission proceeds with Option 2, Defenders also support, as suggested in the issue for comment, that the Commission provide additional guidance and specifically state that "the fact that a challenge is unsuccessful does not by itself establish that the challenge lacked an arguable basis in either law or fact." An even better solution, however, than either of the two options is for the Commission to remove from §3E1.1 all references to relevant conduct.

A. The Commission Should Remove from §3E1.1 All References to Relevant Conduct and Reference Only the Offense of Conviction.

The Commission requests comment on whether it should "remove from §3E1.1 all references to relevant conduct for which the defendant is accountable under §1B1.3, and reference only the elements of the offense." Defenders strongly support such an approach because looking to relevant conduct when assessing acceptance of responsibility undermines a fair and just resolution of disputed sentencing factors without serving legitimate sentencing purposes.

Defenders recommend the following changes to the commentary in §3E1.1, notes 1(A), 3, and 4:

> 1. In determining whether a defendant qualifies under subsection (a), appropriate considerations include, but are not limited to, the following:
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> (A) truthfully admitting the elements of the ~~conduct comprising~~ the offense(s) of conviction~~, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. However, a defendant who falsely denies, or frivolously~~

[1] The right to challenge the scope of relevant conduct under §1B1.3 is acknowledged in §6A1.3 and Federal Rule of Criminal Procedure 32(i), but undermined by the current commentary in §3E1.1.

~~contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility~~.

3. Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the elements of ~~conduct comprising~~ the offense of conviction~~, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under §1B1.3 (Relevant Conduct) (see Application Note 1(A))~~, generally will constitute ~~significant evidence~~ of acceptance of responsibility for the purposes of subsection (a). However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility. Arguing that the government has not carried its burden of proving relevant conduct or other enhancements by a preponderance of the evidence or that the evidence does not meet the legal definition of those provisions is not inconsistent with acceptance of responsibility. ~~A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right~~.

4. Conduct resulting in an enhancement under §3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be ~~extraordinary~~ cases in which adjustments under both §§3C1.1 and 3E1.1 may apply.

The reference to relevant conduct in §3E1.1 should be removed because it does not serve the purposes the Commission originally contemplated when it promulgated the guidelines and undermines a fair and accurate sentencing proceeding. When the guidelines were first created, the Commission believed that a defendant's acceptance of responsibility was a "sound indicator of rehabilitative potential" that should be rewarded with a reduced sentence.[2] The Commission's recent recidivism report, however, reveals that the acceptance of responsibility provision has not proven to be a "sound indicator of rehabilitative potential."[3] The report concluded that an adjustment for acceptance of responsibility "was not associated with lower recidivism rates."[4]

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[2] USSC, *Preliminary Draft of Sentencing Guidelines*, Ch. Three: Offender Characteristics: Post-Offense Conduct, Acceptance of Responsibility §B321, comment. (1986). *See also United States v. Garrasteguy*, 559 F.3d 34, 39 (1st Cir. 2009) (noting that acceptance of responsibility recognizes "increased potential for rehabilitation"); *United States v. Belgard*, 694. F. Supp. 1488, 1497 (D. Ore. 1988) (reduction for acceptance of responsibility recognizes "increased potential for rehabilitation among those who feel and show true remorse for their anti-social conduct"), *aff'd sub nom, United States. v. Summers*, 895 F.2d 615 (9th Cir. 1990).

[3] USSC, *Recidivism Report*, *supra* note 51, at 21. *See also id*. at App. A-1, A-2, and A-3 (defendants who received no adjustment for acceptance of responsibility had lower rearrest, reconviction, and incarceration rates than those who received a 2- or 3-level adjustment).

[4] *Id*. at 21.

The Commission included relevant conduct in the sentencing guidelines as a compromise between real and charged offense sentencing to prevent prosecutors from being able to "influence sentences by increasing or decreasing the number of counts in an indictment." *See* USSG Ch. 1, Pt. A, 4(a). This presumably was to promote one purpose of the guidelines—reducting unwarranted disparity. But the reference to relevant conduct in §3E1.1 undermines a defendant's ability to challenge allegations at sentencing that often have a significant impact on the guideline calculation.

The guidelines already allow an increase in sentence based on relevant conduct under the lowest standard of proof and with a low threshold of reliable evidence.[5] Thus, a prosecutor may choose to charge a defendant with a lesser offense only to seek a significant enhancement at sentencing based upon relevant conduct established through a de minimis form of proof.[6] For example, prosecutors often present uncorroborated hearsay evidence to probation officers that greatly increases the drug quantity for which defendants are held responsible,[7] and probation officers typically include it in the report without further investigation into its accuracy. Even when the information in the presentence report is objectively unreliable, the defense must object[8] to the government's version of the conduct and, in some circuits, the defense bears the burden of "articulat[ing] the reasons why the facts contained therein are untrue or inaccurate."[9] Due

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[5] *See, e.g., United States v. Sandidge*, 784 F.3d 1055 (7th Cir. 2015) ("[A] sentencing court may credit testimony that is totally uncorroborated and comes from an admitted liar, convicted felon, or large scale drug-dealing, paid government informant.") (citing *United States v. Clark*, 583 F.3d 803, 813 (7th Cir. 2008)).

[6] *See United States v. Miller*, 910 F.2d 1321, 1331 (6th Cir. 1990) (Merritt, J., dissenting) ("The Guidelines obviously invite the prosecutor to indict for less serious offenses which are easy to prove and then expand them in the probation office.").

[7] *See generally* Claudia Catalan, *Admissibility of Testimony at Sentencing, Within Meaning of USSG § 6A1.3, Which Requires Such Information be Relevant and Have "Sufficient Indicia of Reliability to Support its Probable Accuracy*," 45 A.L.R. Fed. 2d 457 (originally published in 2010).

[8] *See* Fed. R. Crim. P. 32(i)(3)(A) (permitting court to "accept any undisputed portion of the presentence report as a finding of fact"); USSG §6A1.3 (governing opportunity of parties to object to a factor important to the sentencing determination); *United States v. McCully*, 407 F.3d 931, 933 (9th Cir. 2005) (no plain error for imposing upward enhancements for drug quantity, possession of a weapon, and obstruction of justice where presentence report set forth facts supporting enhancements and defendant did not object); *United State v. Wade*, 458 F.3d 1273, 1277 (11th Cir. 2006) ("failure to object to allegations of fact in a PSI admits those facts for sentencing purposes").

[9] *United States v. Terry*, 916 F.2d 157, 162 (4th Cir. 1990). *See also, United States v. Cirilo*, 803 F.3d 73, 75 (1st Cir. 2015) ("where a defendant's objections to a presentence investigation report are wholly conclusory and unsupported by countervailing evidence, the sentencing court is entitled to rely on the facts set forth in the presentence report"); *United States v. Grant*, 114 F.3d 323, 328 (1st Cir. 1997) (even though defendant objected to certain facts in the presentence report, he "did not provide the sentencing

process requires an opportunity to be heard on these allegations but inclusion of relevant conduct in §3E1.1 chills that opportunity.

Including relevant conduct in §3E1.1 gives prosecutors excessive control over the plea bargaining and sentencing process by giving them a tool to discourage the defendant from challenging the government's version of the offense conduct.[10] If the defense fails to carry the burden of proving that the government's allegations are untrue or inaccurate and the court finds defense counsel's argument frivolous solely because the challenge was unsuccessful, the court can deny the reduction for acceptance of responsibility. The Commission should not further ease the government's burden of proof by requiring a defendant to either admit relevant conduct or take the risk of having an objection found "frivolous."

A provision that permits a court to deny a 2-level reduction because it considers a defendant's challenge to be frivolous undermines the principles of real offense sentencing. If defense counsel must make a strategic decision on whether a judge will consider a challenge frivolous and chooses not to make the challenge out of fear that the court will deny the client acceptance of responsibility, then the defendant may have to serve a sentence that does not accurately account for real offense conduct.[11]

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court with evidence to rebut the factual assertions" so the "court was justified in relying on the contested facts"); *United States v. Moran*, 845 F.2d 135, 138 (7th Cir. 1988) (approving district court's decision to accept "controverted matters in the report unless the defendant presented [contrary] evidence"). *But see United States v. Hudson*, 129 F.3d 994, 995 (8th Cir. 1997); *United States v. Wilken*, 498 F.3d 1160, 1169-70 (10th Cir. 2007).

[10] The National Association of Criminal Defense Lawyers pointed out fifteen years ago that the relevant conduct provisions give "the government an opportunity to enter into plea agreements without having to carry the burden of reasonable doubt standards for the enhancement of relevant conduct issues." NACDL Sentencing and Post-Conviction Comm., Written Testimony 24-25 (Feb. 25, 1992) (Concerning United States Sentencing Commission's Proposed Amendments to Sentencing Guidelines and Policy Statements).

[11] Take, for example, a defendant in criminal history category I who pleads guilty to possession of marijuana with intent to distribute. He has a base offense level of 10, but faces a 2-level enhancement for possession of a dangerous weapon under §2D1.1(b)(1). If he does not contest the enhancement and is given a 2-level reduction for acceptance of responsibility, his final offense level is 10, with a range of 6-12 months in Zone B and the possibility of a probationary sentence with home confinement. If, however, defense counsel challenges the enhancement but loses, and the defendant is denied acceptance, the final offense level is 12 and in Zone C where the guidelines recommend imprisonment. Under this scenario, a defendant may forego contesting the enhancement to increase the possibility of a probationary sentence. If the facts, however, actually show that the weapon was not connected to the offense, then the sentence would not truly reflect the real offense.

Cf. Alexa Clinton, *Taming the Hydra: Prosecutorial Discretion under the Acceptance of Responsibility Provision of the US Sentencing Guidelines*, 79 U. Ch. L. Rev. 1467, 1494 (2013) (discussing how

Including relevant conduct also results in unwarranted disparity because courts take radically different approaches to applying the rule. This is most apparent in the disparity arising from the different interpretations of what is a "frivolous" challenge. A survey of Defenders throughout the country shows vastly different judicial views on whether a defendant's unsuccessful challenge to relevant conduct should result in a denial of the adjustment for acceptance of responsibility. Some judges do not penalize the defense for holding the government to its burden of proof on relevant conduct, whether the challenge is successful or not. Other judges, however, view an unsuccessful challenge as justifying a denial of the reduction. For example, the Seventh Circuit concluded:

> Contesting the veracity of the alleged relevant conduct is no doubt permissible and often perfectly appropriate. However, if a defendant denies the conduct and the court determines it to be true, the defendant cannot then claim that he has accepted responsibility for his actions.

United States v. Cedano-Rojas, 999 F.2d 1175, 1182 (7th Cir. 1993).[12] Even an unsuccessful challenge to the credibility of a witness has been deemed sufficient to deny a defendant credit for acceptance of responsibility.[13] The varying view among courts[14] as to what constitutes a

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government control over the additional 1-level reduction under §3E1.1(b) may result in an increased sentence because it creates a disincentive for the defendant to challenge relevant conduct).

[12] The defendant in *Cedano-Rojas* challenged the previous requirement that a defendant admit relevant conduct to receive the acceptance reduction, but the Guideline was amended pending his appeal to permit acceptance as long as there was no false or frivolous denial. *Cedano-Rojas*, 999 F.2d at 1181-82. Subsequent cases reaffirm the principle that a defendant who denies relevant conduct has not accepted responsibility. *See, e.g.*, *United States v. Brown*, 47 F.3d 198, (7th Cir. 1995) ("If a defendant denies relevant conduct and the court determines such conduct occurred, the defendant cannot claim to have accepted responsibility for his actions."); *United States v. Sandidge*, 784 F.3d 1055, 1064 (7th Cir. 2015) (affirming denial of acceptance of responsibility adjustment simply because court rejected defendant's factual challenge to applicability of cross-reference). *See also United States v. Ratliff*, 376 F. App'x 830, 843 (10th Cir. 2010) (quoting *Brown* to uphold court's denial of acceptance of responsibility adjustment for defendant who challenged extent of the fraud committed); *United States v. Skorniak*, 59 F.3d 750, 757 (8th Cir. 1995) ("a defendant who denies relevant conduct that the court later determines to have occurred has acted in a manner inconsistent with clearly accepting responsibility"); *Elliott v. United States*, 332 F.3d 753, 766 (4th Cir. 2003) ("a denial of relevant conduct is 'inconsistent with acceptance of responsibility'"); *United States v. Burns*, 781 F.3d 688, 690, 693 (4th Cir.), *cert. denied*, 135 S. Ct. 2872 (2015) (defendant who pled guilty to a firearm offense argued that cross-reference to aggravated assault rather than attempted murder should apply because of insufficient evidence of mens rea; even though the defendant did not testify, the court affirmed denial of acceptance of responsibility merely because he "falsely denied" relevant conduct). *See generally* Kimberly Winbush, Annotation, *Downward Adjustment for Acceptance of Responsibility under USSG § 3E1.1—Drug Offenses*, 17 A.L.R. Fed. 2d 193 (2007 & Supp. 2016) (citing numerous cases where the defendant was denied a reduction for acceptance of responsibility because he or she contested relevant conduct).

[13] *See, e.g.*, *United States v. Berthiaume*, 233 F.3d 1000, 1004 (7th Cir. 2000) (upholding district court's decision that defendant "frivolously" contested drug quantity calculation because court rejected the

"frivolous" challenge is directly contrary to the Commission's goal of promoting the uniform application of the Guidelines.

Some appellate courts have upheld the denial based upon the district court's disagreement with the lawyer's argument even if the defendant stands silent. For example, in *United States v. Purchess*, 107 F.3d 1261, 1266-69 (7th Cir. 1997), defense counsel contested relevant conduct without proffering any evidence and the defendant exercised his right to remain silent. The Seventh Circuit concluded that the "defendant and his attorney appear to have been attempting to manipulate the Guidelines" and suggested that whether the attorney proffers evidence or not, "the court can alternatively question the otherwise silent defendant to determine if the defendant understands and adopts the attorney's statements challenging facts underlying possibly relevant conduct. . . . If the defendant does understand and agrees with the argument, then the factual challenges can be and should be attributed to him. If the defendant rejects the attorney's argument, the court can simply disregard it. Such a procedure would insure that a defendant would be unable to reap the benefit of his attorney's factual challenges without risking the acceptance of responsibility reduction." *Id*. at 1267, 1269.[15] The Eleventh Circuit has encouraged denial of an acceptance of responsibility reduction when the defendant's lawyer contested the

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challenge to the reliability of the government's witnesses); *United States v. Jones*, 539 F.3d 895, 897-98 (8th Cir. 2008) (defendant's unsuccessful challenge to credibility of cooperating witness was sufficient to deny acceptance of responsibility adjustment even though appellate court acknowledged that the witness was "not a strong witness" and his "testimony as to drug transactions amounts and frequency was confusing and often internally inconsistent").

[14] *See* discussion *infra* pp. 29-30 (citing case law that shows differing judicial views on meaning of "frivolously contest").

[15] *See also United States v. Lister*, 432 F.3d 754, 759-60 (7th Cir. 2005) (following *Purchess* and denying acceptance of responsibility reduction to a defendant whose attorney challenged the chronology of events presented in the PSR; when the court questioned Lister about whether he agreed with the challenges, Lister stated that he relied on his attorney—an answer that the appellate court characterized as "legal hair-splitting, ultimately frustrating the court's determination"); *United States v. Dong Jin Chen*, 497 F.3d 718, 720-21 (7th Cir. 2007) (following *Purchess* and denying acceptance of responsibility reduction based on the defendant contesting facts contained in the PSR that were established at sentencing hearing; rejecting argument that the defendant did not have sufficient command of the English language to be excused from his conduct); *United States v. Booker*, 248 F.3d 683, 690 (7th Cir. 2001) (affirming denial of acceptance reduction because defendant's denial of relevant conduct was "meritless").

significance of the facts set forth in the presentence report[16] or challenged the constitutionality of his convictions even after pleading guilty.[17]

In sum, denying an acceptance of responsibility reduction merely because a defendant has contested relevant conduct and lost gives prosecutors undue power, undermines the concept of real offense sentencing, and creates unwarranted disparity, without adding to the assessment of a defendant's potential for rehabilitation. Therefore, the Commission should delete from §3E1.1 any reference to relevant conduct and amend the guideline to focus on the offense of conviction.

B. Whether a Defendant is Entitled to an Adjustment for Acceptance of Responsibility Should Depend on Whether the Challenge has Either an Arguable Basis in Law or Fact, Rather Than the Court's Assessment of Whether the Challenge Is "Frivolous" or "Non-frivolous," Particularly Given the Chilling Effect Such an Assessment Has on a Lawyer's Ethical Responsibilities.

If the Commission chooses to maintain the reference to relevant conduct in §3E1.1, Defenders strongly encourage the Commission to adopt Option 2 because a defendant's eligibility for a reduction for acceptance of responsibility should not depend upon a court's subjective assessment of frivolity.

Option 1 of the Commission's proposed amendment to §3E1.1 does not resolve the myriad problems associated with the current wording of the guideline. The proposed language merely converts an affirmative statement about how a frivolous denial of relevant conduct is inconsistent with acceptance of responsibility into a negative statement that a non-frivolous denial does not preclude relief. The term "non-frivolous" is as subjective as the term "frivolous."[18] Under either wording, a defendant who makes a challenge that the court deems "frivolous" is likely to be denied acceptance of responsibility. Consequently, the continued risk of losing one of the few

[16] *United States v. Smith*, 127 F.3d 987, 989 (11th Cir. 1997) (en banc) (even though district court reduced defendant's offense level for acceptance of responsibility, the en banc court opined that the defendant's challenge to whether evidence in the PSR established fraudulent intent was "factual", not "legal" and would have justified denial of the reduction for acceptance of responsibility).

[17] *United States v. Wright*, 133 F.3d 1412, 1413-14 (11th Cir. 1998) ("even if the district court's conclusion rested *exclusively* on Wright's challenges to the constitutionality of his convictions, the district court's refusal to reduce Wright's offense level was permissible").

[18] As Justice Douglas recognized, the "frivolity standard" is "elusive." *See* Brent E. Newton, *Almendarez-Torres and the Anders Ethical Dilemma*, 45 Hous. L. Rev. 747, 757 (2008) (quoting *Cruz v. Hasck*, 404 U.S. 559, 65 (1971) (Douglas, J., concurring)). The problem results from the "fine line 'between the tenuously arguable and the frivolous.'" Further, there is a distinction between factual and legal frivolity. *Id.* (quoting *Nagle v. Alspach*, 8 F.3d 141, 145 (3d Cir. 1993)) (other citations omitted).

available reductions in the length of a term of imprisonment will deter defense lawyers from "making reasonable arguments in defense of their clients."[19]

Reasonable lawyers can disagree about the legal and factual scope of relevant conduct, including disputes about whether the government's allegations are based upon sufficiently reliable evidence, and whether the evidence presented to support an enhancement satisfies the preponderance of the evidence standard. Instructing a court to decide whether to penalize a defendant for challenging relevant conduct based upon the court's view of whether the challenge is frivolous raises due process concerns and chills the rights of defendants to put the government to its burden of proof – a right which is recognized in §6A1.2 (allowing objections to presentence reports) and §6A1.3 (resolution of disputed sentencing factors).[20] And, as discussed above, it also results in unwarranted disparity.

The lack of a definition of frivolity has resulted in inconsistent application of the acceptance of responsibility reduction. As previously discussed, some courts consider "frivolous" to mean any unsuccessful challenge to relevant conduct.[21] Other courts, however, have taken a more refined approach to the meaning of frivolous by focusing on whether the challenge "lacks an arguable basis in law or fact" or is "based on an 'indisputably meritless legal theory."[22] The Fifth Circuit distinguishes between a legal and a factual challenge, opining that "merely pointing out that the evidence does not support a particular upward adjustment or other sentencing calculation, does not strike us as a legitimate ground for ruling that the defendant has not accepted responsibility."[23]

Even judges within the same circuit court do not agree on the meaning of "frivolously contest." The Sixth Circuit's decision in *United States v. Edwards*, 635 F. App'x. 186, 188-89 (6th Cir.

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[19] *United States v. Edwards*, 635 F. App'x 186, 197 (6th Cir. 2015) (Merritt, J., dissenting).

[20] The first Commissioners opined that "[t]he guidelines enhance procedural fairness by largely determining the sentence according to specific, identified factors, each of which a defendant has an opportunity to contest, through evidentiary presentation or allocation, at a sentencing hearing." William W. Wilkins, Jr., *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. Rev. 495 (1990).

[21] *See supra* note 92.

[22] *See United States v. Santos*, 537 F. App'x 369, 375 (5th Cir. 2013) (citing *Neitzke v. Williams*, 490 U.S. 319, 327 (1989) and *Biliski v. Harborth*, 55 F.3d 160, 162 (5th Cir. 1995)).

[23] *Id.* at 375 (*citing United States v. Nguyen*, 190 F.3d 656, 659 (5th Cir. 1999) and finding that court erred in denying acceptance of responsibility simply because defendant objected to sufficiency of evidence supporting importation enhancement). *See also United States v. Patino-Cardnas*, 85 F.3d 1133, 1136 (5th Cir. 1996) (court improperly denied reduction for acceptance of responsibility because defendant "objected to the legal characterization of leadership role given his actions").

2015), demonstrates the ambiguity of the term "frivolous" and explains the dilemma attorneys face in deciding whether to challenge an adjustment. Edwards pled guilty to conspiracy to possess with intent to distribute 500 grams or more of cocaine and 28 grams or more of cocaine base. The final PSR stated that "Edwards should receive a four-level increase under USSG §3B1.1(a) for being an organizer or leader of criminal activity that involved five or more participants, because Edwards had directed the activities of others and recruited participants for the offense." *Id*. at 189. It also recommended a three-level reduction for acceptance of responsibility. Edwards objected to the §3B1.1 enhancement, arguing that he did not play an aggravating role and the offense did not involve five or more participants. The court disagreed and increased Edwards' offense level by four points, pursuant to §3B1.1(a). The court also concluded that, in contesting the leadership-role enhancement, Edwards had frivolously denied relevant conduct, and therefore refused to grant Edwards a reduction for acceptance of responsibility. A panel majority on the Sixth Circuit affirmed the district court's decision.

Judge Merritt dissented, noting that the application of the role enhancement was "debatable," and that the lengthier sentence imposed "deter[s] defense lawyers from making reasonable arguments in defense of their clients":

> The court upholds a 15-year drug sentence for a first-time offender. It does so by affirming a debatable "organizer or leader" enhancement that added many years to the sentence and then added more years by denying Edwards an "acceptance of responsibility" deduction—all because at sentencing his lawyer contested the applicability of the enhancement. The 15-year sentence is much longer than necessary to deter this first-time offender from further violations but does deter defense lawyers from making reasonable arguments in defense of their clients.
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> I do not believe that a criminal defendant's choice to object to the "organizer/leader" enhancement—when it was in dispute by various parties throughout the pendency of the case—is "frivolous." A reduction for accepting responsibility is supposed to be accorded to a criminal defendant who enters a guilty plea and "truthfully admits the conduct compromising the offense." U.S.S.G. § 3E1.1, app. n.3. At the sentencing hearing, defense counsel objected to and argued against the 4-level "organizer or leader" enhancement, but Edwards had consistently admitted the offense conduct. He admitted having contacts with the other conspirators. His counsel only disputed that those contacts demonstrated that he was an organizer or leader. Counsel did not deny any conduct. He only argued that Edwards' conduct did not suggest a leadership role.
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> The evidence regarding the significance and extent of those contacts was somewhat equivocal and should have been open for debate without being deemed a "frivolous objection" to relevant conduct. Simply put, Edwards did not deny any

> conduct. He only denied that his conduct should be characterized as a "leadership role."

United States v. Edwards, 635 F. App'x 186, 196 (6th Cir. 2015) (Merritt, J., dissenting).

Judge Merritt's acknowledgment of the deterrent effect of the court's ruling on defense counsel's willingness to raise arguments on behalf of a client is noteworthy. Permitting a court to deny acceptance of responsibility to a defendant based upon the court's belief that the defense attorney presented a frivolous challenge to relevant conduct merely because the defense loses gives the court extensive power to control litigation and impinge on the lawyer's ethical responsibilities to zealously represent his or her clients.[24]

The manner in which some courts consider any unsuccessful challenge to relevant conduct as "frivolous," makes defense attorneys face a "Hobson's choice"[25]: if they challenge relevant conduct, they run the risk that their client will be denied a reduction in sentence. But if they do not raise the challenge, they run the risk of being ineffective advocates.

Option 2, which eliminates variations of the term "frivolous" is better suited than Option 1 to address the problems identified above. To better ensure Option 2 remedies the problems addressed above, Defenders also encourage the Commission, as suggested in its Issue for Comment, to "state explicitly that the fact that a challenge is unsuccessful does not by itself establish that the challenge lack an arguable basis either in law or in fact." Because some courts have previously determined lack of success disqualifies a defendant from an acceptance of responsibility adjustment, it would be helpful to include explicit language making clear that lack of success is not determinative.

C. The Commission Should Not Include in §3E1.1 Any Reference to Departures/Variances or Informal Challenges to Relevant Conduct.

The Commission requests comment on whether it should reference "informal challenges" to relevant conduct or "broaden the proposed provision to include other sentencing considerations, such as departures or variances." Defenders believe that the Commission should refrain from adding more ambiguity, further complicating the guideline, and hindering a defendant's due

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[24] *See* Margareth Etiene, *Remorse, Responsibility, and Regulating Advocacy: Making Defendants Pay for the Sins of Their Lawyers*, 78 N.Y.U. L. Rev. 2103, 2165 (2003) (discussing how the acceptance of responsibility provision in the guidelines "is the loophole that permits judges to regulate defense attorney conduct with the threat of higher sentences for their clients"). *See also* Hadar Aviram et al., *Check, Pleas: Toward a Jurisprudence of Defense Ethics in Plea Bargaining*, 41 Hastings Const. L.Q. 775, 822-23 (2014) (noting how judges may "extend defendant's sentence in response" to an attorney's "adversarial tactics that judges deem unnecessary").

[25] *Cf*. Newton, *supra* note 98, at 752 (discussing Hobson's choice lawyers must make in raising *Almendarez-Torres* claims).

process rights to contest factual and legal allegations relevant to the court's final sentencing decision. Mentioning in §3E1.1 informal challenges to relevant conduct, departures, or variances would suggest to the court that it may deny acceptance of responsibility if the defendant objects to a sentence toward the high end of the guideline range or an upward departure or variance and the court finds the objection has no arguable basis under Option 2 or is frivolous under Option 1. If the government alleges facts to call for a sentence at the high end of the guideline range, to refute a request for a downward departure or variance, or seeks an upward departure or variance, the defendant should have an absolute right to contest it without fear that the court may use an unsuccessful challenge to further penalize him or her by denying a reduction for acceptance of responsibility.

Excerpt from Nov 6, 2017 Defender Reply Comments

Proposed Amendment #4: Acceptance of Responsibility

DOJ, NAAUSA, the Probation Officers Advisory Group, and the Victims Advisory Group provide the Commission with inaccurate information in an effort to discourage the Commission from making appropriate amendments to §3E1.1 that would not punish a defendant for an unsuccessful challenge to relevant conduct.

Lack of Uniformity in Meaning of "Frivolously Contest." DOJ suggests that the Commission's failure to identify a "circuit split regarding the language currently found in Application Note 1 to §3E1.1" is a reason not to pursue the amendment.[1] But, as Defenders explained at length, courts have applied the current rule in radically different ways and have different interpretations of what it means to "frivolously contest" relevant conduct.[2] For example, some Circuits rule that any unsuccessful challenge to relevant conduct may be considered frivolous whereas others take a more refined approach by focusing on whether the challenge "lacks an arguable basis in law or fact" or is "based on an indisputably meritless legal theory."[3] Option 2 of the Commission's proposed amendment acknowledges the difference in how courts interpret the meaning of "frivolously contest."

Concerns about increased litigation are ill-founded and ignore inconsistent application of the guidelines. DOJ's and NAAUSA's professed concern about additional litigation if the Commission amends §3E1.1[4] does not acknowledge how attorneys in some districts with significant caseloads are already free to challenge relevant conduct without risking a client not receiving a reduction for acceptance of responsibility. For example, in the District of Arizona, defense counsel routinely challenge relevant conduct, sometimes with extended hearings, without suggestion that the defendant should be denied a reduction under §3E1.1. Because some other courts take the opposite approach (e.g., N.D. Ind.) and punish a defendant for challenging relevant conduct, Defenders requested that the Commission amend the guidelines. Ignoring those differences runs contrary to the Commission's goal of promoting uniform application of the guidelines.

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[1] *DOJ Holdover Comment*, at 17.

[2] Letter from Marjorie Meyers, Chair, Federal Defender Sentencing Guideline Committee, to the Honorable William H. Pryor, Jr., Acting Chair, U.S. Sentencing Comm'n, at 52, 55 (Feb. 20, 2017); *id*. at 25-27 (Oct. 10, 2017).

[3] *United States v. Santos*, 537 F. App'x 369, 375 (5th Cir. 2013) (citing *Neitzke v. Williams*, 490 U.S. 319, 327 (1989) and *Biliski v. Harborth*, 55 F.3d 160, 162 (5th Cir. 1995)).

[4] *DOJ Holdover Comment*, at 17; *NAAUSA Holdover Comment*, at 3.

The comment about the supposed risk of additional litigation also disregards that the acceptance of responsibility provision is a trial penalty, which operates to reduce litigation at the trial stage by providing incentives for a guilty plea.[5] That a defendant relieves the government of its burden of proof at trial is alone a sufficient basis for a sentencing reduction. The guidelines also reduce litigation by allowing a judge, based on a mere preponderance of evidence, to determine if the prosecutor has carried the burden of proving relevant conduct. It is fundamentally unfair to penalize a person for appropriate challenges to the reliability of information that prosecutors give to probation officers to support enhanced sentences.

Victims Will Not be Forced to Testify About Relevant Conduct. The suggestion that a change in in the amendment would force a victim to testify is misleading.[6] In districts where the defense does not risk losing the reduction for acceptance of responsibility when relevant conduct is litigated, long-time-Defenders report that they have rarely seen victims testify about relevant conduct. Moreover, because the government need only prove relevant conduct by a preponderance of the evidence, and can use hearsay evidence, the government can choose not to present the testimony of a victim. A recent case from the Middle District of Alabama demonstrates this point, ruling that "the Government is not required to obtain statements or testimony from all identify-theft victims since relevant conduct under the Sentencing Guidelines need only be proven by preponderance of the evidence."[7] And even if challenges to relevant conduct required victims of the offense to testify at a sentencing hearing, the position of DOJ is at odds with their practice of having victims from past offenses testify to support upward departures.[8]

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[5] The acceptance of responsibility provision was never "a foregone conclusion" when the guidelines were first promulgated. Indeed, "the Commissioners were concerned that a reduction in penalty levels based on a guilty plea could be deemed an unconstitutional 'trial penalty' for those defendants who did not plead guilty." Brent Newton & Dawinder Sidhu, *The History of the Original United States Sentencing Commission*, 1985-1987, 45 Hofstra L. Rev. 1167, 1282 (2017).

[6] *DOJ Holdover Comment*, at 18; Letter from T. Michael Andrews, Chair, Victims Advisory Group, to Chairman Pryor and Members of the Commission, at 2 (Sept. 29, 2017).

[7] *Young v. United States*, 2017 WL 939017, at *4 (M.D. Ala. Jan. 31, 2017).

[8] *See, e.g.*, *United States v. Spiwak*, 377 F. App'x 319, 323 (4th Cir. 2010) (finding no error in government presenting testimony of victim of prior sexual abuse crime to support upward departure in child pornography possession case even though witness did not fall within the definition of a victim under the Crime Victims Rights Act, 18 U.S.C. § 3771).