ACCEPTANCE OF RESPONSIBILITY
WORKING GROUP REPORT

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I. Introduction

The Acceptance of Responsibility Working Group was assigned the task of examining the acceptance of responsibility guideline, section 3E1.1, to determine whether any changes may be needed in the structure of the guideline, the language of the guideline and related commentary, or the manner in which the Commission trains and educates the field about application of the guideline. This report summarizes the results of the group's efforts.

Section 3E1.1 has been included in the guidelines since they were first promulgated in November 1987. This section provides for a two-level reduction in a defendant's combined adjusted offense level (i.e., after the application of guidelines from Chapter Two and the remainder of Chapter Three) "if the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct." U.S.S.G. §3E1.1. The guideline has been amended three times since its adoption. Effective January 15, 1988, the words "his criminal conduct" in the sentence just quoted replaced the words "the offense of conviction." Effective November 1, 1989, the commentary was amended to reflect that there is a rebuttable presumption, rather than a categorical prohibition, against granting the "acceptance reduction" when the defendant obstructs justice. Finally, effective November 1, 1990, the guideline was amended to provide more guidance to determine when a defendant who attempts to accept responsibility after a trial is eligible for the reduction, to strengthen the significance of a guilty plea, and to eliminate a portion of the language relating to the standard of

review of an acceptance of responsibility determination. There are no amendments to the guideline in 1991.

The general areas of concern that the group focused on were: (1) whether the guideline is being interpreted and applied consistently across the country; (2) whether the guideline provides a significant enough offense level reduction, especially for defendants whose offense levels are relatively high; (3) whether the guideline needs to differentiate between defendants (for example, between ones who "merely" admit wrongdoing and those who go further and attempt to rectify their wrong by making restitution); and (4) whether there are factors that the guideline does not consider that would help a court determine when the reduction is warranted.

To address these concerns adequately, the working group sought and considered input from a wide variety of sources. This included computer analysis of the raw data drawn from the case files that are submitted to the Commission after each sentencing of a guidelines case; in-depth analysis of the files from atypical or aberrant cases; analysis of published opinions from the courts dealing with acceptance of responsibility; review of the available literature; consideration of questions and problems that have come to the attention of the Commission's Technical Assistance Service; personal interviews with each of the seven voting Commissioners and the two ex-officio Commissioners; consideration of proposals submitted by the Judicial Conference of the United States; solicitation of input from practitioners (including the Sentencing Commission's Practitioners' Advisory Group) and probation officers; and review of public comment received by the Commission.

II. Presentation of Data

A. Monitoring Data

Monitoring data from fiscal year 1990 was used in conjunction with available FPSSIS data from 1984 through 1990 in order to provide some insight into the application of Section 3E1.1. Although mode of conviction (i.e., plea vs. trial) is not the only focus of the acceptance of responsibility adjustment, it certainly is highly correlated with the application of the two level reduction and is central to the language that is presented in the guideline. For this reason data is provided on mode of conviction separately and is cross tabulated with the acceptance of responsibility adjustment. Additionally, the acceptance of responsibility adjustment was analyzed with what were thought to be relevant variables.

1. Mode of Conviction

Since the implementation of the Sentencing Reform Act in 1984, mode of conviction (i.e., the ratio between guilty pleas and convictions by trial) has remained stable over the last six years and eight months that data are available.[1] While these data suggest that the number of federal defendants sentenced each year has increased since 1984, the proportion of defendants pleading guilty has remained relatively consistent throughout the six year and eight month period reviewed. See Appendix, Figure A.

More specifically, in 1984 the plea rate was 88.3 percent, while in 1990 (January through August) the plea rate was 88.7 percent. The difference between the plea rate in

[1]Data files from FPSSIS were available for calendar years 1984 through August, 1990. Due to the termination of FPSSIS in August 1990, mode of conviction information was unavailable for the last quarter of calendar year 1990.

1984 and 1990 was less than one half of one percent. Table 1 illustrates the number and percentage of pleas and trials for each of these six and three quarters years. The mode of conviction in this table is further broken down for pre-guideline and guideline cases sentenced since November, 1987. Generally, the mode of conviction for guideline cases is comparable to pre-guideline cases. For instance, the plea rate for guideline cases in 1989 was 88.1 percent while the plea rate for pre-guideline cases was 89.7 percent in 1989. The plea rate was 1.6 percent higher in 1989 for pre-guideline cases than for guideline cases. While this indicates a slight decrease in the plea rate for guideline cases, the overall rate for the last six years and eight months has remained about the same.

The data indicated that defendants convicted of more serious offenses tended to plead guilty less often than those convicted of less serious offenses. These results were examined further to determine if this lower plea rate by more serious offenders might justify more than a two-level reduction for acceptance of responsibility by defendants at higher offense levels. In particular, comparison was made to plea rates under the pre-guidelines system. This comparison, shown in tables 2A through 2E, shows that this phenomenon is not new. Defendants in the pre-guidelines era whose final sentences were lengthy (a rough indicator of the seriousness of the offense) also pleaded guilty less often. A direct comparison of the plea rates for defendants sentenced to the same sentence under the pre-guidelines and guidelines systems may understate how often a defendant would plead under the guidelines system. This is true because a sentence imposed under the pre-guidelines system is usually significantly longer than the sentence actually to be served. Thus, it may be more appropriate to compare the plea rates for

defendants sentenced to a certain number of months under the guidelines to defendants sentenced to more months under the pre-guidelines system, in order to see if the incentives to plead have changed for comparable serious offenders.

2. Acceptance of Responsibility

Data collected by the Monitoring Unit indicate that approximately 79 percent of the cases receive the acceptance of responsibility reduction.[2] Of those defendants that plead guilty, eighty-eight percent received the acceptance reduction. However, of those defendants that go to trial, only twenty percent receive the acceptance reduction. These results suggest that application of the acceptance of responsibility guideline is strongly related to the mode of conviction of the defendant. See the table below.

Acceptance of Responsibility Reduction	Total		Plea		Trial	
	Number	Percent	Number	Percent	Number	Percent
Yes	13,444	79.1	12,994	88.0	450	20.2
No	3,550	20.9	1,768	12.0	1,782	79.8
Total	16,994	100.0	14,762	86.9	2,232	13.1

Based on the instructions and application notes to §3E1.1, one would expect that people who plead guilty will generally get the two level reduction for accepting responsibility, and those who go to trial will not. As a result, the working group decided to examine those cases that do not follow this assumption: those where the

[2]Monitoring data used in these analyses include cases sentenced between October 1, 1989 and September 30, 1990, the 1990 fiscal year. Data on 3E1.1, acceptance of responsibility, included only cases for which information from the Court was available. Acceptance of responsibility information from the PSR was not included when there was no statement of reasons or sentencing transcript in the case file.

defendant pleads guilty and does not get the two level reduction for accepting responsibility, and those where the defendant that proceeds to trial but does get the reduction.[3]

Table 3 shows the breakdown of "guilty plea to trial ratio" and "acceptance to non-acceptance ratio" for each guideline range. As Table 3 suggests, defendants in the highest guideline ranges (above guideline minimums of 210) are more likely to go to trial and not receive the acceptance of responsibility reduction. In contrast, defendants in the lower guideline ranges (below guideline minimums of nine) are more likely to plead guilty and receive the acceptance of responsibility reduction.

Additional analyses suggest that defendants who are in higher offense levels (above offense level 30) and are in criminal history category VI are less likely to receive the acceptance reduction, and go to trial more often, than other defendants.

While it is clear that mode of conviction varies from district to district (See Table I, U.S. Sentencing Commission 1990 Annual Report), application of the acceptance of responsibility guideline seems to be fairly consistent across districts. Of those defendants that plead guilty, 75 percent receive the two level reduction for acceptance of responsibility. In only a handful of districts is acceptance credit denied in more than 25 percent of guilty plea cases -- Western Texas, Western Arkansas, Northern Oklahoma, Northern Georgia, and Southern Alabama. Similarly, in only a few districts is the acceptance of responsibility reduction given in more than 30 percent of the cases that proceed to trial-- Maryland, Middle North Carolina, Eastern Louisiana,

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[3]The results are discussed below in section II. A. 3., Aberrations in Application.

and Southern Ohio. Although variations with respect to the application of the acceptance of responsibility adjustment do exist, the Commission may conclude that they are not too pronounced.

3. Aberrations in Application of the Acceptance of Responsibility Guideline

As earlier data presented suggests, their is a strong correlation between plea rates and the awarding of acceptance of responsibility credit, on the one hand, and trial rates and the denial of acceptance of responsibility credit, on the other hand. This section will deal with cases that deviate from this correlation. These "aberrations" fall into two broad categories: 1) where the defendant entered a plea but did not receive acceptance of responsibility credit, and 2) where the defendant went to trial and acceptance of responsibility credit was awarded.

Seventy-six case files were randomly selected in order to gain insight into the rationale behind these seemingly aberrant applications.

The following observations concerning these seventy-six cases are not intended to be a "scientific" or statistical analysis of the results, but are intended to provide a sense of the reasons expressed by the courts, probation officers, the government and defense for the application or non-application of the acceptance of responsibility guideline.[4]

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[4]Four forms were designed and utilized to assist in the extraction and organization of the case file data. Case File Summary Forms 2A and 2B were used for the group of cases that went to trial and received acceptance of responsibility. Case File Summary Forms 3A and 3B were used for the case files on defendants that entered a plea and did not receive acceptance of responsibility.

Three important factors emerged in this analysis of the two categories of cases: 1) Reasons extracted from the case file for granting or denying acceptance of responsibility credit; 2) Whether the defendant objected to denial of credit or the government to granting of it; and 3) Whether a contrary ruling on the acceptance of responsibility issue would have had an effect on the sentence ultimately imposed.

Defendants Who Plead Guilty But Did Not Receive Acceptance of Responsibility Credit.

1. Reasons for denial of acceptance of responsibility.

Forty-three cases were randomly selected from a pool of cases that involved those defendants who pleaded guilty and did not receive acceptance of responsibility credit. Analysis reveals that in virtually every case the denial of acceptance of responsibility by the court was a plausible application of section 3E1.1: ten defendants maintained an outright denial of their guilt (despite pleading guilty); seven defendants received an obstruction enhancement, which generally precludes the acceptance of responsibility credit; five defendants would not talk with the probation officer; and three defendants gave false information to the probation officer. The most common reason for denial of the acceptance of responsibility credit in this group involved an additional eighteen defendants who admitted their guilt, but minimized their involvement or tried to shift culpability away from themselves.

2. Position of Defense Concerning the Acceptance of Responsibility Credit.

Of the 43 files, fourteen do not reveal whether defendant's counsel took any position regarding the denial of acceptance of responsibility credit. Seventeen defense attorneys objected to the acceptance of responsibility denial.

Ten defense attorneys did not object to the denial of credit for acceptance of responsibility.[3] This is not as surprising as it might seem at first glance. Most of these defendants either obstructed justice, expressed an outright denial of guilt, or did not speak to the probation officer.

3. Effect that Granting Acceptance of Responsibility Credit May Have Had Upon the Sentence.

In only six of the 43 cases did the denial of acceptance of responsibility credit clearly affect the ultimate sentence. In these six cases, denial of acceptance of responsibility credit resulted in higher sentences. Thirteen of the 43 cases were sentenced near or at the bottom of the guideline range. The denial of the two level reduction in these cases could create a range that overlapped with the range that included the acceptance of responsibility credit. For example, one of these defendants had a guideline range of 24-30 months without acceptance of responsibility credit, and was sentenced to 24 months. If the defendant received the two level reduction, the range would have been 18-24 months. The same sentence could have been imposed in either range. Furthermore, 8 out of the 43 cases had guideline ranges of 0-6 months, which could not be lowered even by an acceptance of responsibility reduction. The following table summarizes the case file analysis.

[3]Unlike the fourteen cases where it could not be determined whether the defense objected, these ten case files contained addenda to the presentence reports or sentencing transcripts that show the lack of any objections.

PLEADS GUILTY, DOES NOT GET ACCEPTANCE OF RESPONSIBILITY CREDIT

# OF CASES	REASONS THE CREDIT WAS DENIED
10	Defendant denied guilt outright to court or probation officer
18	Defendant admitted guilt, but tried to minimize his role or responsibility, or tried to place the primary blame on someone or something else.
1	Defendant engaged in violation of bond or new criminal behavior from time of plea to sentencing.
2	Defendant did not talk to probation officer on advice of counsel
3	Defendant did not talk to probation officer (reason unstated or other than advice of counsel)
2	Defendant gave false information to probation officer about offense or related conduct
1	Defendant gave other false information to the probation officer
7	Defendant obstructed justice

# OF CASES	DEFENDANT'S POSITION ON ACCEPTANCE OF RESPONSIBILITY CREDIT
0	Defense agreed to denial of credit for acceptance of responsibility
10	Defense did not object to denial of acceptance of responsibility credit as verified by PSR addendum or sentencing transcript
14	No evidence in the file that defendant objected to denial of credit for acceptance of responsibility, but PSR addendum and sentencing transcript unavailable
0	Parties stipulated to the denial of the acceptance of responsibility credit
17	Defense objected to denial of acceptance of responsibility credit

# OF CASES	WHETHER DENIAL OF CREDIT AFFECTED THE ULTIMATE SENTENCE
2	Mandatory minimum statute made the acceptance of responsibility determination irrelevant.
8	Guideline range was 0-6, even without the acceptance of responsibility credit
13	The sentence could have been the same if the defendant received the acceptance reduction, due to an overlap between the two guideline ranges
4	Judge followed the parties' stipulated sentence.
1	Judge made a downward departure, for reasons unrelated to acceptance of responsibility, that was below the range that would have applied if the defendant received acceptance of responsibility.
1	Judge gave a downward departure, but reason unknown
6	Denial of acceptance of responsibility credit increased sentence
8	Unable to determine

Defendants Who Went to Trial, Yet Received Acceptance of Responsibility Credit.

1. Reasons for Granting the Acceptance of Responsibility Credit.

Thirty-three case files were reviewed. In 30 of the 33 cases, the defendant made some admission of guilt to the probation officer or the government. These cases may be the "rare situations" mentioned in Application Note 2 where a defendant clearly demonstrates an acceptance of responsibility for his criminal conduct, even though he exercises his right to trial. Because the group relied only on the case files in reviewing these cases, a more definitive conclusion is not possible.

In 18 of the 33 cases, the defendant made a full admission of guilt. In another 12 cases, the defendant admitted guilt but the probation officer perceived the admission as incomplete. In three cases, the defendant made no admission of guilt, or denied guilt completely.

2. Government's Position on Acceptance of Responsibility.

In the cases examined, the government usually had not expressed an objection to the defendant receiving acceptance of responsibility credit following a trial.[4] In fact, objections were found in only seven of the 33 cases.

3. Effect that Denial of Acceptance of Responsibility Credit May have had on the Sentence.

In almost half of these cases the determination to grant acceptance of responsibility credit clearly affected the ultimate sentence. In 16 cases the defendants received

[4]For the three cases without addendums or sentencing transcripts, the prosecutor may have objected at sentencing and that objection may not be reflected in our files.

acceptance of responsibility credit and sentences at or near the bottom of the range. There were instances, however, in which the acceptance of responsibility credit appears irrelevant to the ultimate sentence. In three cases the mandatory minimum requirement was higher then the top of the guideline range without the acceptance of responsibility reduction. There were five cases with downward departures unrelated to acceptance of responsibility, that resulted in sentences below the range even when acceptance of responsibility credit was applied. In several cases, the defendant could have received the same sentence regardless of the acceptance of responsibility determination because of an overlap between the range with the acceptance of responsibility credit and the range without the credit. For example, the defendant's guideline range with the acceptance of responsibility reduction is 1 - 7 months. If the acceptance of responsibility credit had not been applied, this defendant's range would be 4 -10 months. The defendant received a sentence of four months, which the court could have given from either range, with or without applying acceptance of responsibility.

The following table summarizes the case file analysis.

DEFENDANT GOES TO TRIAL, RECEIVES ACCEPTANCE OF RESPONSIBILITY

# OF CASES	REASONS FOR GIVING ACCEPTANCE OF RESPONSIBILITY CREDIT
2	Admitted guilt to the government before trial, and also admitted guilt to probation officer
2	Admitted guilt to the government before trial, but did not fully admit guilt to probation officer
9	Admitted guilt for the first time to the probation officer, not a full admission
16	Admitted guilt for the first time to the probation officer, appears to be a full admission
1	Admitted guilt to, and/or cooperated with, the government, but did not make a statement to probation officer
3	Made no statement to government or probation officer, or denied guilt

# OF CASES	GOVERNMENT'S POSITION ON ACCEPTANCE OF RESPONSIBILITY
1	Government requested that defendant get acceptance of responsibility credit
22	Government did not object to acceptance of responsibility credit. (PSR addendum or sentencing transcript is available to verify)
3	No evidence that government objected to credit for acceptance of responsibility. (PSR addendum or sentencing transcript not available to verify)
7	Government objected to defendant receiving acceptance of responsibility credit.

# OF CASES	EFFECT OF ACCEPTANCE OF RESPONSIBILITY ON ULTIMATE SENTENCE
3	Mandatory minimum statute made the acceptance of responsibility determination irrelevant. (Even without acceptance of responsibility the guideline range is below the mandatory minimum.)
5	Judge made a downward departure (for reasons unrelated to acceptance of responsibility) that was below the range that applied when the defendant got acceptance of responsibility credit.
5	Defendant could have received the same sentence without the acceptance of responsibility credit due to the overlap of the two guideline ranges.
16	Sentenced near or at the low end of the range with acceptance of responsibility.
4	Sentence near the top of the range with acceptance of responsibility.

4. Departures Related to Acceptance of Responsibility

Twenty-one case files involving downward departures based on acceptance of responsibility were reviewed. Eight of these case files did not include a statement of reasons, although previous phone calls to the field by the Monitoring Unit revealed that acceptance of responsibility was the reason given for the departure. Further analysis of the reasons could not be made with the available data. In another five cases involving acceptance departures, the motivation or reasoning of the court was unclear. In three other departure cases, the court did not grant the acceptance reduction under the language of the guidelines, but the court departed for reasons related to acceptance. In two other departures cases, the court cited the application of the career offender as reason for not granting the Acceptance of Responsibility reduction and a statutory maximum that fell below the guideline range minimum. Finally, in three departure cases the court granted the two level reduction for acceptance and also departed due to an unusually high degree of acceptance.[5]

B. Case Law

In most respects the case law over the last year dealing with the acceptance of responsibility guideline has been uncontroversial. On a general level, every court that has dealt with the constitutionality of §3E1.1 has upheld the validity of the guideline. See, e.g., United States v. De Jongh, 937 F.2d 1 (1st Cir. 1991); United States v. White, 869 F.2d 822, 825-26 (5th Cir.), cert. denied, 490 U.S. 1112 (1989); United States v. Monsour, 893

[5]Case File Summary Form #1 was used in the review of these files. See Appendix.

F.2d 126, 129 (6th Cir. 1990); United States v. Gonzalez, 897 F.2d 1018 (9th Cir. 1990). Although, as will be noted below, the courts have disagreed on the scope of conduct for which a defendant can be required to acknowledge responsibility, there does not appear to be any dispute that the Constitution permits a court to reward a defendant for accepting responsibility for the offense of conviction.

On a more specific level, the courts have dealt with whether various factors are permissible grounds for denying acceptance credit. Several cases have held that a court may deny credit when the defendant continues to engage in criminal conduct after his arrest. United States v. Sanchez, 893 F.2d 679, 681 (5th Cir. 1990); United States v. Lassiter, 929 F.2d 267 (6th Cir. 1991); United States v. Cooper, 912 F.2d 344, 346 (9th Cir. 1990). At least one court has upheld denial of acceptance credit when the defendant refused to provide financial information to the court relative to a determination of the appropriate fine. United States v. Cross, 900 F.2d 66, 70 (6th Cir. 1990). A defendant also may be denied credit when he minimizes his responsibility for the offense. See, e.g., United States v. Reyes, 927 F.2d 48 (1st Cir. 1991); United States v. Nelson, 922 F.2d 311 (6th Cir. 1990), cert. denied, 111 S.Ct. 1635 (1991). In one of the few cases reversing a district court's factual determination that the defendant accepted responsibility, the Sixth Circuit held that a defendant's post-trial statement did not reflect the type of timely acceptance of responsibility envisioned in the guidelines and, in any event, did not contain an admission of guilt. United States v. Williams, 940 F.2d 176 (6th Cir. 1991).

On the other hand, one court held that it violates the Fifth Amendment to deny acceptance credit based on a defendant's failure to assist in recovering the fruits and

instrumentalities of an offense, or on his failure to surrender voluntarily after commission of the offense. United States v. Watt, 910 F.2d 587, 590-93 (9th Cir. 1990).[6] Id. The Eighth Circuit ruled that failure to do one of the acts listed in Application Note 1 of the guideline does not disqualify a defendant from getting credit, United States v. Russell, 913 F.2d 1288 (8th Cir. 1990), cert. denied, 111 S.Ct. 1687 (1991); and the Sixth Circuit held that neither an Alford plea nor an entrapment defense is necessarily a bar to the two-level reduction. United States v. Tucker, 925 F.2d 990 (6th Cir. 1991) (Alford plea); United States v. Fleener, 900 F.2d 914 (6th Cir. 1990) (entrapment defense).

One aspect of §3E1.1 has caused a split in the circuits. As noted above, this point of disagreement refers to language in the guideline and commentary that identify the scope of conduct for which a defendant must accept responsibility in order to receive a two-level reduction. The guideline currently reads, in pertinent part:

> §3E1.1. **Acceptance of Responsibility**
>
> (a) If the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct, reduce the offense level by **2** levels.
>
> * * *
>
> *Commentary*
>
> *Application Notes:*
>
> *1. In determining whether a defendant qualifies for this provision, appropriate considerations include, but are not limited to, the following:*

[6]Both considerations are deemed appropriate in Application Note 1 to the guideline. The court held that a sentencing judge may not balance against evidence of remorse or acceptance of responsibility the fact that a defendant asserted his constitutional rights to counsel and to remain silent at the investigative stage. Id., 910 F.2d at 591.

* * *

(c) voluntary and truthful admission to authorities of involvement in the offense and related conduct.

The express language of the guideline and its commentary therefore requires the defendant to recognize and accept responsibility for "his criminal conduct," and one consideration in this determination is whether the defendant has admitted involvement in "the offense and related conduct." The Circuits have split on the meaning of the terms "criminal conduct" and "the offense and related conduct." The Third, Fourth, Fifth and Eleventh Circuits have explicitly held that this language means a defendant must accept responsibility for the offense(s) of conviction and all relevant conduct, as defined in §1B1.3 of the guidelines. United States v. Friersome, No. 90-3382 (3d Cir. Oct. 1, 1991), United States v. Gordon, 895 F.2d 932 (4th Cir.), cert. denied, 111 S.Ct. 131 (1990); United States v. Mourning, 914 F.2d 699 (5th Cir. 1990); United States v. Ignancio Munio, 909 F.2d 436 (11th Cir. 1990), cert. denied, 111 S.Ct. 1393 (1991). The Sixth Circuit has implicitly followed this approach. United States v. Herrera, 928 F.2d 769 (6th Cir. 1991) (affirming denial of acceptance of responsibility reduction when the defendant did not admit to involvement with drugs outside the time-frame of the indictment); but see United States v. Guarin, 898 F.2d 1120, (6th Cir. 1990) (distinguishing Perez-Franco while expressly reserving whether to follow it); United States v. Chambers, No. 89-1381 (6th Cir. Sept. 10, 1991) (distinguishing Perez-Franco without commenting on whether the Sixth Circuit follows it).

In contrast, the First, Second, and Ninth Circuits have held that a defendant need only accept responsibility for the offense(s) he was convicted of in order to receive the

two-level reduction. United States v. Perez-Franco, 873 F.2d 455 (1st Cir. 1989); United States v. Oliveras, 905 F.2d 623 (2d Cir. 1990); United States v. Piper, 918 F.2d 839 (9th Cir. 1990). The Tenth Circuit has not directly faced this issue, but one panel noted in dictum that a defendant's admission of, and acceptance of responsibility for, the offense of conviction "may satisfy [§3E1.1 of] the sentencing guidelines without going beyond the actual charge and proof at trial." United States v. Rogers, 921 F.2d 975, 982 (10th Cir. 1990) (citing Perez-Franco, supra, 873 F.2d at 459, and ultimately holding that §3E1.1 does not violate the Fifth Amendment).

The cases cited above have dealt on two levels with this issue of the "scope of conduct" for which a defendant must accept responsibility. They have interpreted the language of the guideline and commentary to determine whether it requires a defendant to accept responsibility for unconvicted conduct, and the constitutionality of such a broad requirement. These two issues are independent of one another in the sense that a court's view of the constitutionality of a broad "scope of conduct" approach should have no bearing on its answer to the question whether the Commission intended that approach. Nonetheless, those courts that have interpreted the "scope of conduct" language narrowly (e.g., Perez-Franco) have allowed their conclusion that a broad interpretation would be unconstitutional to influence them to conclude that the Commission did not intend such an interpretation. See, e.g., Perez-Franco, 873 F.2d at 463; Oliveras, 905 F.2d at 628-29.

The First and Second Circuits have analyzed the language of §3E1.1 and concluded that it does not require the defendant to accept responsibility for more than

the offense of conviction. In the First Circuit case, Perez-Franco, the government pointed out that the January 15, 1988, amendment to §3E1.1 changed the language to require that the defendant accept responsibility for "his criminal conduct" rather than for "the offense of conviction." The government argued that the amendment reflected the Commission's intent to require the defendant to accept responsibility for unconvicted criminal conduct as well. The court rejected this interpretation, because there would be no limitation on the scope of "criminal conduct" for which a defendant must accept responsibility. It would include not just charged conduct, but other related and unrelated prior criminal conduct that the defendant may have engaged in at any time. Perez-Franco, 873 F.2d at 459. "This reading could not possibly have been what the drafters intended." Id. The court determined that "an equally plausible rationale for the amendment" was to correct the possible misimpression that the guideline -- by referring to acceptance of responsibility for the offense "of conviction" -- only applied to defendants who went to trial.[7] The court went on to hold that the government's interpretation of §3E1.1 would impermissibly compel a defendant to incriminate himself -- i.e., to waive his fifth amendment rights -- in order to avoid a higher sentence. Id., 873 F.2d at 463.[8]

The Second Circuit adopted a narrow interpretation of the "criminal conduct" language in §3E1.1. It began its opinion with the constitutional issue, agreeing with the conclusion of the majority in Perez-Franco that a broad rule would be unconstitutional.

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[7]The Court did not explain how one could conclude that defendants who have pleaded guilty have not been "convicted" of an offense.

[8]The Honorable Levin H. Campbell, Chief Judge, concurred in the judgment, but thought it unnecessary to consider the constitutional issue in light of the conclusion that the Commission intended a narrow rule.

The court then announced, "we construe the statute [sic] as granting credit to a defendant who has been found to have accepted full responsibility for conduct included in those counts to which he has pled guilty." Oliveras, 905 F.2d at 629. The court, like the First Circuit, rejected the government's argument that the 1988 amendment was intended to expand the scope of conduct for which a defendant must accept responsibility. It noted that the Commission labeled that amendment a "clarification" and that the government's interpretation "would effect a change rather than simply a clarification." Id. (emphasis in original). It followed the First Circuit's interpretation that the purpose of the amendment may have been to clarify that the guideline applies to defendants who plead guilty, not just those who have been tried. The court also found it significant that the Commission chose the term "related conduct" in the commentary, rather than "relevant conduct." If the Commission had wanted to require a defendant to admit his involvement in relevant conduct, it would have used that term, the court observed. Id., 905 F.2d at 629 - 630. The court noted that its holding did not render the term "related conduct" meaningless, because "[c]riminal conduct that relates directly to the pled count may be considered." Id., 905 F.2d at 630.

As noted above, four circuits -- the Third, Fourth, Fifth and Eleventh -- have explicitly held that §3E1.1 of the guidelines requires a defendant to accept responsibility for criminal conduct beyond the offense of conviction. The Fifth Circuit noted in Mourning that it was "convinced" that the 1988 amendment "speaks to acceptance of responsibility for all relevant conduct" and that such an interpretation is rational because relevant conduct is defined in such a way that it only includes acts and omissions that bear some

special relationship to the offense of conviction. Id., 914 F.2d at 706. The court also addressed the constitutional concerns that the First and Second Circuits raised. The court noted that it is permissible to reward a defendant who is truly contrite. The fact that such defendants are given more lenient treatment does not mean that those who choose to go to trial are being penalized. Id., 914 F.2d at 707; see also Gordon, 895 F.2d at 936-37. "To the extent the defendant wishes to avail himself of §3E1.1, any 'dilemma' he faces in assessing his criminal conduct is one of his own making." Mourning, 914 F.2d at 707.

Because of the split in the circuits, the Commission may wish to adopt a rule that will be upheld in all of the courts, or it may wish to take an approach that will facilitate bringing the constitutional issue before the Supreme Court. These options will be discussed below in section III.

C. Technical Assistance Service Reports

The Commission's Technical Assistance Service Hotline calls concerning Acceptance of Responsibility from October 1, 1990 through October 1, 1991 were reviewed. On average, the hotline received three acceptance of responsibility calls a month with a total of 34 acceptance of responsibility calls during this period. These numbers represent an estimated 1.4% of the total (2,496) calls received by the hotline during the same period.

The acceptance of responsibility questions received covered a variety of aspects of this guideline with no one point of concern appearing more than a few times. Questions addressed areas such as: the importance of timeliness, the relationship between acceptance and obstructive behavior, the effect of new criminal behavior

following arrest. One caller asked if the guideline allowed for more than a two level reduction. Clarification of related conduct as it appears in Application Note 1(c) was also requested.

The annual number of calls related to Acceptance of Responsibility has declined from 54 in fiscal year 1989, to 38 calls in fiscal year 1990, to 34 calls in fiscal year 1991.

D. Compilation of Public Comment and Input From Outside Experts.

1. Letters Submitted to the Commission

As part of its attempt to determine outside opinion about the operation of the acceptance of responsibility guideline, the working group examined letters submitted to the Commission over the last year that dealt with §3E1.1. This public comment came from two sources -- judges and probation officers. A total of twelve letters were received. The suggestions included eliminating §3E1.1 altogether, providing an additional inducement for defendants who do more than plead guilty, providing more detailed guidance for when the adjustment applies, strengthening the presumption for giving the reduction when a defendant pleads guilty, and allowing a reduction of up to five offense levels where a defendant does additional things that show he has accepted responsibility. One suggestion was to defer somehow the granting of the credit to a time "later in the rehabilitative process."[9] In sum, the suggestion mentioned the most often (by four of the twelve) was to provide a greater inducement for defendants who do more than admit guilt and show remorse.

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[9]It is unclear how this suggestion, which involved examining how the defendant adjusts after release from prison, could be implemented.

2. Recommendations to the Judicial Conference

The Committee on Criminal Law and Probation Administration of the Judicial Conference of the United States submitted a recommendation to the Sentencing Commission to consider modification of §3E1.1. The Committee asserts "[t]he two-level reduction is seen by many judges as insufficient to encourage plea agreements particularly at higher offense levels." **Report and Recommendations of the Judicial Conference of the United States for Amendments to the Sentencing Guidelines** (1991), Appendix p. 10. The Committee notes that if a defendant must accept responsibility for related conduct, he may have to acknowledge wrongful conduct that will raise his offense level more than offsetting the two-level reduction for accepting responsibility. Id. The Judicial Conference therefore "recommends that the Commission consider increasing the two-level adjustment for acceptance of responsibility and also give consideration to providing that greater adjustments be available for higher offense levels to encourage entries of pleas in cases where defendants, who in anticipation of long periods of incarceration may, without adequate incentive, go to trial." Id. at App. pp. 10-11.

The Judicial Conference also recommends that the Commission amend the guideline or adopt an additional one "to recognize and encourage affirmative actions demonstrating acceptance of responsibility other than entry of a plea of guilty." Id. at App. p. 11. A preliminary option prepared by the staff of the Judicial Conference, but not submitted as part of the Conference's formal recommendations, would raise the general offense level reduction for accepting responsibility to three levels and add language

stating that "[i]f the defendant takes affirmative action to redress the harm of his criminal conduct, reduce by 2 additional levels." Finally, the Judicial Conference recommends that the Commission "reconsider utilizing a range of several offense levels for acceptance of responsibility to provide for more individual consideration of varying degrees and demonstrations of acceptance." Id.

3. Data from the Evaluation Report

As part of the Commission's study on the operation of the sentencing guideline system, members of the evaluation staff visited 12 judicial district offices during December 1990 through March 1991. Staff conducted interviews with judges, assistant U.S. attorneys, federal defenders and private defense attorneys, and probation officers. One district office was selected from each of the eleven judicial circuits, with one circuit containing two of the offices visited.

The structured interviews consisted of 45-50 questions appropriate to the profession of the respondent. Lasting about one hour each, the interviews included questions about guideline application and the general impact of the sentencing guidelines.

The respondents' statements about the Acceptance of Responsibility Guideline were reviewed. (The working group did not review the complete interviews of the respondents, but limited their examination to those statements where acceptance of responsibility was mentioned.)

A few observations emerge. First, several statements suggest that acceptance of responsibility is applied differently across the nation and within a given district. For example, compare these two comments made by probation officers: "Defendants who

plead guilty always get acceptance;" and "acceptance of responsibility is not automatic just because the defendant pleads guilty." A federal defender made this comment concerning disparity in application of acceptance of responsibility in trial cases where defendants wish to appeal, "The two cities in this district are different---ours give it and the other doesn't."

Secondly, some federal defenders and judges interviewed suggested that the reduction for acceptance of responsibility should be increased. Their recommendations included an increase in the acceptance of responsibility reduction for all defendants, an increase only for defendants who do more than just plead guilty, or an increase for those defendants at the higher offense ranges.

Finally, some respondents viewed acceptance of responsibility as a problematic guideline. They cited difficulty in interpreting the Commission's meaning of "scope of related conduct," the guideline's failure to take into account real remorse, and their impression that acceptance of responsibility provokes litigation. A few respondents expressed their concern about defendants who go to trial and later may want to appeal. If these defendants admit guilt to the court, they may jeopardize a later appeal. However, if these defendants do not discuss their criminal involvement, they are unlikely to receive the acceptance of responsibility credit.

E. Literature Review.

The Federal Sentencing Reporter devoted its January/February 1991 issue to "Plea Bargaining Under the Guidelines." The editors offered two proposals relevant to the acceptance guideline. One is to label the adjustment "plea benefit" and increase the

reduction to 40%, which the Commission's Supplementary Report to the original guidelines noted was the average size of the reduction in pre-guideline cases.[10] The second proposal is to put the burden on the government, when a defendant pleads guilty, to show by clear and convincing evidence that exceptional circumstances warrant less than a full reduction. Freed and Miller, Editor's Observations: Plea Bargained Sentences, Disparity and "Guideline Justice", 3 **Federal Sentencing Reporter** 175, 176 (1991).

III. Potential Solutions

A. The Scope of Conduct Issue.

The Commission has three options for addressing the scope of conduct for which a defendant must accept responsibility in order to get the two-level reduction. Those options are:

(1) No change;

(2) Rewrite the guideline so that it explicitly requires a defendant to accept responsibility for only the offense of conviction; and

(3) Rewrite the guideline so that it explicitly requires a defendant to accept responsibility for the offense and all relevant conduct.

Option One

The chief drawback to doing nothing is that it creates a situation in which defendants in different districts are held to different standards due solely to the fact that they are in different districts. The result is that a defendant who is only willing to accept

[10]Although pre-guideline sentences imposed may have been an average 40% shorter for defendants who pleaded guilty, the difference in sentences served was probably less pronounced due to the operation of the parole guidelines.

responsibility for the count of conviction receives a two-level reduction in his offense level if he is sentenced in New York, but is denied the reduction if he is sentenced in Virginia.[11] This unwarranted disparity would be even greater, of course, if the Commission changed the guideline to allow for more than a two-level reduction. With at least three Circuits on each side of this issue, the lower courts will not arrive at a uniform interpretation of §3E1.1. Short of an amendment, this leaves the possibility of resolving the issue with the Supreme Court. In light of that Court's recent opinion in Braxton v. United States, 111 S.Ct. 1854 (1991), it is unlikely that the Court will do so.

In Braxton, the Court noted that the Commission has the power to modify its own guidelines and that Congress anticipated that the Commission would make clarifications where there are conflicting judicial decisions regarding their interpretation. The Court continued:

> This congressional expectation alone might induce us to be more restrained and circumspect in using our certiorari power as the primary means of resolving such conflicts; but there is even further indication that we ought to adopt that course. In addition to the duty to review and revise the guidelines, Congress has granted the Commission the unusual explicit power to decide whether and to what extent its amendments reducing sentences will be given retroactive effect, 28 U.S.C. § 994(u).

Id. at 1858. Thus, the Supreme Court is unlikely to resolve a split in the circuits where the Commission has the power to do so. Although the Commission cannot resolve the question as to whether it is constitutional to require a defendant to accept responsibility

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[11]The focus is properly placed on where the defendant is sentenced, rather than where he commits his offense. A defendant arrested in a district other than where charges are filed may enter into a Rule 20 plea agreement in which he pleads guilty and is sentenced in the district in which he is arrested. Rule 20, F.R.Crim.P. Thus, he would be subject to the sentencing practices and guidelines interpretations that prevail in that district.

for conduct beyond the offense of conviction, it can resolve the question whether the guidelines contain such a requirement. If the Commission makes clear that it intends that sort of rule (and three circuits have held that it has not done so), the Supreme Court would have the constitutional issue properly framed for it to consider. It should be noted that the 1991 amendments heighten the need for a clarification of the Commission's intent under §3E1.1. New language in the commentary to section 1B1.5 suggests a broad interpretation of the scope of conduct in §3E1.1. It states that where there is a cross-reference to another guideline, the acceptance of responsibility adjustment (among others) is "to be determined in respect to that other offense guideline" and should be "applied as if the offense of conviction had directly referenced" that guideline. U.S.S.G. §1B1.5, comment. (n.2). This suggests that a defendant must accept responsibility for the underlying offense conduct rather than just the elements of the offense of conviction. On the other hand, the commentary to section 1B1.1 has been amended to define "offense" to include "the offense of conviction and all relevant conduct under §1B1.3 (Relevant Conduct) . . . ." U.S.S.G. §1B1.1, comment. (n.1(l)). The fact that the Commission did not change the language of §3E1.1(a) back to "offense" from "criminal conduct" could be read to mean that it is resisting the broad "scope of conduct" rule.[12]

Option Two

If the Commission chooses to clarify the scope of conduct for which a defendant must accept responsibility, it can go in either direction. If it chooses the second option

[12]The commentary does refer to the "offense and related conduct," but in light of the problem the courts have had in interpreting the 1988 amendment to §3E1.1, it would be surprising if they changed those decisions based on this new definition alone.

(requiring a defendant to accept responsibility only for the offense of conviction), it will avoid the constitutionality issue. On the other hand, it will increase the significance of the choice between/among count(s) or statute(s) to which the defendant will plead guilty. Thus, although in a drug case the offense level calculation does not depend upon which of several distribution counts a defendant pleads to, the acceptance of responsibility determination would. This would permit parties to use plea practices to manipulate the operation of the guideline and create unwarranted disparity.

Option Three

If the Commission chooses option three (requiring the defendant to accept responsibility for all relevant conduct, or specifically defining "related conduct") it will clear the way for resolution of the constitutionality of such a rule. The essence of the argument against the constitutionality of such a rule is that it punishes a defendant for asserting his fifth amendment right not to incriminate himself with respect to conduct beyond the count of conviction. The "punishment" is the higher guideline range that results from failing to accept responsibility for all of the relevant conduct. The right not to incriminate one's self is implicated, according to this argument, because statements a defendant makes to a probation officer about other criminal conduct would be admissible in a later court proceeding. Even if the government has agreed to dismiss charges involving other conduct, or not to bring such charges, "[a] plea bargain can unravel at any time, for any number of reasons." Perez-Franco, 873 F.2d at 460. The court feared that the government would then be relieved of its agreement to immunize the other conduct. Id. Also, "statements relating to guilty pleas made in one state court can be used in trials in

a different state." Id. Furthermore, the argument goes, statements made to a probation officer do not fall within the protection of Rule 410 of the Federal Rules of Criminal Procedure, which renders inadmissible any statement made by a defendant in the course of plea discussions "with an attorney for the prosecuting authority," because probation officers are not attorneys for the prosecuting authority. Perez-Franco, 873 F.2d at 460-61.

The problem with this argument is that it proves too much. By its reasoning, a defendant cannot be compelled to tell a probation officer about criminal conduct beyond the offense to which he is pleading guilty, because if the plea falls through those statements could be used against him in a later prosecution. But if the plea falls through, and if Rule 410 does not preclude the admissibility of those statements in a prosecution for the "other" criminal conduct, it also does not preclude the admissibility of statements made to the probation officer about the offense to which the defendant did plead guilty. Rule 410 turns not on the type of conduct that the defendant is admitting to, but rather on the timing of the statement and the identity of the person to whom it is made. Thus, the defendant faces the same risk of self-incrimination with admissions he makes to the probation officer about the offense he's attempting to plead to as he does with admissions about other criminal conduct. By the same token, if a defendant's fifth amendment rights are implicated by the risk that admissions about other crimes will be used in a prosecution by another jurisdiction, they also would be implicated by the risk that admissions about the crime he is pleading to would be used by another jurisdiction. This is true because the double jeopardy clause does not preclude successive

prosecutions for the same conduct by separate sovereigns. See, e.g., United States v. Wheeler, 435 U.S. 313 (1978).

Variations on Option Three

A change in this guideline to broaden the scope of conduct to which the acceptance of responsibility guideline applies could be structured in more than one way. The obvious approach would be for the Commission to require that the defendant accept responsibility for all of the relevant conduct in order to be eligible for the offense level reduction. An alternative approach would be to have the guideline language require that the defendant accept responsibility for only the offense of conviction, but word the commentary in such a way that the court may consider admissions about relevant conduct in deciding whether the defendant has accepted responsibility. This would fit with the current structure of Application Note 1 to the guideline, which provides a non-exhaustive list of factors a court may consider in deciding whether a defendant has accepted responsibility for the offense of conviction. A defendant need not do all of the things listed in Application Note 1 to qualify for the credit. Thus, if written and applied properly, this guideline would provide one way -- but not the only way -- for a defendant to get the two-level reduction.

There are drawbacks to this approach. It draws a fine distinction between requiring a defendant to admit to relevant conduct, on the one hand, and treating his decision whether to accept responsibility for relevant conduct as merely one (non-dispositive) factor in the decision whether he accepted responsibility for the offense of conviction, on the other hand. The guideline may be misapplied by those who do not

apprehend this distinction. In addition, it may be difficult in the real world to administer fairly a rule that says defendants who admit to all of their conduct should be treated the same as defendants who admit only to the offense of conviction but have something else related to the guideline operating in their favor. On the positive side, this rule would probably survive constitutional challenge because, while it does something for the defendant who admits to all of the relevant conduct, it does not automatically disqualify a defendant who refuses to talk about the other conduct. The latter defendant could qualify for the credit based on one of the other considerations in Application Note 1 (e.g., timeliness of the admissions made, restitution, or voluntary surrender to authorities).

B. Changes in the Offense Level Reductions Made under the Guideline.

Increasing the offense level reduction to more than two levels

Section 3E1.1 provides a flat two-level reduction if a defendant has accepted responsibility. If the Commission determines that a greater reduction is appropriate, there are several ways to implement such a change. The choice depends upon what problem, if any, the Commission is attempting to address. The Commission may determine that there needs to be a greater incentive, across the board, for defendants to accept responsibility for their conduct, or that accepting responsibility is such a strong indication that a defendant is on the way to reform or is less culpable than average that a greater reward is appropriate. In this case, the Commission could provide for a greater reduction across the board, such as a three-level or four-level reduction for any case. In analyzing this option, or any option that increases the possible offense level reduction, the following comparisons are instructive:

Offense level/ Criminal History Category	Range	Range with 2 level reduction	Range with 3-level reduction	Range with 4-level reduction	Range with 5-level reduction
10/I	6-12	2-8	1-7	0-6	0-6
12/I	10-16	6-12	4-10	2-8	1-7
15/I	18-24	12-18	10-16	8-14	6-12
18/I	27-33	21-27	18-24	15-21	12-18
22/I	41-51	33-41	30-37	27-33	24-30
26/II	70-87	57-71	51-63	46-57	41-51
32/II	135-168	108-135	97-121	87-108	78-97
38/II	262-327	210-262	188-235	168-210	151-188
42/II	360-life	324-405	292-365	262-327	235-293

This table illustrates how much a sentence would be affected by various possible changes in the guideline.

Different reductions for different levels of "acceptance"

The current guideline takes an "all or nothing" approach. Either a defendant gets a two-level reduction or no reduction. This same approach could be continued if the reduction is raised to three levels, for example. An alternative would be to allow different defendants to qualify for a different level of reduction. This would allow courts to distinguish between defendants who admit their wrongdoing and those who do something more (e.g., make restitution or assist in the recovery of the fruits and instrumentalities of the offense).

One purpose behind an extra reduction for action to redress the harm caused would be to provide an incentive to do more than just plead guilty. It has the following drawbacks, however: it may treat defendants differently based on whether they (or their

friends or relatives) can afford to pay restitution, and it may be seen as unfair to defendants whose crimes cause harms that, by their nature, cannot be redressed easily or that otherwise do not fit the considerations listed in Application Note 1 (e.g., voluntary resignation from office). Another effect, which could be viewed as desirable, is that this guideline could be used to give a reduction to defendants who make a good faith effort to redress the harms. In particular, drug defendants who try to cooperate but cannot convince the government to make a substantial assistance departure motion may be given this extra acceptance reduction. The reason this result could be desirable is it could remove the pressure on courts to resort to unguided departures to reward such assistance. See, e.g., United States v. Garcia, 926 F.2d 125 (2d Cir. 1991) (departing downward despite no government motion, because the defendant's willingness to testify encouraged other defendants to plead and thereby provided substantial assistance to the courts).

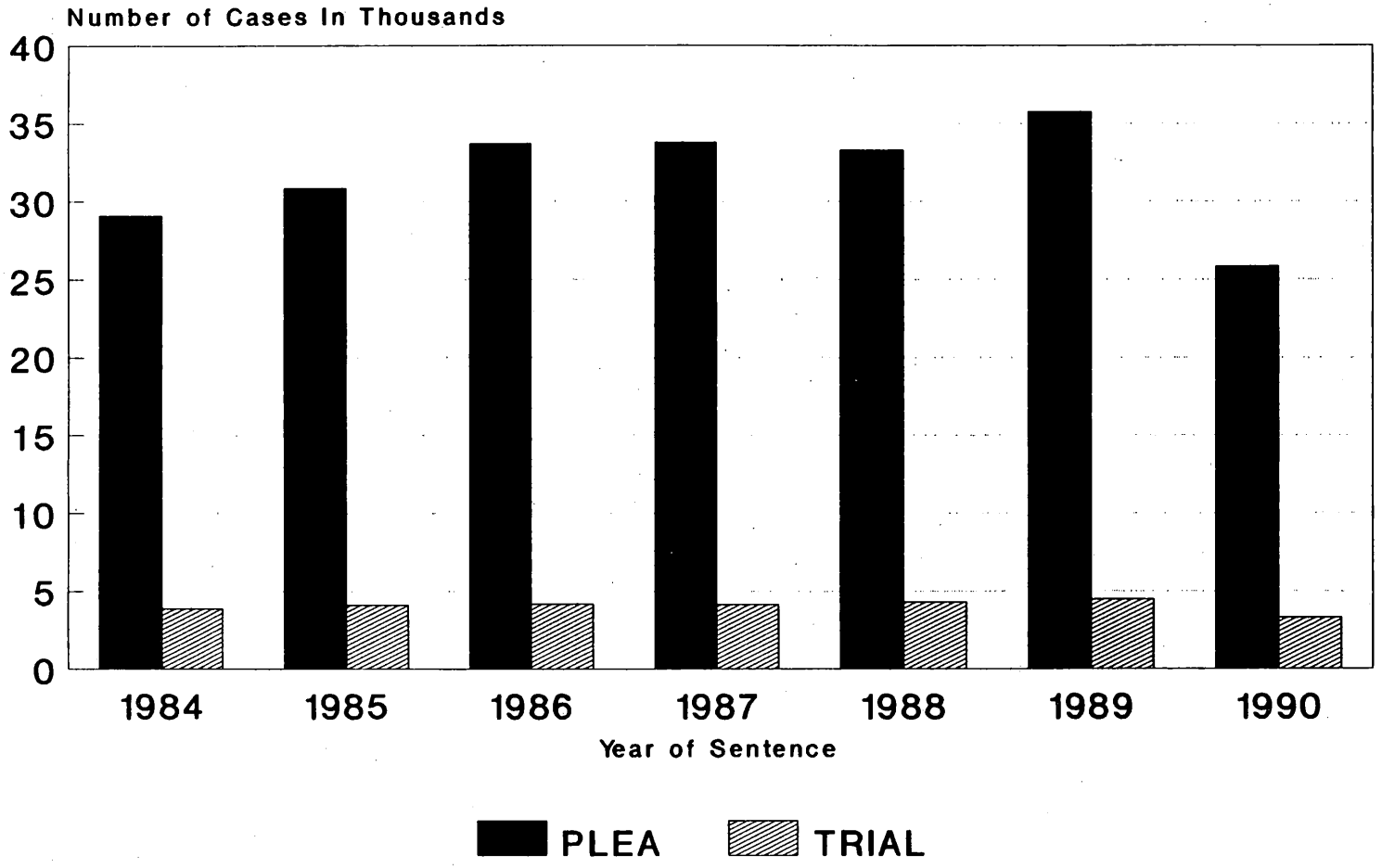
Greater reductions at higher total offense levels

Another option for amending the amount of the reduction under this guideline is to make a greater reduction available for defendants with higher offense levels. This was also included as a recommendation by the Judicial Conference. Such a change would be aimed at encouraging defendants facing significant prison terms to plead guilty more often. Such defendants plead guilty less often than offenders with lower offense levels, although the Working Group's research indicates that this same phenomenon occurred in the pre-guidelines days. It may be that in such cases the government is more willing to try the case, and less willing to plead the defendant to a lesser charge or a lower

sentence, due to the seriousness of the offense. Perhaps before the guidelines serious offenders were more willing to gamble on the results of a trial rather than on the size of a reduction that would result from a guilty plea. Under the guidelines, defendants have a better idea what the size of the reduction will be after a plea, but apparently it is sometimes worth the gamble to them to go to trial. While the underlying reasons for serious offenders to choose trial over guilty plea may have changed marginally under the guidelines (our data do not address this issue), there is little difference in the ultimate ratio. Whether the guidelines should merely try to mimic the prior ratio is beyond the scope of the present analysis but certainly an option the Commission may wish to consider.

APPENDIX

FIGURE A
MODE OF CONVICTION BY YEAR SENTENCED



Source: 1984 - 1990 FPSSIS Data Files.

Note that the 1990 file only includes cases sentenced through August, 1990.

TABLE 1
MODE OF CONVICTION BY YEAR OF SENTENCING
(1984 through August, 1990)

MODE OF CONVICTION	YEAR									
	1984		1985		1986		1987			
	Pre-Guidleine		Pre-Guideline		Pre-Guideline		Pre-Guideline		Guideline	
	N	%	N	%	N	%	N	%	N	%
Plea	29,084	88.3	30,876	88.3	33,733	88.9	33,783	88.9	14	100.0
Trial	3,864	11.7	4,095	11.7	4,192	11.1	4,157	11.1	0	0.0
TOTAL	32,948	100.0	34,971	100.0	37,925	100.0	37,940	100.0	14	100.0

MODE OF CONVICTION	1988				1989				1990			
	Pre-Guideline		Guideline		Pre-Guideline		Guideline		Pre-Guideline		Guideline	
	N	%	N	%	N	%	N	%	N	%	N	%
Plea	27,229	88.3	6,078	89.9	16,406	89.7	19,339	88.1	7,698	89.9	18,146	88.2
Trial	3,609	11.7	682	10.1	1,885	10.3	2,603	11.9	869	10.1	2,435	11.8
TOTAL	30,838	100.0	6,760	100.0	18,291	100.0	21,942	100.0	8,567	100.0	20,581	[illegible]

TABLE 2-A
PRISON TERM IMPOSED BY MODE OF CONVICTION
PRE-GUIDELINE DEFENDANTS SENTENCED
(1984 THROUGH 1986)

PRISON TERM IMPOSED IN MONTHS	MODE OF CONVICTIONS											
	1984				1985				1986			
	PLEA		TRIAL		PLEA		TRIAL		PLEA		TRIAL	
	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT
TOTAL	29,079	88.3	3,859	11.7	30,875	88.3	4,091	11.7	33,728	89.0	4,179	11.0
ZERO	14,527	94.8	797	5.2	14,278	94.4	849	5.6	14,977	94.4	896	5.6
1 - 59	10,853	86.5	1,688	13.5	12,216	88.0	1,668	12.0	13,423	89.1	1,640	10.9
60	1,376	82.0	303	18.1	1,605	80.6	386	19.4	1,777	82.9	367	17.1
61 - 119	1,045	75.7	336	24.3	1,197	77.4	350	22.6	1,536	80.0	384	20.0
120	489	69.0	220	31.0	600	70.6	250	29.4	783	77.5	227	22.5
121 - 179	201	69.3	89	30.7	261	69.8	113	30.2	365	75.6	118	24.4
180	249	66.9	123	33.1	266	67.0	131	33.0	388	69.7	169	30.3
181 -239	55	65.5	29	34.5	77	74.8	26	25.2	77	64.7	42	35.3
240	140	62.5	84	37.5	168	62.0	103	38.0	202	62.9	119	37.1
241 - 360	102	47.9	111	52.1	149	52.3	136	47.7	145	56.2	113	43.8
361 AND ABOVE	20	29.9	47	70.2	39	40.6	57	59.4	41	34.2	79	65.8
LIFE	22	40.7	32	59.3	19	46.3	22	53.7	14	35.9	25	64.1

TABLE 2-B
PRISON TERM IMPOSED BY MODE OF CONVICTION
GUIDELINE AND PRE-GUIDELINE DEFENDANTS SENTENCED
(JANUARY 1, 1988 THROUGH DECEMBER 31, 1988)

PRISON TERM IMPOSED IN MONTHS	GUIDELINE CONVICTIONS					PRE-GUIDELINE CONVICTIONS				
	TOTAL	PLEA		TRIAL		TOTAL	PLEA		TRIAL	
		NUMBER	PERCENT	NUMBER	PERCENT		NUMBER	PERCENT	NUMBER	PERCENT
TOTAL	14	14	100.0	0	0.0	37,920	33,779	89.1	4,141	10.9
ZERO	10	10	100.0	0	0.0	15,074	14,292	94.8	783	5.2
1 - 59	3	3	100.0	0	0.0	15,009	13,527	90.1	1,482	9.9
60	1	1	100.0	0	0.0	2,489	2,108	84.7	381	15.3
61 - 119	0	0	0.0	0	0.0	2,096	1,627	77.6	469	22.4
120	0	0	0.0	0	0.0	1,135	852	75.1	283	24.9
121 - 179	0	0	0.0	0	0.0	544	391	71.9	153	28.1
180	0	0	0.0	0	0.0	626	431	68.9	195	31.2
181 - 239	0	0	0.0	0	0.0	161	122	75.8	39	24.2
240	0	0	0.0	0	0.0	345	223	64.6	122	35.4
241 - 360	0	0	0.0	0	0.0	261	144	55.2	117	44.8
361 AND ABOVE	0	0	0.0	0	0.0	138	43	31.2	95	68.8
LIFE	0	0	0.0	0	0.0	41	19	46.3	22	53.7

TABLE 2-C
PRISON TERM IMPOSED BY MODE OF CONVICTION
GUIDELINE AND PRE-GUIDELINE DEFENDANTS SENTENCED
(JANUARY 1, 1988 THROUGH DECEMBER 31, 1988)

PRIMARY OFFENSE	GUIDELINE CONVICTIONS					PRE-GUIDELINE CONVICTIONS				
	TOTAL	PLEA		TRIAL		TOTAL	PLEA		TRIAL	
		NUMBER	PERCENT	NUMBER	PERCENT		NUMBER	PERCENT	NUMBER	PERCENT
TOTAL	6,759	6,078	89.9	681	10.1	30,824	27,228	88.3	3,596	11.7
ZERO	1,578	1,537	97.4	41	2.6	13,329	12,622	94.7	707	5.3
1 - 59	3,720	3,482	93.6	238	6.4	11,063	9,901	89.5	1,162	10.5
60	309	270	87.4	39	12.6	1,983	1,639	82.7	344	17.4
61 - 119	576	447	77.6	129	22.4	1,641	1,266	77.2	375	22.9
120	123	89	72.4	34	27.6	1,021	716	70.1	305	29.9
121- 179	205	128	62.4	77	37.6	466	321	68.9	145	31.1
180	55	34	61.8	21	38.2	503	341	67.8	162	32.2
181 - 239	64	34	53.1	30	46.9	116	65	56.0	51	44.0
240	44	20	45.5	24	54.6	290	160	55.2	130	44.8
241 - 360	61	32	52.5	29	47.5	252	131	52.0	121	48.0
361 AND ABOVE	16	4	25.0	12	75.0	111	48	43.2	63	56.8
LIFE	8	1	12.5	7	87.5	49	18	36.7	31	63.3

TABLE 2-D
PRISON TERM IMPOSED BY MODE OF CONVICTION
GUIDELINE AND PRE-GUIDELINE DEFENDANTS SENTENCED
(JANUARY 1, 1989 THROUGH DECEMBER 31, 1989)

PRIMARY OFFENSE	GUIDELINE CONVICTIONS					PRE-GUIDELINE CONVICTIONS				
	TOTAL	PLEA		TRIAL		TOTAL	PLEA		TRIAL	
		NUMBER	PERCENT	NUMBER	PERCENT		NUMBER	PERCENT	NUMBER	PERCENT
TOTAL	21,940	19,339	88.1	2,601	11.9	18,285	16,406	89.7	1,879	10.3
ZERO	4,885	4,747	97.2	138	2.8	9,615	9,099	94.6	516	5.4
1 - 59	11,112	10,318	92.9	794	7.2	6,014	5,366	89.2	648	10.8
60	989	852	86.2	137	13.9	771	659	85.5	112	14.5
61 -119	2,306	1,838	79.7	468	20.3	766	595	77.7	171	22.3
120	425	320	75.3	105	24.7	361	271	75.1	90	24.9
121 - 179	960	653	68.0	307	32.0	189	120	63.5	69	36.5
180	144	79	54.9	65	45.1	188	117	62.2	71	37.8
181 - 239	452	250	55.3	202	44.7	74	45	60.8	29	39.2
240	133	70	52.6	63	47.4	112	57	50.9	55	49.1
241 - 360	397	180	45.3	217	54.7	106	53	50.0	53	50.0
361 AND ABOVE	94	24	25.5	70	74.5	75	19	25.3	56	74.7
LIFE	43	8	18.6	35	81.4	14	5	35.7	9	64.3

TABLE 2-E
PRISON TERM IMPOSED BY MODE OF CONVICTION
GUIDELINE AND PRE-GUIDELINE DEFENDANTS SENTENCED
(JANUARY 1, 1990 THROUGH AUGUST 31, 1990)

PRIMARY OFFENSE	GUIDELINE CONVICTIONS					PRE-GUIDELINE CONVICTIONS				
	TOTAL	PLEA		TRIAL		TOTAL	PLEA		TRIAL	
		NUMBER	PERCENT	NUMBER	PERCENT		NUMBER	PERCENT	NUMBER	PERCENT
TOTAL	20,577	18,144	88.2	2,433	11.8	8,564	7,698	89.9	866	10.1
ZERO	4,994	4,858	97.3	136	2.7	5,036	4,697	93.3	339	6.7
1 - 59	9,938	9,206	92.6	732	7.4	2,510	2,213	88.2	297	11.8
60	951	833	87.6	118	12.4	329	289	87.8	40	12.2
61 - 119	2,041	1,623	79.5	418	20.5	272	219	80.5	53	19.5
120	470	360	76.6	110	23.4	145	104	71.7	41	28.3
121 - 179	994	675	67.9	319	32.1	82	64	78.1	18	22.0
180	157	93	59.2	64	40.8	60	36	60.0	24	40.0
181 - 239	411	240	58.4	171	41.6	23	19	82.6	4	17.4
240	113	54	47.8	59	52.2	45	28	62.2	17	37.8
241 - 360	358	161	45.0	197	55.0	42	17	40.5	25	59.5
361 AND ABOVE	94	29	30.9	65	69.2	12	8	66.7	4	33.3
LIFE	56	12	21.4	44	78.6	8	4	50.0	4	50.0

Table 3

GUIDELINE SENTENCING RANGES BY MODE OF CONVICTION AND ACCEPTANCE OF RESPONSIBILITY
For Guideline Cases With Complete Reports on the Sentencing Hearing Received (October 1, 1989 through September 30, 1990)

GUIDELINE RANGE	Total	Percent	MODE OF CONVICTION							
			PLEA				TRIAL			
			Acceptance		No Acceptance		Acceptance		No Acceptance	
			N	%	N	%	N	%	N	%
0-6	2,526	15.3	2283	90.4	148	5.9	56	2.2	39	1.5
1-7	614	3.7	563	91.7	26	4.2	17	2.8	8	1.3
2-8	640	3.9	578	90.3	42	6.6	8	1.3	12	1.9
3-9	8	0.1	8	100.0	0	0.0	0	0.0	0	0.0
4-10	534	3.2	454	85.0	62	11.6	6	1.1	12	2.3
6-12	1,009	6.1	904	89.6	64	6.3	12	1.2	29	2.9
8-14	544	3.3	470	86.4	46	8.5	8	1.5	20	3.7
9-15	67	0.4	62	92.5	5	7.5	0	0.0	0	0.0
10-16	709	4.3	553	78.0	94	13.3	14	2.0	48	6.8
12-18	508	3.1	413	81.3	54	10.6	11	2.2	30	5.9
15-21	714	4.3	585	81.9	73	10.2	11	1.5	45	6.3
18-24	339	2.1	245	72.3	55	16.2	4	1.2	35	10.3
21-27	626	3.8	467	74.6	83	13.3	12	1.9	64	10.2
24-30	372	2.3	295	79.3	45	12.1	12	3.2	20	5.4
27-33	553	3.4	393	71.1	86	15.6	10	1.8	64	11.6
30-37	214	1.3	139	65.0	36	16.8	4	1.9	35	16.4
33-41	509	3.1	367	72.1	71	14.0	9	1.8	62	12.2
37-46	232	1.4	165	71.1	33	14.2	8	3.5	26	11.2
41-51	450	2.7	329	73.1	53	11.8	21	4.7	47	10.4
46-57	167	1.0	125	74.9	23	13.8	6	3.6	13	7.8
51-63	824	5.0	690	83.7	47	5.7	38	4.6	49	6.0
57-71	196	1.2	158	80.6	14	7.1	1	0.5	23	11.7
63-78	695	4.2	447	64.3	81	11.7	34	4.9	133	19.1
70-87	175	1.1	108	61.7	28	16.0	3	1.7	36	20.6
77-96	71	0.4	60	84.5	3	4.2	1	1.4	7	9.9
78-97	442	2.7	277	62.7	63	14.3	14	3.2	88	19.9
84-105	29	0.2	26	89.7	1	3.5	1	3.5	1	3.5
87-108	87	0.5	57	65.5	6	6.9	4	4.6	20	23.0
92-115	58	0.4	40	69.0	10	17.2	1	1.7	7	12.1
97-121	397	2.4	278	70.0	39	9.8	21	5.3	59	14.9
100-125	21	0.1	15	71.4	2	9.5	2	9.5	2	9.5
108-135	84	0.5	55	65.5	8	9.5	4	4.8	17	20.2
110-137	39	0.2	22	56.4	8	20.5	0	0.0	9	23.1
120-150	19	0.1	16	84.2	0	0.0	0	0.0	3	15.8
121-151	437	2.6	240	54.9	64	14.7	24	5.5	109	24.9
130-162	13	0.1	8	61.5	2	15.4	0	0.0	3	23.1
135-168	127	0.8	77	60.6	15	11.8	1	0.8	34	26.8
140-175	348	2.1	181	52.3	54	15.6	15	4.3	96	27.8
151-188	207	1.3	149	72.0	16	7.7	10	4.8	32	15.5
168-210	224	1.4	99	44.2	41	18.3	6	2.7	78	34.8
188-235	188	1.1	94	50.0	29	15.4	9	4.8	56	29.8
210-262	132	0.8	52	39.4	20	15.2	1	0.8	59	44.7
235-293	122	0.7	32	26.2	25	20.5	5	4.1	60	49.2
262-327	89	0.5	42	47.2	13	14.6	6	6.7	28	31.5
292-365	29	0.2	5	17.2	4	13.8	1	3.5	19	65.5
324-405	119	0.7	23	19.3	22	18.5	2	1.7	72	60.5
360-life	23	0.1	0	0.00	3	100.0	1	5.0	19	95.0
TOTAL	16,528	100.0	12,649	76.5	1,717	10.4	434	2.6	1,728	10.5

ACCEPTANCE OF RESPONSIBILITY CASE FILE SUMMARY # 1
Acceptance Departures

Coder _____
QC _____
Case No. _____

USSC Identification No. _____

Did defendant get the two-level reduction under §3E1.1? Yes ___ No ___

Other grounds for departing besides "acceptance"? (If yes, list)

_____
_____
_____

Court's reasons for using a departure to reward "acceptance" (rather than, or in addition to, §3E1.1) _____
_____
_____
_____

Comments _____
_____
_____
_____
_____

ACCEPTANCE OF RESPONSIBILITY CASE FILE SUMMARY # 2
Defendants Who Get Acceptance Credit After a Trial

Coder _____
QC _____
Case No. _____

USSC Identification No. _____

Is a sentencing transcript available in the file? Yes ___ No ___

Departure? None ___ Up ___ Down ___

Reasons: _____
_____

Did defendant plead guilty to any charges? Yes ___ No ___

Did PSR recommend credit for "acceptance"? Yes ___ No ___

Reasons given by PSR for its recommendation regarding "acceptance" credit:

_____
_____
_____

Government position on "acceptance" credit?

Opposed credit for acceptance: ___
Supported credit for acceptance: ___
Took no formal position: ___

Court's reasons for giving "acceptance" credit (also indicate if no reasons were given, or if the court merely adopted the findings and/or recommendations from the PSR):

_____
_____
_____
_____

Comments _____
_____
_____
_____

ACCEPTANCE OF RESPONSIBILITY CASE FILE SUMMARY # 3
Defendants Who Plead And Are Denied Acceptance Credit

Coder _____
QC _____
Case No. _____

USSC Identification No. _____

Is a sentencing transcript available in the file? Yes ___ No ___

Departure? None ___ Up ___ Down ___

Reasons: _____
_____

Did defendant go to trial on any charges? Yes ___ No ___

Did PSR recommend credit for "acceptance"? Yes ___ No ___

Reasons given by PSR for its recommendation regarding "acceptance" credit:
_____
_____

Government position on "acceptance" credit?

Opposed credit for acceptance: ___
Supported credit for acceptance: ___
Took no formal position: ___

Did defendant object to denial of acceptance credit? Yes ___ No ___

Court's reasons for denying "acceptance" credit (also indicate if no reasons were given, or if the court merely adopted the findings and/or recommendations from the PSR):
_____
_____
_____

Comments _____
_____
_____
_____

8. Consider modification of the acceptance of responsibility Guideline.

The defendant entered a plea agreement which included factual stipulations that he was the manager of an operation to distribute 1 kg. of cocaine, and that he accepted responsiblity for his crime. These facts would give him an offense level of 26 and a guideline range of 63-78 months. After discussion with the case agent, the probation officer determined that the defendant was actually the leader of a larger conspiracy to distribute over 5 kg. of cocaine, leading to an offense level of 36 and a Guideline range of 188-235 months. If the defendant pleads guilty and accepts responsibility, this could be reduced to 151-188 months. The prospect of a twelve-and-a-half year sentence, even with a guilty plea, leads the defendant to withdraw his plea and take his chances at trial.

Judges are confronted with some plea agreements that contain stipulations understating the defendant's conduct. The choice is to accept them and thereby undermine sentencing uniformity, or reject them and risk a trial. Without such plea agreements, the incentives needed to encourage guilty pleas are seen as insufficient, especially at higher Guideline levels. Judicial Conference recommendation 8 asks the Commission to explore whether the Guideline's major explicit tool for encouraging honest plea bargaining---the acceptance of responsibility reduction--might be modified to reflect its crucial place in a workable Guideline system.

Most important, the revisions would clarify that the foreseeability and scope of agreement criteria apply to §1B1.3(a)(2) aggregable offenses. At present, the "common course of conduct or common scheme or plan" standard found in (a)(2) sometimes conflicts with the standards in the application notes, since offenses covered by (a)(2) are often also jointly-undertaken. The illustrations in the commentary suggest that defendants who aid and abet a joint criminal activity are liable for the full amounts of drug or money, notwithstanding claims that they were not aware of and could not reasonably foresee the amounts involved. This suggests that all conduct that is part of a common scheme or plan may be attributed to a defendant, regardless of foreseeability. Application note 2 may be intended to make the "common scheme or plan" standard secondary to the criteria in application note 1, but this is far from clear.

The purpose of Recommendation #7 is to clarify that defendants in all types of offenses are to be punished only for criminal acts and harms which were reasonably foreseeable, or of which they were personally aware. It would give judges flexibility to tailor the offense level, especially that part due to the aggregation of amounts of drugs or money, according to the part of the total for which each defendant should be held culpable.

1B1.3. Relevant Conduct (Factors that Determine the Guideline Range).

(a) Chapters Two (Offense conduct) and Three (Adjustments).

(1) all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would otherwise be accountable, *or counseled, commanded, induced, procured, or willfully caused by the defendant, or in the case of joint criminal activity, reasonably foreseeable acts of others in furtherance of the jointly undertaken criminal plan,* that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for theat offense, or that otherwise were in furtherance of that offense;

(2) solely with respect to offenses of a character for which 3D1.2(d) would require grouping of multiple counts, all such acts and omissions and *amounts* that were part of the same course of conduct or common scheme or plan as the offense of conviction, *and of which the defendant was aware or which were reasonably foreseeable to the defendant.*

Recommendation #8: Consider modification of the Acceptance of Responsibility.Guideline.

The acceptance of responsibility guideline allows for a reduction of two offense levels (or roughly a 25 percent reduction) when a defendant "clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct." The guideline

appears intended to accomplish three things: 1) encourage guilty pleas, 2) provide an incentive for cooperation with authorities and 3) recognize sincere remorse. In the United States Sentencing Commission amendments forwarded to Congress this spring, the Commission revised Application Note 2 to make clear that the two-level reduction is "not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt." As a corollary, Note 3 was amended to provide that entry of a guilty plea prior to trial and truthful admission of "related conduct" constitute "significant evidence" of acceptance of responsibility. Both notes provide "overrides" for unusual circumstances, for example, where a defendant goes to trial only to press a constitutional challenge to a criminal statute.

The effect of the amended notes read together is that a timely plea of guilty with admission of related conduct will likely result in a sentence reduction, while putting the government to its proof, regardless of other indices of acceptance or responsibility, ordinarily will not. This appears to respond to perceived concerns that there has been disparity in application of the acceptance of responsibility guideline where some defendants, even after going to trial, were given the reduction while others were unaccountably denied the reduction after entry of a guilty plea.[1] The amendment focuses this guideline almost entirely on the reward of a guilty plea.

However, this new focus may not be effective to achieve the multiple purposes of the acceptance of responsibility guidelines. The two-level reduction is seen by many judges as insufficient to encourage plea agreements particularly at higher offense levels. The Commission's own study of past practice showed that the average time served when a conviction results from a guilty plea was 30 to 40 percent below what would otherwise have been served.[2]

Moreover, to receive the reduction the defendant must acknowledge involvement in both the offense of conviction and "related conduct."[3] This makes the incentive especially weak when, in order to qualify, defendants must acknowledge wrongdoing to related conduct that can result in offense level increases of more than two levels. In addition, requiring admissions to related conduct may result in continued disparate application, as it is not always clear what degree of admission of such conduct is required. The Judicial conference therefore recommends that the Commission consider increasing the two-level adjustment for acceptance of responsibility and also give consideration to providing that greater adjustments be available

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[1] For a discussion of different uses of this adjustment in districts in the Eighth Circuit, see United States v. Knight, 905 F.2d 189 No. 89-1799 (June 1, 1990).

[2] The United States Sentencing Commission Supplemental Report on the Initial Sentencing Guidelines and Policy Statements, June 18, 1987, pp. 48-50.

[3] There is a split in the circuits as to whether it is constitutional to require admission of criminal conduct beyond the offense of conviction as a condition of giving the acceptance of responsibility. Compare United States v. Oliveras, 905 F.2d 623, No. 89-1380 (2d Cir. June 4, 1990) and United States v. Perez-Franco, 873 F.2d 455 (1st Cir. 1989), holding that acceptance of responsibility should be assessed solely with respect to actual charges to which the defendant pleads guilty, with United States v. Gordon, 895 F.2d 932 (4th Cir. 1990), holding that the defendant must accept responsibility for all criminal conduct.

for higher offense levels to encourage entries of pleas in cases where defendants, who in anticipation of long periods of incarceration may, without adequate incentive, go to trial.

The amended guideline also reduces the incentive for defendants to take other affirmative actions demonstrating acceptance of responsibility, such as payment of restitution or resignation from the office or position held during the commission of the offense. (See list of factors in the current guideline commentary, section 3E1.1, Application Note 1.) The Judicial Conference recommends that the Commission consider revising this guideline--or adding another--to recognize and encourage affirmative actions demonstrating acceptance of responsibility other than entry of a plea of guilty.

The Judicial Conference also recommends that the Commission reconsider utilizing a range of several offense levels for acceptance of responsibility to provide for more individual consideration of varying degrees and demonstrations of acceptance. We are aware that such an approach was considered by the Commission in its 1987 Revised Draft Sentencing Guidelines but not adopted. We believe such an approach provides much needed flexibility in allowing the court to address the various elements of acceptance of responsibility and does not implicate the 25 percent rule set forth in 28 U.S.C. § 994(b)(2). Section 994(b)(2) provides that "if a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range...shall not exceed the minimum by...25 percent or 6 months." This section addresses the actual imprisonment range, and not the multiple determinations needed to arrive at such a range. Moreover, it is specifically limited to such ranges that include a term of imprisonment indicating that not all determinations be limited by the 25 percent restriction.

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ACCEPTANCE OF RESPONSIBILITY
WORKING GROUP REPORT

Submitted by:

Susan Winarsky
David Debold
Richard McNeil

October 16, 1991

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I. Introduction

The Acceptance of Responsibility Working Group was assigned the task of examining the acceptance of responsibility guideline, section 3E1.1, to determine whether any changes may be needed in the structure of the guideline, the language of the guideline and related commentary, or the manner in which the Commission trains and educates the field about application of the guideline. This report summarizes the results of the group's efforts.

Section 3E1.1 has been included in the guidelines since they were first promulgated in November 1987. This section provides for a two-level reduction in a defendant's combined adjusted offense level (i.e., after the application of guidelines from Chapter Two and the remainder of Chapter Three) "if the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct." U.S.S.G. §3E1.1. The guideline has been amended three times since its adoption. Effective January 15, 1988, the words "his criminal conduct" in the sentence just quoted replaced the words "the offense of conviction." Effective November 1, 1989, the commentary was amended to reflect that there is a rebuttable presumption, rather than a categorical prohibition, against granting the "acceptance reduction" when the defendant obstructs justice. Finally, effective November 1, 1990, the guideline was amended to provide more guidance to determine when a defendant who attempts to accept responsibility after a trial is eligible for the reduction, to strengthen the significance of a guilty plea, and to eliminate a portion of the language relating to the standard of

review of an acceptance of responsibility determination. There are no amendments to the guideline in 1991.

The general areas of concern that the group focused on were: (1) whether the guideline is being interpreted and applied consistently across the country; (2) whether the guideline provides a significant enough offense level reduction, especially for defendants whose offense levels are relatively high; (3) whether the guideline needs to differentiate between defendants (for example, between ones who "merely" admit wrongdoing and those who go further and attempt to rectify their wrong by making restitution); and (4) whether there are factors that the guideline does not consider that would help a court determine when the reduction is warranted.

To address these concerns adequately, the working group sought and considered input from a wide variety of sources. This included computer analysis of the raw data drawn from the case files that are submitted to the Commission after each sentencing of a guidelines case; in-depth analysis of the files from atypical or aberrant cases; analysis of published opinions from the courts dealing with acceptance of responsibility; review of the available literature; consideration of questions and problems that have come to the attention of the Commission's Technical Assistance Service; personal interviews with each of the seven voting Commissioners and the two ex-officio Commissioners; consideration of proposals submitted by the Judicial Conference of the United States; solicitation of input from practitioners (including the Sentencing Commission's Practitioners' Advisory Group) and probation officers; and review of public comment received by the Commission.

II. Presentation of Data

A. Monitoring Data

Monitoring data from fiscal year 1990 was used in conjunction with available FPSSIS data from 1984 through 1990 in order to provide some insight into the application of Section 3E1.1. Although mode of conviction (i.e., plea vs. trial) is not the only focus of the acceptance of responsibility adjustment, it certainly is highly correlated with the application of the two level reduction and is central to the language that is presented in the guideline. For this reason data is provided on mode of conviction separately and is cross tabulated with the acceptance of responsibility adjustment. Additionally, the acceptance of responsibility adjustment was analyzed with what were thought to be relevant variables.

1. Mode of Conviction

Since the implementation of the Sentencing Reform Act in 1984, mode of conviction (i.e., the ratio between guilty pleas and convictions by trial) has remained stable over the last six years and eight months that data are available.[1] While these data suggest that the number of federal defendants sentenced each year has increased since 1984, the proportion of defendants pleading guilty has remained relatively consistent throughout the six year and eight month period reviewed. See Appendix, Figure A.

More specifically, in 1984 the plea rate was 88.3 percent, while in 1990 (January through August) the plea rate was 88.7 percent. The difference between the plea rate in

[1]Data files from FPSSIS were available for calendar years 1984 through August, 1990. Due to the termination of FPSSIS in August 1990, mode of conviction information was unavailable for the last quarter of calendar year 1990.

1984 and 1990 was less than one half of one percent. Table 1 illustrates the number and percentage of pleas and trials for each of these six and three quarters years. The mode of conviction in this table is further broken down for pre-guideline and guideline cases sentenced since November, 1987. Generally, the mode of conviction for guideline cases is comparable to pre-guideline cases. For instance, the plea rate for guideline cases in 1989 was 88.1 percent while the plea rate for pre-guideline cases was 89.7 percent in 1989. The plea rate was 1.6 percent higher in 1989 for pre-guideline cases than for guideline cases. While this indicates a slight decrease in the plea rate for guideline cases, the overall rate for the last six years and eight months has remained about the same.

The data indicated that defendants convicted of more serious offenses tended to plead guilty less often than those convicted of less serious offenses. These results were examined further to determine if this lower plea rate by more serious offenders might justify more than a two-level reduction for acceptance of responsibility by defendants at higher offense levels. In particular, comparison was made to plea rates under the pre-guidelines system. This comparison, shown in tables 2A through 2E, shows that this phenomenon is not new. Defendants in the pre-guidelines era whose final sentences were lengthy (a rough indicator of the seriousness of the offense) also pleaded guilty less often. A direct comparison of the plea rates for defendants sentenced to the same sentence under the pre-guidelines and guidelines systems may understate how often a defendant would plead under the guidelines system. This is true because a sentence imposed under the pre-guidelines system is usually significantly longer than the sentence actually to be served. Thus, it may be more appropriate to compare the plea rates for

defendants sentenced to a certain number of months under the guidelines to defendants sentenced to more months under the pre-guidelines system, in order to see if the incentives to plead have changed for comparable serious offenders.

2. Acceptance of Responsibility

Data collected by the Monitoring Unit indicate that approximately 79 percent of the cases receive the acceptance of responsibility reduction.[2] Of those defendants that plead guilty, eighty-eight percent received the acceptance reduction. However, of those defendants that go to trial, only twenty percent receive the acceptance reduction. These results suggest that application of the acceptance of responsibility guideline is strongly related to the mode of conviction of the defendant. See the table below.

Acceptance of Responsibility Reduction	Total		Plea		Trial	
	Number	Percent	Number	Percent	Number	Percent
Yes	13,444	79.1	12,994	88.0	450	20.2
No	3,550	20.9	1,768	12.0	1,782	79.8
Total	16,994	100.0	14,762	86.9	2,232	13.1

Based on the instructions and application notes to §3E1.1, one would expect that people who plead guilty will generally get the two level reduction for accepting responsibility, and those who go to trial will not. As a result, the working group decided to examine those cases that do not follow this assumption: those where the

[2]Monitoring data used in these analyses include cases sentenced between October 1, 1989 and September 30, 1990, the 1990 fiscal year. Data on 3E1.1, acceptance of responsibility, included only cases for which information from the Court was available. Acceptance of responsibility information from the PSR was not included when there was no statement of reasons or sentencing transcript in the case file.

defendant pleads guilty and does not get the two level reduction for accepting responsibility, and those where the defendant that proceeds to trial but does get the reduction.[3]

Table 3 shows the breakdown of "guilty plea to trial ratio" and "acceptance to non-acceptance ratio" for each guideline range. As Table 3 suggests, defendants in the highest guideline ranges (above guideline minimums of 210) are more likely to go to trial and not receive the acceptance of responsibility reduction. In contrast, defendants in the lower guideline ranges (below guideline minimums of nine) are more likely to plead guilty and receive the acceptance of responsibility reduction.

Additional analyses suggest that defendants who are in higher offense levels (above offense level 30) and are in criminal history category VI are less likely to receive the acceptance reduction, and go to trial more often, than other defendants.

While it is clear that mode of conviction varies from district to district (See Table I, U.S. Sentencing Commission 1990 Annual Report), application of the acceptance of responsibility guideline seems to be fairly consistent across districts. Of those defendants that plead guilty, 75 percent receive the two level reduction for acceptance of responsibility. In only a handful of districts is acceptance credit denied in more than 25 percent of guilty plea cases -- Western Texas, Western Arkansas, Northern Oklahoma, Northern Georgia, and Southern Alabama. Similarly, in only a few districts is the acceptance of responsibility reduction given in more than 30 percent of the cases that proceed to trial-- Maryland, Middle North Carolina, Eastern Louisiana,

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[3]The results are discussed below in section II. A. 3., Aberrations in Application.

and Southern Ohio. Although variations with respect to the application of the acceptance of responsibility adjustment do exist, the Commission may conclude that they are not too pronounced.

3. Aberrations in Application of the Acceptance of Responsibility Guideline

As earlier data presented suggests, their is a strong correlation between plea rates and the awarding of acceptance of responsibility credit, on the one hand, and trial rates and the denial of acceptance of responsibility credit, on the other hand. This section will deal with cases that deviate from this correlation. These "aberrations" fall into two broad categories: 1) where the defendant entered a plea but did not receive acceptance of responsibility credit, and 2) where the defendant went to trial and acceptance of responsibility credit was awarded.

Seventy-six case files were randomly selected in order to gain insight into the rationale behind these seemingly aberrant applications.

The following observations concerning these seventy-six cases are not intended to be a "scientific" or statistical analysis of the results, but are intended to provide a sense of the reasons expressed by the courts, probation officers, the government and defense for the application or non-application of the acceptance of responsibility guideline.[4]

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[4]Four forms were designed and utilized to assist in the extraction and organization of the case file data. Case File Summary Forms 2A and 2B were used for the group of cases that went to trial and received acceptance of responsibility. Case File Summary Forms 3A and 3B were used for the case files on defendants that entered a plea and did not receive acceptance of responsibility.

Three important factors emerged in this analysis of the two categories of cases: 1) Reasons extracted from the case file for granting or denying acceptance of responsibility credit; 2) Whether the defendant objected to denial of credit or the government to granting of it; and 3) Whether a contrary ruling on the acceptance of responsibility issue would have had an effect on the sentence ultimately imposed.

Defendants Who Plead Guilty But Did Not Receive Acceptance of Responsibility Credit.

1. Reasons for denial of acceptance of responsibility.

Forty-three cases were randomly selected from a pool of cases that involved those defendants who pleaded guilty and did not receive acceptance of responsibility credit. Analysis reveals that in virtually every case the denial of acceptance of responsibility by the court was a plausible application of section 3E1.1: ten defendants maintained an outright denial of their guilt (despite pleading guilty); seven defendants received an obstruction enhancement, which generally precludes the acceptance of responsibility credit; five defendants would not talk with the probation officer; and three defendants gave false information to the probation officer. The most common reason for denial of the acceptance of responsibility credit in this group involved an additional eighteen defendants who admitted their guilt, but minimized their involvement or tried to shift culpability away from themselves.

2. Position of Defense Concerning the Acceptance of Responsibility Credit.

Of the 43 files, fourteen do not reveal whether defendant's counsel took any position regarding the denial of acceptance of responsibility credit. Seventeen defense attorneys objected to the acceptance of responsibility denial.

Ten defense attorneys did not object to the denial of credit for acceptance of responsibility.[3] This is not as surprising as it might seem at first glance. Most of these defendants either obstructed justice, expressed an outright denial of guilt, or did not speak to the probation officer.

3. Effect that Granting Acceptance of Responsibility Credit May Have Had Upon the Sentence.

In only six of the 43 cases did the denial of acceptance of responsibility credit clearly affect the ultimate sentence. In these six cases, denial of acceptance of responsibility credit resulted in higher sentences. Thirteen of the 43 cases were sentenced near or at the bottom of the guideline range. The denial of the two level reduction in these cases could create a range that overlapped with the range that included the acceptance of responsibility credit. For example, one of these defendants had a guideline range of 24-30 months without acceptance of responsibility credit, and was sentenced to 24 months. If the defendant received the two level reduction, the range would have been 18-24 months. The same sentence could have been imposed in either range. Furthermore, 8 out of the 43 cases had guideline ranges of 0-6 months, which could not be lowered even by an acceptance of responsibility reduction. The following table summarizes the case file analysis.

[3]Unlike the fourteen cases where it could not be determined whether the defense objected, these ten case files contained addenda to the presentence reports or sentencing transcripts that show the lack of any objections.

PLEADS GUILTY, DOES NOT GET ACCEPTANCE OF RESPONSIBILITY CREDIT

# OF CASES	REASONS THE CREDIT WAS DENIED
10	Defendant denied guilt outright to court or probation officer
18	Defendant admitted guilt, but tried to minimize his role or responsibility, or tried to place the primary blame on someone or something else.
1	Defendant engaged in violation of bond or new criminal behavior from time of plea to sentencing.
2	Defendant did not talk to probation officer on advice of counsel
3	Defendant did not talk to probation officer (reason unstated or other than advice of counsel)
2	Defendant gave false information to probation officer about offense or related conduct
1	Defendant gave other false information to the probation officer
7	Defendant obstructed justice

# OF CASES	DEFENDANT'S POSITION ON ACCEPTANCE OF RESPONSIBILITY CREDIT
0	Defense agreed to denial of credit for acceptance of responsibility
10	Defense did not object to denial of acceptance of responsibility credit as verified by PSR addendum or sentencing transcript
14	No evidence in the file that defendant objected to denial of credit for acceptance of responsibility, but PSR addendum and sentencing transcript unavailable
0	Parties stipulated to the denial of the acceptance of responsibility credit
17	Defense objected to denial of acceptance of responsibility credit

# OF CASES	WHETHER DENIAL OF CREDIT AFFECTED THE ULTIMATE SENTENCE
2	Mandatory minimum statute made the acceptance of responsibility determination irrelevant.
8	Guideline range was 0-6, even without the acceptance of responsibility credit
13	The sentence could have been the same if the defendant received the acceptance reduction, due to an overlap between the two guideline ranges
4	Judge followed the parties' stipulated sentence.
1	Judge made a downward departure, for reasons unrelated to acceptance of responsibility, that was below the range that would have applied if the defendant received acceptance of responsibility.
1	Judge gave a downward departure, but reason unknown
6	Denial of acceptance of responsibility credit increased sentence
8	Unable to determine

Defendants Who Went to Trial, Yet Received Acceptance of Responsibility Credit.

1. Reasons for Granting the Acceptance of Responsibility Credit.

Thirty-three case files were reviewed. In 30 of the 33 cases, the defendant made some admission of guilt to the probation officer or the government. These cases may be the "rare situations" mentioned in Application Note 2 where a defendant clearly demonstrates an acceptance of responsibility for his criminal conduct, even though he exercises his right to trial. Because the group relied only on the case files in reviewing these cases, a more definitive conclusion is not possible.

In 18 of the 33 cases, the defendant made a full admission of guilt. In another 12 cases, the defendant admitted guilt but the probation officer perceived the admission as incomplete. In three cases, the defendant made no admission of guilt, or denied guilt completely.

2. Government's Position on Acceptance of Responsibility.

In the cases examined, the government usually had not expressed an objection to the defendant receiving acceptance of responsibility credit following a trial.[4] In fact, objections were found in only seven of the 33 cases.

3. Effect that Denial of Acceptance of Responsibility Credit May have had on the Sentence.

In almost half of these cases the determination to grant acceptance of responsibility credit clearly affected the ultimate sentence. In 16 cases the defendants received

[4]For the three cases without addendums or sentencing transcripts, the prosecutor may have objected at sentencing and that objection may not be reflected in our files.

acceptance of responsibility credit and sentences at or near the bottom of the range. There were instances, however, in which the acceptance of responsibility credit appears irrelevant to the ultimate sentence. In three cases the mandatory minimum requirement was higher then the top of the guideline range without the acceptance of responsibility reduction. There were five cases with downward departures unrelated to acceptance of responsibility, that resulted in sentences below the range even when acceptance of responsibility credit was applied. In several cases, the defendant could have received the same sentence regardless of the acceptance of responsibility determination because of an overlap between the range with the acceptance of responsibility credit and the range without the credit. For example, the defendant's guideline range with the acceptance of responsibility reduction is 1 - 7 months. If the acceptance of responsibility credit had not been applied, this defendant's range would be 4 -10 months. The defendant received a sentence of four months, which the court could have given from either range, with or without applying acceptance of responsibility.

The following table summarizes the case file analysis.

DEFENDANT GOES TO TRIAL, RECEIVES ACCEPTANCE OF RESPONSIBILITY

# OF CASES	REASONS FOR GIVING ACCEPTANCE OF RESPONSIBILITY CREDIT
2	Admitted guilt to the government before trial, and also admitted guilt to probation officer
2	Admitted guilt to the government before trial, but did not fully admit guilt to probation officer
9	Admitted guilt for the first time to the probation officer, not a full admission
16	Admitted guilt for the first time to the probation officer, appears to be a full admission
1	Admitted guilt to, and/or cooperated with, the government, but did not make a statement to probation officer
3	Made no statement to government or probation officer, or denied guilt

# OF CASES	GOVERNMENT'S POSITION ON ACCEPTANCE OF RESPONSIBILITY
1	Government requested that defendant get acceptance of responsibility credit
22	Government did not object to acceptance of responsibility credit. (PSR addendum or sentencing transcript is available to verify)
3	No evidence that government objected to credit for acceptance of responsibility. (PSR addendum or sentencing transcript not available to verify)
7	Government objected to defendant receiving acceptance of responsibility credit.

# OF CASES	EFFECT OF ACCEPTANCE OF RESPONSIBILITY ON ULTIMATE SENTENCE
3	Mandatory minimum statute made the acceptance of responsibility determination irrelevant. (Even without acceptance of responsibility the guideline range is below the mandatory minimum.)
5	Judge made a downward departure (for reasons unrelated to acceptance of responsibility) that was below the range that applied when the defendant got acceptance of responsibility credit.
5	Defendant could have received the same sentence without the acceptance of responsibility credit due to the overlap of the two guideline ranges.
16	Sentenced near or at the low end of the range with acceptance of responsibility.
4	Sentence near the top of the range with acceptance of responsibility.

4. Departures Related to Acceptance of Responsibility

Twenty-one case files involving downward departures based on acceptance of responsibility were reviewed. Eight of these case files did not include a statement of reasons, although previous phone calls to the field by the Monitoring Unit revealed that acceptance of responsibility was the reason given for the departure. Further analysis of the reasons could not be made with the available data. In another five cases involving acceptance departures, the motivation or reasoning of the court was unclear. In three other departure cases, the court did not grant the acceptance reduction under the language of the guidelines, but the court departed for reasons related to acceptance. In two other departures cases, the court cited the application of the career offender as reason for not granting the Acceptance of Responsibility reduction and a statutory maximum that fell below the guideline range minimum. Finally, in three departure cases the court granted the two level reduction for acceptance and also departed due to an unusually high degree of acceptance.[5]

B. Case Law

In most respects the case law over the last year dealing with the acceptance of responsibility guideline has been uncontroversial. On a general level, every court that has dealt with the constitutionality of §3E1.1 has upheld the validity of the guideline. See, e.g., United States v. De Jongh, 937 F.2d 1 (1st Cir. 1991); United States v. White, 869 F.2d 822, 825-26 (5th Cir.), cert. denied, 490 U.S. 1112 (1989); United States v. Monsour, 893

[5]Case File Summary Form #1 was used in the review of these files. See Appendix.

F.2d 126, 129 (6th Cir. 1990); United States v. Gonzalez, 897 F.2d 1018 (9th Cir. 1990). Although, as will be noted below, the courts have disagreed on the scope of conduct for which a defendant can be required to acknowledge responsibility, there does not appear to be any dispute that the Constitution permits a court to reward a defendant for accepting responsibility for the offense of conviction.

On a more specific level, the courts have dealt with whether various factors are permissible grounds for denying acceptance credit. Several cases have held that a court may deny credit when the defendant continues to engage in criminal conduct after his arrest. United States v. Sanchez, 893 F.2d 679, 681 (5th Cir. 1990); United States v. Lassiter, 929 F.2d 267 (6th Cir. 1991); United States v. Cooper, 912 F.2d 344, 346 (9th Cir. 1990). At least one court has upheld denial of acceptance credit when the defendant refused to provide financial information to the court relative to a determination of the appropriate fine. United States v. Cross, 900 F.2d 66, 70 (6th Cir. 1990). A defendant also may be denied credit when he minimizes his responsibility for the offense. See, e.g., United States v. Reyes, 927 F.2d 48 (1st Cir. 1991); United States v. Nelson, 922 F.2d 311 (6th Cir. 1990), cert. denied, 111 S.Ct. 1635 (1991). In one of the few cases reversing a district court's factual determination that the defendant accepted responsibility, the Sixth Circuit held that a defendant's post-trial statement did not reflect the type of timely acceptance of responsibility envisioned in the guidelines and, in any event, did not contain an admission of guilt. United States v. Williams, 940 F.2d 176 (6th Cir. 1991).

On the other hand, one court held that it violates the Fifth Amendment to deny acceptance credit based on a defendant's failure to assist in recovering the fruits and

instrumentalities of an offense, or on his failure to surrender voluntarily after commission of the offense. United States v. Watt, 910 F.2d 587, 590-93 (9th Cir. 1990).[6] Id. The Eighth Circuit ruled that failure to do one of the acts listed in Application Note 1 of the guideline does not disqualify a defendant from getting credit, United States v. Russell, 913 F.2d 1288 (8th Cir. 1990), cert. denied, 111 S.Ct. 1687 (1991); and the Sixth Circuit held that neither an Alford plea nor an entrapment defense is necessarily a bar to the two-level reduction. United States v. Tucker, 925 F.2d 990 (6th Cir. 1991) (Alford plea); United States v. Fleener, 900 F.2d 914 (6th Cir. 1990) (entrapment defense).

One aspect of §3E1.1 has caused a split in the circuits. As noted above, this point of disagreement refers to language in the guideline and commentary that identify the scope of conduct for which a defendant must accept responsibility in order to receive a two-level reduction. The guideline currently reads, in pertinent part:

> §3E1.1. **Acceptance of Responsibility**
>
> (a) If the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct, reduce the offense level by **2** levels.
>
> * * *
>
> *Commentary*
>
> *Application Notes:*
>
> *1. In determining whether a defendant qualifies for this provision, appropriate considerations include, but are not limited to, the following:*

[6]Both considerations are deemed appropriate in Application Note 1 to the guideline. The court held that a sentencing judge may not balance against evidence of remorse or acceptance of responsibility the fact that a defendant asserted his constitutional rights to counsel and to remain silent at the investigative stage. Id., 910 F.2d at 591.

* * *

(c) voluntary and truthful admission to authorities of involvement in the offense and related conduct.

The express language of the guideline and its commentary therefore requires the defendant to recognize and accept responsibility for "his criminal conduct," and one consideration in this determination is whether the defendant has admitted involvement in "the offense and related conduct." The Circuits have split on the meaning of the terms "criminal conduct" and "the offense and related conduct." The Third, Fourth, Fifth and Eleventh Circuits have explicitly held that this language means a defendant must accept responsibility for the offense(s) of conviction and all relevant conduct, as defined in §1B1.3 of the guidelines. United States v. Friersome, No. 90-3382 (3d Cir. Oct. 1, 1991), United States v. Gordon, 895 F.2d 932 (4th Cir.), cert. denied, 111 S.Ct. 131 (1990); United States v. Mourning, 914 F.2d 699 (5th Cir. 1990); United States v. Ignancio Munio, 909 F.2d 436 (11th Cir. 1990), cert. denied, 111 S.Ct. 1393 (1991). The Sixth Circuit has implicitly followed this approach. United States v. Herrera, 928 F.2d 769 (6th Cir. 1991) (affirming denial of acceptance of responsibility reduction when the defendant did not admit to involvement with drugs outside the time-frame of the indictment); but see United States v. Guarin, 898 F.2d 1120, (6th Cir. 1990) (distinguishing Perez-Franco while expressly reserving whether to follow it); United States v. Chambers, No. 89-1381 (6th Cir. Sept. 10, 1991) (distinguishing Perez-Franco without commenting on whether the Sixth Circuit follows it).

In contrast, the First, Second, and Ninth Circuits have held that a defendant need only accept responsibility for the offense(s) he was convicted of in order to receive the

two-level reduction. United States v. Perez-Franco, 873 F.2d 455 (1st Cir. 1989); United States v. Oliveras, 905 F.2d 623 (2d Cir. 1990); United States v. Piper, 918 F.2d 839 (9th Cir. 1990). The Tenth Circuit has not directly faced this issue, but one panel noted in dictum that a defendant's admission of, and acceptance of responsibility for, the offense of conviction "may satisfy [§3E1.1 of] the sentencing guidelines without going beyond the actual charge and proof at trial." United States v. Rogers, 921 F.2d 975, 982 (10th Cir. 1990) (citing Perez-Franco, supra, 873 F.2d at 459, and ultimately holding that §3E1.1 does not violate the Fifth Amendment).

The cases cited above have dealt on two levels with this issue of the "scope of conduct" for which a defendant must accept responsibility. They have interpreted the language of the guideline and commentary to determine whether it requires a defendant to accept responsibility for unconvicted conduct, and the constitutionality of such a broad requirement. These two issues are independent of one another in the sense that a court's view of the constitutionality of a broad "scope of conduct" approach should have no bearing on its answer to the question whether the Commission intended that approach. Nonetheless, those courts that have interpreted the "scope of conduct" language narrowly (e.g., Perez-Franco) have allowed their conclusion that a broad interpretation would be unconstitutional to influence them to conclude that the Commission did not intend such an interpretation. See, e.g., Perez-Franco, 873 F.2d at 463; Oliveras, 905 F.2d at 628-29.

The First and Second Circuits have analyzed the language of §3E1.1 and concluded that it does not require the defendant to accept responsibility for more than

the offense of conviction. In the First Circuit case, Perez-Franco, the government pointed out that the January 15, 1988, amendment to §3E1.1 changed the language to require that the defendant accept responsibility for "his criminal conduct" rather than for "the offense of conviction." The government argued that the amendment reflected the Commission's intent to require the defendant to accept responsibility for unconvicted criminal conduct as well. The court rejected this interpretation, because there would be no limitation on the scope of "criminal conduct" for which a defendant must accept responsibility. It would include not just charged conduct, but other related and unrelated prior criminal conduct that the defendant may have engaged in at any time. Perez-Franco, 873 F.2d at 459. "This reading could not possibly have been what the drafters intended." Id. The court determined that "an equally plausible rationale for the amendment" was to correct the possible misimpression that the guideline -- by referring to acceptance of responsibility for the offense "of conviction" -- only applied to defendants who went to trial.[7] The court went on to hold that the government's interpretation of §3E1.1 would impermissibly compel a defendant to incriminate himself -- i.e., to waive his fifth amendment rights -- in order to avoid a higher sentence. Id., 873 F.2d at 463.[8]

The Second Circuit adopted a narrow interpretation of the "criminal conduct" language in §3E1.1. It began its opinion with the constitutional issue, agreeing with the conclusion of the majority in Perez-Franco that a broad rule would be unconstitutional.

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[7]The Court did not explain how one could conclude that defendants who have pleaded guilty have not been "convicted" of an offense.

[8]The Honorable Levin H. Campbell, Chief Judge, concurred in the judgment, but thought it unnecessary to consider the constitutional issue in light of the conclusion that the Commission intended a narrow rule.

The court then announced, "we construe the statute [sic] as granting credit to a defendant who has been found to have accepted full responsibility for conduct included in those counts to which he has pled guilty." Oliveras, 905 F.2d at 629. The court, like the First Circuit, rejected the government's argument that the 1988 amendment was intended to expand the scope of conduct for which a defendant must accept responsibility. It noted that the Commission labeled that amendment a "clarification" and that the government's interpretation "would effect a change rather than simply a clarification." Id. (emphasis in original). It followed the First Circuit's interpretation that the purpose of the amendment may have been to clarify that the guideline applies to defendants who plead guilty, not just those who have been tried. The court also found it significant that the Commission chose the term "related conduct" in the commentary, rather than "relevant conduct." If the Commission had wanted to require a defendant to admit his involvement in relevant conduct, it would have used that term, the court observed. Id., 905 F.2d at 629 - 630. The court noted that its holding did not render the term "related conduct" meaningless, because "[c]riminal conduct that relates directly to the pled count may be considered." Id., 905 F.2d at 630.

As noted above, four circuits -- the Third, Fourth, Fifth and Eleventh -- have explicitly held that §3E1.1 of the guidelines requires a defendant to accept responsibility for criminal conduct beyond the offense of conviction. The Fifth Circuit noted in Mourning that it was "convinced" that the 1988 amendment "speaks to acceptance of responsibility for all relevant conduct" and that such an interpretation is rational because relevant conduct is defined in such a way that it only includes acts and omissions that bear some

special relationship to the offense of conviction. Id., 914 F.2d at 706. The court also addressed the constitutional concerns that the First and Second Circuits raised. The court noted that it is permissible to reward a defendant who is truly contrite. The fact that such defendants are given more lenient treatment does not mean that those who choose to go to trial are being penalized. Id., 914 F.2d at 707; see also Gordon, 895 F.2d at 936-37. "To the extent the defendant wishes to avail himself of §3E1.1, any 'dilemma' he faces in assessing his criminal conduct is one of his own making." Mourning, 914 F.2d at 707.

Because of the split in the circuits, the Commission may wish to adopt a rule that will be upheld in all of the courts, or it may wish to take an approach that will facilitate bringing the constitutional issue before the Supreme Court. These options will be discussed below in section III.

C. Technical Assistance Service Reports

The Commission's Technical Assistance Service Hotline calls concerning Acceptance of Responsibility from October 1, 1990 through October 1, 1991 were reviewed. On average, the hotline received three acceptance of responsibility calls a month with a total of 34 acceptance of responsibility calls during this period. These numbers represent an estimated 1.4% of the total (2,496) calls received by the hotline during the same period.

The acceptance of responsibility questions received covered a variety of aspects of this guideline with no one point of concern appearing more than a few times. Questions addressed areas such as: the importance of timeliness, the relationship between acceptance and obstructive behavior, the effect of new criminal behavior

following arrest. One caller asked if the guideline allowed for more than a two level reduction. Clarification of related conduct as it appears in Application Note 1(c) was also requested.

The annual number of calls related to Acceptance of Responsibility has declined from 54 in fiscal year 1989, to 38 calls in fiscal year 1990, to 34 calls in fiscal year 1991.

D. Compilation of Public Comment and Input From Outside Experts.

1. Letters Submitted to the Commission

As part of its attempt to determine outside opinion about the operation of the acceptance of responsibility guideline, the working group examined letters submitted to the Commission over the last year that dealt with §3E1.1. This public comment came from two sources -- judges and probation officers. A total of twelve letters were received. The suggestions included eliminating §3E1.1 altogether, providing an additional inducement for defendants who do more than plead guilty, providing more detailed guidance for when the adjustment applies, strengthening the presumption for giving the reduction when a defendant pleads guilty, and allowing a reduction of up to five offense levels where a defendant does additional things that show he has accepted responsibility. One suggestion was to defer somehow the granting of the credit to a time "later in the rehabilitative process."[9] In sum, the suggestion mentioned the most often (by four of the twelve) was to provide a greater inducement for defendants who do more than admit guilt and show remorse.

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[9]It is unclear how this suggestion, which involved examining how the defendant adjusts after release from prison, could be implemented.

2. Recommendations to the Judicial Conference

The Committee on Criminal Law and Probation Administration of the Judicial Conference of the United States submitted a recommendation to the Sentencing Commission to consider modification of §3E1.1. The Committee asserts "[t]he two-level reduction is seen by many judges as insufficient to encourage plea agreements particularly at higher offense levels." **Report and Recommendations of the Judicial Conference of the United States for Amendments to the Sentencing Guidelines** (1991), Appendix p. 10. The Committee notes that if a defendant must accept responsibility for related conduct, he may have to acknowledge wrongful conduct that will raise his offense level more than offsetting the two-level reduction for accepting responsibility. Id. The Judicial Conference therefore "recommends that the Commission consider increasing the two-level adjustment for acceptance of responsibility and also give consideration to providing that greater adjustments be available for higher offense levels to encourage entries of pleas in cases where defendants, who in anticipation of long periods of incarceration may, without adequate incentive, go to trial." Id. at App. pp. 10-11.

The Judicial Conference also recommends that the Commission amend the guideline or adopt an additional one "to recognize and encourage affirmative actions demonstrating acceptance of responsibility other than entry of a plea of guilty." Id. at App. p. 11. A preliminary option prepared by the staff of the Judicial Conference, but not submitted as part of the Conference's formal recommendations, would raise the general offense level reduction for accepting responsibility to three levels and add language

stating that "[i]f the defendant takes affirmative action to redress the harm of his criminal conduct, reduce by 2 additional levels." Finally, the Judicial Conference recommends that the Commission "reconsider utilizing a range of several offense levels for acceptance of responsibility to provide for more individual consideration of varying degrees and demonstrations of acceptance." Id.

3. Data from the Evaluation Report

As part of the Commission's study on the operation of the sentencing guideline system, members of the evaluation staff visited 12 judicial district offices during December 1990 through March 1991. Staff conducted interviews with judges, assistant U.S. attorneys, federal defenders and private defense attorneys, and probation officers. One district office was selected from each of the eleven judicial circuits, with one circuit containing two of the offices visited.

The structured interviews consisted of 45-50 questions appropriate to the profession of the respondent. Lasting about one hour each, the interviews included questions about guideline application and the general impact of the sentencing guidelines.

The respondents' statements about the Acceptance of Responsibility Guideline were reviewed. (The working group did not review the complete interviews of the respondents, but limited their examination to those statements where acceptance of responsibility was mentioned.)

A few observations emerge. First, several statements suggest that acceptance of responsibility is applied differently across the nation and within a given district. For example, compare these two comments made by probation officers: "Defendants who

plead guilty always get acceptance;" and "acceptance of responsibility is not automatic just because the defendant pleads guilty." A federal defender made this comment concerning disparity in application of acceptance of responsibility in trial cases where defendants wish to appeal, "The two cities in this district are different---ours give it and the other doesn't."

Secondly, some federal defenders and judges interviewed suggested that the reduction for acceptance of responsibility should be increased. Their recommendations included an increase in the acceptance of responsibility reduction for all defendants, an increase only for defendants who do more than just plead guilty, or an increase for those defendants at the higher offense ranges.

Finally, some respondents viewed acceptance of responsibility as a problematic guideline. They cited difficulty in interpreting the Commission's meaning of "scope of related conduct," the guideline's failure to take into account real remorse, and their impression that acceptance of responsibility provokes litigation. A few respondents expressed their concern about defendants who go to trial and later may want to appeal. If these defendants admit guilt to the court, they may jeopardize a later appeal. However, if these defendants do not discuss their criminal involvement, they are unlikely to receive the acceptance of responsibility credit.

E. Literature Review.

The Federal Sentencing Reporter devoted its January/February 1991 issue to "Plea Bargaining Under the Guidelines." The editors offered two proposals relevant to the acceptance guideline. One is to label the adjustment "plea benefit" and increase the

reduction to 40%, which the Commission's Supplementary Report to the original guidelines noted was the average size of the reduction in pre-guideline cases.[10] The second proposal is to put the burden on the government, when a defendant pleads guilty, to show by clear and convincing evidence that exceptional circumstances warrant less than a full reduction. Freed and Miller, Editor's Observations: Plea Bargained Sentences, Disparity and "Guideline Justice", 3 **Federal Sentencing Reporter** 175, 176 (1991).

III. Potential Solutions

A. The Scope of Conduct Issue.

The Commission has three options for addressing the scope of conduct for which a defendant must accept responsibility in order to get the two-level reduction. Those options are:

(1) No change;

(2) Rewrite the guideline so that it explicitly requires a defendant to accept responsibility for only the offense of conviction; and

(3) Rewrite the guideline so that it explicitly requires a defendant to accept responsibility for the offense and all relevant conduct.

Option One

The chief drawback to doing nothing is that it creates a situation in which defendants in different districts are held to different standards due solely to the fact that they are in different districts. The result is that a defendant who is only willing to accept

[10]Although pre-guideline sentences imposed may have been an average 40% shorter for defendants who pleaded guilty, the difference in sentences served was probably less pronounced due to the operation of the parole guidelines.

responsibility for the count of conviction receives a two-level reduction in his offense level if he is sentenced in New York, but is denied the reduction if he is sentenced in Virginia.[11] This unwarranted disparity would be even greater, of course, if the Commission changed the guideline to allow for more than a two-level reduction. With at least three Circuits on each side of this issue, the lower courts will not arrive at a uniform interpretation of §3E1.1. Short of an amendment, this leaves the possibility of resolving the issue with the Supreme Court. In light of that Court's recent opinion in Braxton v. United States, 111 S.Ct. 1854 (1991), it is unlikely that the Court will do so.

In Braxton, the Court noted that the Commission has the power to modify its own guidelines and that Congress anticipated that the Commission would make clarifications where there are conflicting judicial decisions regarding their interpretation. The Court continued:

> This congressional expectation alone might induce us to be more restrained and circumspect in using our certiorari power as the primary means of resolving such conflicts; but there is even further indication that we ought to adopt that course. In addition to the duty to review and revise the guidelines, Congress has granted the Commission the unusual explicit power to decide whether and to what extent its amendments reducing sentences will be given retroactive effect, 28 U.S.C. § 994(u).

Id. at 1858. Thus, the Supreme Court is unlikely to resolve a split in the circuits where the Commission has the power to do so. Although the Commission cannot resolve the question as to whether it is constitutional to require a defendant to accept responsibility

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[11]The focus is properly placed on where the defendant is sentenced, rather than where he commits his offense. A defendant arrested in a district other than where charges are filed may enter into a Rule 20 plea agreement in which he pleads guilty and is sentenced in the district in which he is arrested. Rule 20, F.R.Crim.P. Thus, he would be subject to the sentencing practices and guidelines interpretations that prevail in that district.

a different state." Id. Furthermore, the argument goes, statements made to a probation officer do not fall within the protection of Rule 410 of the Federal Rules of Criminal Procedure, which renders inadmissible any statement made by a defendant in the course of plea discussions "with an attorney for the prosecuting authority," because probation officers are not attorneys for the prosecuting authority. Perez-Franco, 873 F.2d at 460-61.

The problem with this argument is that it proves too much. By its reasoning, a defendant cannot be compelled to tell a probation officer about criminal conduct beyond the offense to which he is pleading guilty, because if the plea falls through those statements could be used against him in a later prosecution. But if the plea falls through, and if Rule 410 does not preclude the admissibility of those statements in a prosecution for the "other" criminal conduct, it also does not preclude the admissibility of statements made to the probation officer about the offense to which the defendant did plead guilty. Rule 410 turns not on the type of conduct that the defendant is admitting to, but rather on the timing of the statement and the identity of the person to whom it is made. Thus, the defendant faces the same risk of self-incrimination with admissions he makes to the probation officer about the offense he's attempting to plead to as he does with admissions about other criminal conduct. By the same token, if a defendant's fifth amendment rights are implicated by the risk that admissions about other crimes will be used in a prosecution by another jurisdiction, they also would be implicated by the risk that admissions about the crime he is pleading to would be used by another jurisdiction. This is true because the double jeopardy clause does not preclude successive

(requiring a defendant to accept responsibility only for the offense of conviction), it will avoid the constitutionality issue. On the other hand, it will increase the significance of the choice between/among count(s) or statute(s) to which the defendant will plead guilty. Thus, although in a drug case the offense level calculation does not depend upon which of several distribution counts a defendant pleads to, the acceptance of responsibility determination would. This would permit parties to use plea practices to manipulate the operation of the guideline and create unwarranted disparity.

Option Three

If the Commission chooses option three (requiring the defendant to accept responsibility for all relevant conduct, or specifically defining "related conduct") it will clear the way for resolution of the constitutionality of such a rule. The essence of the argument against the constitutionality of such a rule is that it punishes a defendant for asserting his fifth amendment right not to incriminate himself with respect to conduct beyond the count of conviction. The "punishment" is the higher guideline range that results from failing to accept responsibility for all of the relevant conduct. The right not to incriminate one's self is implicated, according to this argument, because statements a defendant makes to a probation officer about other criminal conduct would be admissible in a later court proceeding. Even if the government has agreed to dismiss charges involving other conduct, or not to bring such charges, "[a] plea bargain can unravel at any time, for any number of reasons." Perez-Franco, 873 F.2d at 460. The court feared that the government would then be relieved of its agreement to immunize the other conduct. Id. Also, "statements relating to guilty pleas made in one state court can be used in trials in

for conduct beyond the offense of conviction, it can resolve the question whether the guidelines contain such a requirement. If the Commission makes clear that it intends that sort of rule (and three circuits have held that it has not done so), the Supreme Court would have the constitutional issue properly framed for it to consider. It should be noted that the 1991 amendments heighten the need for a clarification of the Commission's intent under §3E1.1. New language in the commentary to section 1B1.5 suggests a broad interpretation of the scope of conduct in §3E1.1. It states that where there is a cross-reference to another guideline, the acceptance of responsibility adjustment (among others) is "to be determined in respect to that other offense guideline" and should be "applied as if the offense of conviction had directly referenced" that guideline. U.S.S.G. §1B1.5, comment. (n.2). This suggests that a defendant must accept responsibility for the underlying offense conduct rather than just the elements of the offense of conviction. On the other hand, the commentary to section 1B1.1 has been amended to define "offense" to include "the offense of conviction and all relevant conduct under §1B1.3 (Relevant Conduct) . . . ." U.S.S.G. §1B1.1, comment. (n.1(l)). The fact that the Commission did not change the language of §3E1.1(a) back to "offense" from "criminal conduct" could be read to mean that it is resisting the broad "scope of conduct" rule.[12]

Option Two

If the Commission chooses to clarify the scope of conduct for which a defendant must accept responsibility, it can go in either direction. If it chooses the second option

[12]The commentary does refer to the "offense and related conduct," but in light of the problem the courts have had in interpreting the 1988 amendment to §3E1.1, it would be surprising if they changed those decisions based on this new definition alone.

apprehend this distinction. In addition, it may be difficult in the real world to administer fairly a rule that says defendants who admit to all of their conduct should be treated the same as defendants who admit only to the offense of conviction but have something else related to the guideline operating in their favor. On the positive side, this rule would probably survive constitutional challenge because, while it does something for the defendant who admits to all of the relevant conduct, it does not automatically disqualify a defendant who refuses to talk about the other conduct. The latter defendant could qualify for the credit based on one of the other considerations in Application Note 1 (e.g., timeliness of the admissions made, restitution, or voluntary surrender to authorities).

B. Changes in the Offense Level Reductions Made under the Guideline.

Increasing the offense level reduction to more than two levels

Section 3E1.1 provides a flat two-level reduction if a defendant has accepted responsibility. If the Commission determines that a greater reduction is appropriate, there are several ways to implement such a change. The choice depends upon what problem, if any, the Commission is attempting to address. The Commission may determine that there needs to be a greater incentive, across the board, for defendants to accept responsibility for their conduct, or that accepting responsibility is such a strong indication that a defendant is on the way to reform or is less culpable than average that a greater reward is appropriate. In this case, the Commission could provide for a greater reduction across the board, such as a three-level or four-level reduction for any case. In analyzing this option, or any option that increases the possible offense level reduction, the following comparisons are instructive:

prosecutions for the same conduct by separate sovereigns. See, e.g., United States v. Wheeler, 435 U.S. 313 (1978).

Variations on Option Three

A change in this guideline to broaden the scope of conduct to which the acceptance of responsibility guideline applies could be structured in more than one way. The obvious approach would be for the Commission to require that the defendant accept responsibility for all of the relevant conduct in order to be eligible for the offense level reduction. An alternative approach would be to have the guideline language require that the defendant accept responsibility for only the offense of conviction, but word the commentary in such a way that the court may consider admissions about relevant conduct in deciding whether the defendant has accepted responsibility. This would fit with the current structure of Application Note 1 to the guideline, which provides a non-exhaustive list of factors a court may consider in deciding whether a defendant has accepted responsibility for the offense of conviction. A defendant need not do all of the things listed in Application Note 1 to qualify for the credit. Thus, if written and applied properly, this guideline would provide one way -- but not the only way -- for a defendant to get the two-level reduction.

There are drawbacks to this approach. It draws a fine distinction between requiring a defendant to admit to relevant conduct, on the one hand, and treating his decision whether to accept responsibility for relevant conduct as merely one (non-dispositive) factor in the decision whether he accepted responsibility for the offense of conviction, on the other hand. The guideline may be misapplied by those who do not

Offense level/ Criminal History Category	Range	Range with 2 level reduction	Range with 3-level reduction	Range with 4-level reduction	Range with 5-level reduction
10/I	6-12	2-8	1-7	0-6	0-6
12/I	10-16	6-12	4-10	2-8	1-7
15/I	18-24	12-18	10-16	8-14	6-12
18/I	27-33	21-27	18-24	15-21	12-18
22/I	41-51	33-41	30-37	27-33	24-30
26/II	70-87	57-71	51-63	46-57	41-51
32/II	135-168	108-135	97-121	87-108	78-97
38/II	262-327	210-262	188-235	168-210	151-188
42/II	360-life	324-405	292-365	262-327	235-293

This table illustrates how much a sentence would be affected by various possible changes in the guideline.

Different reductions for different levels of "acceptance"

The current guideline takes an "all or nothing" approach. Either a defendant gets a two-level reduction or no reduction. This same approach could be continued if the reduction is raised to three levels, for example. An alternative would be to allow different defendants to qualify for a different level of reduction. This would allow courts to distinguish between defendants who admit their wrongdoing and those who do something more (e.g., make restitution or assist in the recovery of the fruits and instrumentalities of the offense).

One purpose behind an extra reduction for action to redress the harm caused would be to provide an incentive to do more than just plead guilty. It has the following drawbacks, however: it may treat defendants differently based on whether they (or their

sentence, due to the seriousness of the offense. Perhaps before the guidelines serious offenders were more willing to gamble on the results of a trial rather than on the size of a reduction that would result from a guilty plea. Under the guidelines, defendants have a better idea what the size of the reduction will be after a plea, but apparently it is sometimes worth the gamble to them to go to trial. While the underlying reasons for serious offenders to choose trial over guilty plea may have changed marginally under the guidelines (our data do not address this issue), there is little difference in the ultimate ratio. Whether the guidelines should merely try to mimic the prior ratio is beyond the scope of the present analysis but certainly an option the Commission may wish to consider.

friends or relatives) can afford to pay restitution, and it may be seen as unfair to defendants whose crimes cause harms that, by their nature, cannot be redressed easily or that otherwise do not fit the considerations listed in Application Note 1 (e.g., voluntary resignation from office). Another effect, which could be viewed as desirable, is that this guideline could be used to give a reduction to defendants who make a good faith effort to redress the harms. In particular, drug defendants who try to cooperate but cannot convince the government to make a substantial assistance departure motion may be given this extra acceptance reduction. The reason this result could be desirable is it could remove the pressure on courts to resort to unguided departures to reward such assistance. See, e.g., United States v. Garcia, 926 F.2d 125 (2d Cir. 1991) (departing downward despite no government motion, because the defendant's willingness to testify encouraged other defendants to plead and thereby provided substantial assistance to the courts).

Greater reductions at higher total offense levels

Another option for amending the amount of the reduction under this guideline is to make a greater reduction available for defendants with higher offense levels. This was also included as a recommendation by the Judicial Conference. Such a change would be aimed at encouraging defendants facing significant prison terms to plead guilty more often. Such defendants plead guilty less often than offenders with lower offense levels, although the Working Group's research indicates that this same phenomenon occurred in the pre-guidelines days. It may be that in such cases the government is more willing to try the case, and less willing to plead the defendant to a lesser charge or a lower

APPENDIX

TABLE 2-A
PRISON TERM IMPOSED BY MODE OF CONVICTION
PRE-GUIDELINE DEFENDANTS SENTENCED
(1984 THROUGH 1986)

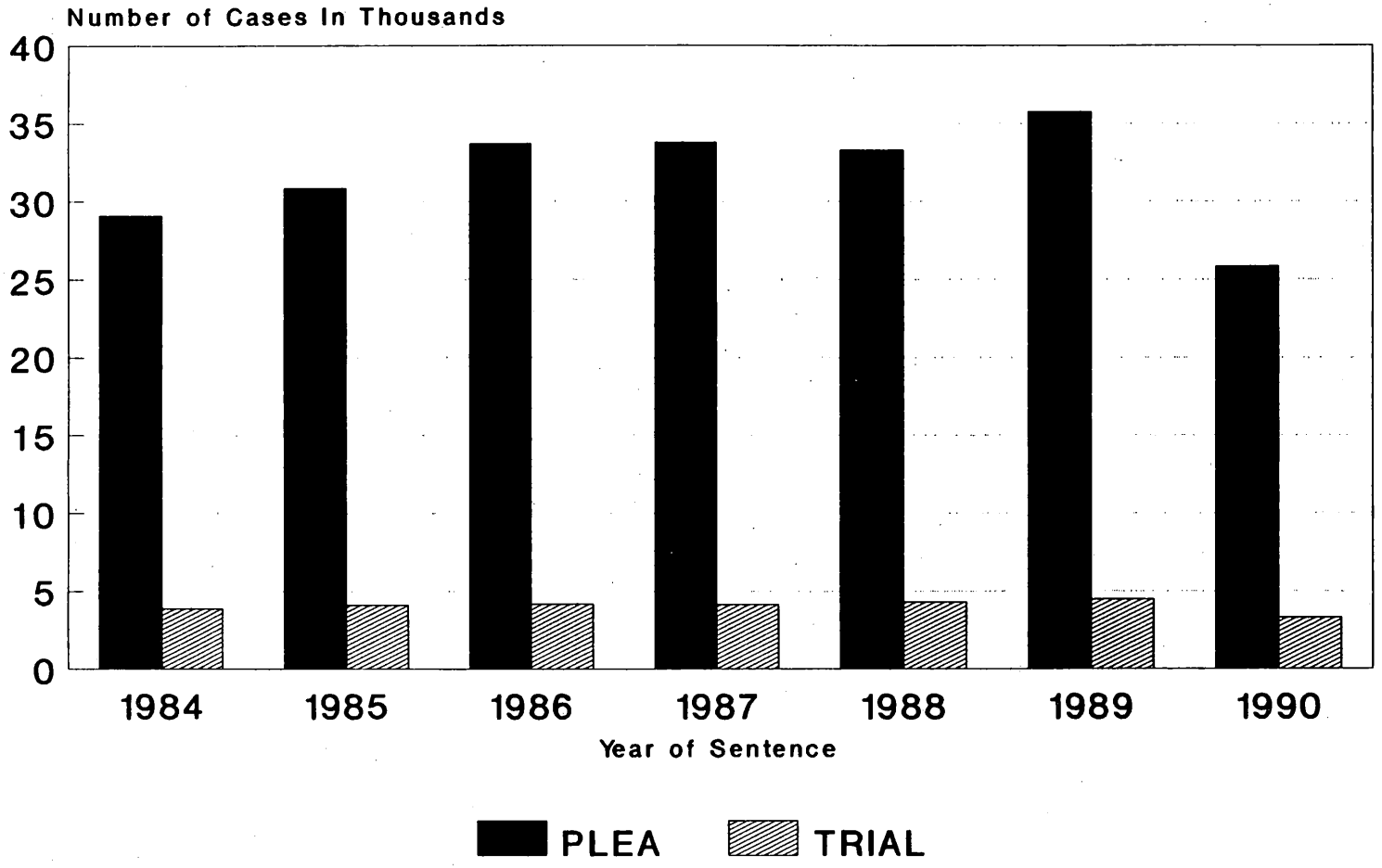
PRISON TERM IMPOSED IN MONTHS	MODE OF CONVICTIONS											
	1984				1985				1986			
	PLEA		TRIAL		PLEA		TRIAL		PLEA		TRIAL	
	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT
TOTAL	29,079	88.3	3,859	11.7	30,875	88.3	4,091	11.7	33,728	89.0	4,179	11.0
ZERO	14,527	94.8	797	5.2	14,278	94.4	849	5.6	14,977	94.4	896	5.6
1 - 59	10,853	86.5	1,688	13.5	12,216	88.0	1,668	12.0	13,423	89.1	1,640	10.9
60	1,376	82.0	303	18.1	1,605	80.6	386	19.4	1,777	82.9	367	17.1
61 - 119	1,045	75.7	336	24.3	1,197	77.4	350	22.6	1,536	80.0	384	20.0
120	489	69.0	220	31.0	600	70.6	250	29.4	783	77.5	227	22.5
121 - 179	201	69.3	89	30.7	261	69.8	113	30.2	365	75.6	118	24.4
180	249	66.9	123	33.1	266	67.0	131	33.0	388	69.7	169	30.3
181 -239	55	65.5	29	34.5	77	74.8	26	25.2	77	64.7	42	35.3
240	140	62.5	84	37.5	168	62.0	103	38.0	202	62.9	119	37.1
241 - 360	102	47.9	111	52.1	149	52.3	136	47.7	145	56.2	113	43.8
361 AND ABOVE	20	29.9	47	70.2	39	40.6	57	59.4	41	34.2	79	65.8
LIFE	22	40.7	32	59.3	19	46.3	22	53.7	14	35.9	25	64.1

TABLE 1
MODE OF CONVICTION BY YEAR OF SENTENCING
(1984 through August, 1990)

MODE OF CONVICTION	YEAR									
	1984		1985		1986		1987			
	Pre-Guidleine		Pre-Guideline		Pre-Guideline		Pre-Guideline		Guideline	
	N	%	N	%	N	%	N	%	N	%
Plea	29,084	88.3	30,876	88.3	33,733	88.9	33,783	88.9	14	100.0
Trial	3,864	11.7	4,095	11.7	4,192	11.1	4,157	11.1	0	0.0
TOTAL	32,948	100.0	34,971	100.0	37,925	100.0	37,940	100.0	14	100.0

MODE OF CONVICTION	1988				1989				1990			
	Pre-Guideline		Guideline		Pre-Guideline		Guideline		Pre-Guideline		Guideline	
	N	%	N	%	N	%	N	%	N	%	N	%
Plea	27,229	88.3	6,078	89.9	16,406	89.7	19,339	88.1	7,698	89.9	18,146	88.2
Trial	3,609	11.7	682	10.1	1,885	10.3	2,603	11.9	869	10.1	2,435	11.8
TOTAL	30,838	100.0	6,760	100.0	18,291	100.0	21,942	100.0	8,567	100.0	20,581	[illegible]

FIGURE A
MODE OF CONVICTION BY YEAR SENTENCED



Source: 1984 - 1990 FPSSIS Data Files.

Note that the 1990 file only includes cases sentenced through August, 1990.

TABLE 2-D
PRISON TERM IMPOSED BY MODE OF CONVICTION
GUIDELINE AND PRE-GUIDELINE DEFENDANTS SENTENCED
(JANUARY 1, 1989 THROUGH DECEMBER 31, 1989)

PRIMARY OFFENSE	GUIDELINE CONVICTIONS					PRE-GUIDELINE CONVICTIONS				
	TOTAL	PLEA		TRIAL		TOTAL	PLEA		TRIAL	
		NUMBER	PERCENT	NUMBER	PERCENT		NUMBER	PERCENT	NUMBER	PERCENT
TOTAL	21,940	19,339	88.1	2,601	11.9	18,285	16,406	89.7	1,879	10.3
ZERO	4,885	4,747	97.2	138	2.8	9,615	9,099	94.6	516	5.4
1 - 59	11,112	10,318	92.9	794	7.2	6,014	5,366	89.2	648	10.8
60	989	852	86.2	137	13.9	771	659	85.5	112	14.5
61 -119	2,306	1,838	79.7	468	20.3	766	595	77.7	171	22.3
120	425	320	75.3	105	24.7	361	271	75.1	90	24.9
121 - 179	960	653	68.0	307	32.0	189	120	63.5	69	36.5
180	144	79	54.9	65	45.1	188	117	62.2	71	37.8
181 - 239	452	250	55.3	202	44.7	74	45	60.8	29	39.2
240	133	70	52.6	63	47.4	112	57	50.9	55	49.1
241 - 360	397	180	45.3	217	54.7	106	53	50.0	53	50.0
361 AND ABOVE	94	24	25.5	70	74.5	75	19	25.3	56	74.7
LIFE	43	8	18.6	35	81.4	14	5	35.7	9	64.3

TABLE 2-C
PRISON TERM IMPOSED BY MODE OF CONVICTION
GUIDELINE AND PRE-GUIDELINE DEFENDANTS SENTENCED
(JANUARY 1, 1988 THROUGH DECEMBER 31, 1988)

PRIMARY OFFENSE	GUIDELINE CONVICTIONS					PRE-GUIDELINE CONVICTIONS				
	TOTAL	PLEA		TRIAL		TOTAL	PLEA		TRIAL	
		NUMBER	PERCENT	NUMBER	PERCENT		NUMBER	PERCENT	NUMBER	PERCENT
TOTAL	6,759	6,078	89.9	681	10.1	30,824	27,228	88.3	3,596	11.7
ZERO	1,578	1,537	97.4	41	2.6	13,329	12,622	94.7	707	5.3
1 - 59	3,720	3,482	93.6	238	6.4	11,063	9,901	89.5	1,162	10.5
60	309	270	87.4	39	12.6	1,983	1,639	82.7	344	17.4
61 - 119	576	447	77.6	129	22.4	1,641	1,266	77.2	375	22.9
120	123	89	72.4	34	27.6	1,021	716	70.1	305	29.9
121- 179	205	128	62.4	77	37.6	466	321	68.9	145	31.1
180	55	34	61.8	21	38.2	503	341	67.8	162	32.2
181 - 239	64	34	53.1	30	46.9	116	65	56.0	51	44.0
240	44	20	45.5	24	54.6	290	160	55.2	130	44.8
241 - 360	61	32	52.5	29	47.5	252	131	52.0	121	48.0
361 AND ABOVE	16	4	25.0	12	75.0	111	48	43.2	63	56.8
LIFE	8	1	12.5	7	87.5	49	18	36.7	31	63.3

TABLE 2-B
PRISON TERM IMPOSED BY MODE OF CONVICTION
GUIDELINE AND PRE-GUIDELINE DEFENDANTS SENTENCED
(JANUARY 1, 1988 THROUGH DECEMBER 31, 1988)

PRISON TERM IMPOSED IN MONTHS	GUIDELINE CONVICTIONS					PRE-GUIDELINE CONVICTIONS				
	TOTAL	PLEA		TRIAL		TOTAL	PLEA		TRIAL	
		NUMBER	PERCENT	NUMBER	PERCENT		NUMBER	PERCENT	NUMBER	PERCENT
TOTAL	14	14	100.0	0	0.0	37,920	33,779	89.1	4,141	10.9
ZERO	10	10	100.0	0	0.0	15,074	14,292	94.8	783	5.2
1 - 59	3	3	100.0	0	0.0	15,009	13,527	90.1	1,482	9.9
60	1	1	100.0	0	0.0	2,489	2,108	84.7	381	15.3
61 - 119	0	0	0.0	0	0.0	2,096	1,627	77.6	469	22.4
120	0	0	0.0	0	0.0	1,135	852	75.1	283	24.9
121 - 179	0	0	0.0	0	0.0	544	391	71.9	153	28.1
180	0	0	0.0	0	0.0	626	431	68.9	195	31.2
181 - 239	0	0	0.0	0	0.0	161	122	75.8	39	24.2
240	0	0	0.0	0	0.0	345	223	64.6	122	35.4
241 - 360	0	0	0.0	0	0.0	261	144	55.2	117	44.8
361 AND ABOVE	0	0	0.0	0	0.0	138	43	31.2	95	68.8
LIFE	0	0	0.0	0	0.0	41	19	46.3	22	53.7

TABLE 2-E
PRISON TERM IMPOSED BY MODE OF CONVICTION
GUIDELINE AND PRE-GUIDELINE DEFENDANTS SENTENCED
(JANUARY 1, 1990 THROUGH AUGUST 31, 1990)

PRIMARY OFFENSE	GUIDELINE CONVICTIONS					PRE-GUIDELINE CONVICTIONS				
	TOTAL	PLEA		TRIAL		TOTAL	PLEA		TRIAL	
		NUMBER	PERCENT	NUMBER	PERCENT		NUMBER	PERCENT	NUMBER	PERCENT
TOTAL	20,577	18,144	88.2	2,433	11.8	8,564	7,698	89.9	866	10.1
ZERO	4,994	4,858	97.3	136	2.7	5,036	4,697	93.3	339	6.7
1 - 59	9,938	9,206	92.6	732	7.4	2,510	2,213	88.2	297	11.8
60	951	833	87.6	118	12.4	329	289	87.8	40	12.2
61 - 119	2,041	1,623	79.5	418	20.5	272	219	80.5	53	19.5
120	470	360	76.6	110	23.4	145	104	71.7	41	28.3
121 - 179	994	675	67.9	319	32.1	82	64	78.1	18	22.0
180	157	93	59.2	64	40.8	60	36	60.0	24	40.0
181 - 239	411	240	58.4	171	41.6	23	19	82.6	4	17.4
240	113	54	47.8	59	52.2	45	28	62.2	17	37.8
241 - 360	358	161	45.0	197	55.0	42	17	40.5	25	59.5
361 AND ABOVE	94	29	30.9	65	69.2	12	8	66.7	4	33.3
LIFE	56	12	21.4	44	78.6	8	4	50.0	4	50.0

Table 3

GUIDELINE SENTENCING RANGES BY MODE OF CONVICTION AND ACCEPTANCE OF RESPONSIBILITY
For Guideline Cases With Complete Reports on the Sentencing Hearing Received (October 1, 1989 through September 30, 1990)

GUIDELINE RANGE	Total	Percent	MODE OF CONVICTION							
			PLEA				TRIAL			
			Acceptance		No Acceptance		Acceptance		No Acceptance	
			N	%	N	%	N	%	N	%
0-6	2,526	15.3	2283	90.4	148	5.9	56	2.2	39	1.5
1-7	614	3.7	563	91.7	26	4.2	17	2.8	8	1.3
2-8	640	3.9	578	90.3	42	6.6	8	1.3	12	1.9
3-9	8	0.1	8	100.0	0	0.0	0	0.0	0	0.0
4-10	534	3.2	454	85.0	62	11.6	6	1.1	12	2.3
6-12	1,009	6.1	904	89.6	64	6.3	12	1.2	29	2.9
8-14	544	3.3	470	86.4	46	8.5	8	1.5	20	3.7
9-15	67	0.4	62	92.5	5	7.5	0	0.0	0	0.0
10-16	709	4.3	553	78.0	94	13.3	14	2.0	48	6.8
12-18	508	3.1	413	81.3	54	10.6	11	2.2	30	5.9
15-21	714	4.3	585	81.9	73	10.2	11	1.5	45	6.3
18-24	339	2.1	245	72.3	55	16.2	4	1.2	35	10.3
21-27	626	3.8	467	74.6	83	13.3	12	1.9	64	10.2
24-30	372	2.3	295	79.3	45	12.1	12	3.2	20	5.4
27-33	553	3.4	393	71.1	86	15.6	10	1.8	64	11.6
30-37	214	1.3	139	65.0	36	16.8	4	1.9	35	16.4
33-41	509	3.1	367	72.1	71	14.0	9	1.8	62	12.2
37-46	232	1.4	165	71.1	33	14.2	8	3.5	26	11.2
41-51	450	2.7	329	73.1	53	11.8	21	4.7	47	10.4
46-57	167	1.0	125	74.9	23	13.8	6	3.6	13	7.8
51-63	824	5.0	690	83.7	47	5.7	38	4.6	49	6.0
57-71	196	1.2	158	80.6	14	7.1	1	0.5	23	11.7
63-78	695	4.2	447	64.3	81	11.7	34	4.9	133	19.1
70-87	175	1.1	108	61.7	28	16.0	3	1.7	36	20.6
77-96	71	0.4	60	84.5	3	4.2	1	1.4	7	9.9
78-97	442	2.7	277	62.7	63	14.3	14	3.2	88	19.9
84-105	29	0.2	26	89.7	1	3.5	1	3.5	1	3.5
87-108	87	0.5	57	65.5	6	6.9	4	4.6	20	23.0
92-115	58	0.4	40	69.0	10	17.2	1	1.7	7	12.1
97-121	397	2.4	278	70.0	39	9.8	21	5.3	59	14.9
100-125	21	0.1	15	71.4	2	9.5	2	9.5	2	9.5
108-135	84	0.5	55	65.5	8	9.5	4	4.8	17	20.2
110-137	39	0.2	22	56.4	8	20.5	0	0.0	9	23.1
120-150	19	0.1	16	84.2	0	0.0	0	0.0	3	15.8
121-151	437	2.6	240	54.9	64	14.7	24	5.5	109	24.9
130-162	13	0.1	8	61.5	2	15.4	0	0.0	3	23.1
135-168	127	0.8	77	60.6	15	11.8	1	0.8	34	26.8
140-175	348	2.1	181	52.3	54	15.6	15	4.3	96	27.8
151-188	207	1.3	149	72.0	16	7.7	10	4.8	32	15.5
168-210	224	1.4	99	44.2	41	18.3	6	2.7	78	34.8
188-235	188	1.1	94	50.0	29	15.4	9	4.8	56	29.8
210-262	132	0.8	52	39.4	20	15.2	1	0.8	59	44.7
235-293	122	0.7	32	26.2	25	20.5	5	4.1	60	49.2
262-327	89	0.5	42	47.2	13	14.6	6	6.7	28	31.5
292-365	29	0.2	5	17.2	4	13.8	1	3.5	19	65.5
324-405	119	0.7	23	19.3	22	18.5	2	1.7	72	60.5
360-life	23	0.1	0	0.00	3	100.0	1	5.0	19	95.0
TOTAL	16,528	100.0	12,649	76.5	1,717	10.4	434	2.6	1,728	10.5

ACCEPTANCE OF RESPONSIBILITY CASE FILE SUMMARY # 1
Acceptance Departures

Coder _____
QC _____
Case No. _____

USSC Identification No. _____

Did defendant get the two-level reduction under §3E1.1? Yes ___ No ___

Other grounds for departing besides "acceptance"? (If yes, list)

_____
_____
_____

Court's reasons for using a departure to reward "acceptance" (rather than, or in addition to, §3E1.1) _____
_____
_____
_____

Comments _____
_____
_____
_____
_____

ACCEPTANCE OF RESPONSIBILITY CASE FILE SUMMARY # 2
Defendants Who Get Acceptance Credit After a Trial

Coder _____
QC _____
Case No. _____

USSC Identification No. _____

Is a sentencing transcript available in the file? Yes ___ No ___

Departure? None ___ Up ___ Down ___

Reasons: _____
_____

Did defendant plead guilty to any charges? Yes ___ No ___

Did PSR recommend credit for "acceptance"? Yes ___ No ___

Reasons given by PSR for its recommendation regarding "acceptance" credit:

_____
_____
_____

Government position on "acceptance" credit?

Opposed credit for acceptance: ___
Supported credit for acceptance: ___
Took no formal position: ___

Court's reasons for giving "acceptance" credit (also indicate if no reasons were given, or if the court merely adopted the findings and/or recommendations from the PSR):

_____
_____
_____
_____

Comments _____
_____
_____
_____

ACCEPTANCE OF RESPONSIBILITY CASE FILE SUMMARY # 3
Defendants Who Plead And Are Denied Acceptance Credit

Coder _____
QC _____
Case No. _____

USSC Identification No. _____

Is a sentencing transcript available in the file? Yes ___ No ___

Departure? None ___ Up ___ Down ___

Reasons: _____
_____

Did defendant go to trial on any charges? Yes ___ No ___

Did PSR recommend credit for "acceptance"? Yes ___ No ___

Reasons given by PSR for its recommendation regarding "acceptance" credit:
_____
_____

Government position on "acceptance" credit?

Opposed credit for acceptance: ___
Supported credit for acceptance: ___
Took no formal position: ___

Did defendant object to denial of acceptance credit? Yes ___ No ___

Court's reasons for denying "acceptance" credit (also indicate if no reasons were given, or if the court merely adopted the findings and/or recommendations from the PSR):
_____
_____
_____

Comments _____
_____
_____
_____

8. Consider modification of the acceptance of responsibility Guideline.

The defendant entered a plea agreement which included factual stipulations that he was the manager of an operation to distribute 1 kg. of cocaine, and that he accepted responsiblity for his crime. These facts would give him an offense level of 26 and a guideline range of 63-78 months. After discussion with the case agent, the probation officer determined that the defendant was actually the leader of a larger conspiracy to distribute over 5 kg. of cocaine, leading to an offense level of 36 and a Guideline range of 188-235 months. If the defendant pleads guilty and accepts responsibility, this could be reduced to 151-188 months. The prospect of a twelve-and-a-half year sentence, even with a guilty plea, leads the defendant to withdraw his plea and take his chances at trial.

Judges are confronted with some plea agreements that contain stipulations understating the defendant's conduct. The choice is to accept them and thereby undermine sentencing uniformity, or reject them and risk a trial. Without such plea agreements, the incentives needed to encourage guilty pleas are seen as insufficient, especially at higher Guideline levels. Judicial Conference recommendation 8 asks the Commission to explore whether the Guideline's major explicit tool for encouraging honest plea bargaining---the acceptance of responsibility reduction--might be modified to reflect its crucial place in a workable Guideline system.

Most important, the revisions would clarify that the foreseeability and scope of agreement criteria apply to §1B1.3(a)(2) aggregable offenses. At present, the "common course of conduct or common scheme or plan" standard found in (a)(2) sometimes conflicts with the standards in the application notes, since offenses covered by (a)(2) are often also jointly-undertaken. The illustrations in the commentary suggest that defendants who aid and abet a joint criminal activity are liable for the full amounts of drug or money, notwithstanding claims that they were not aware of and could not reasonably foresee the amounts involved. This suggests that all conduct that is part of a common scheme or plan may be attributed to a defendant, regardless of foreseeability. Application note 2 may be intended to make the "common scheme or plan" standard secondary to the criteria in application note 1, but this is far from clear.

The purpose of Recommendation #7 is to clarify that defendants in all types of offenses are to be punished only for criminal acts and harms which were reasonably foreseeable, or of which they were personally aware. It would give judges flexibility to tailor the offense level, especially that part due to the aggregation of amounts of drugs or money, according to the part of the total for which each defendant should be held culpable.

1B1.3. Relevant Conduct (Factors that Determine the Guideline Range).

(a) Chapters Two (Offense conduct) and Three (Adjustments).

(1) all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would otherwise be accountable, *or counseled, commanded, induced, procured, or willfully caused by the defendant, or in the case of joint criminal activity, reasonably foreseeable acts of others in furtherance of the jointly undertaken criminal plan,* that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for theat offense, or that otherwise were in furtherance of that offense;

(2) solely with respect to offenses of a character for which 3D1.2(d) would require grouping of multiple counts, all such acts and omissions and *amounts* that were part of the same course of conduct or common scheme or plan as the offense of conviction, *and of which the defendant was aware or which were reasonably foreseeable to the defendant.*

Recommendation #8: Consider modification of the Acceptance of Responsibility.Guideline.

The acceptance of responsibility guideline allows for a reduction of two offense levels (or roughly a 25 percent reduction) when a defendant "clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct." The guideline

appears intended to accomplish three things: 1) encourage guilty pleas, 2) provide an incentive for cooperation with authorities and 3) recognize sincere remorse. In the United States Sentencing Commission amendments forwarded to Congress this spring, the Commission revised Application Note 2 to make clear that the two-level reduction is "not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt." As a corollary, Note 3 was amended to provide that entry of a guilty plea prior to trial and truthful admission of "related conduct" constitute "significant evidence" of acceptance of responsibility. Both notes provide "overrides" for unusual circumstances, for example, where a defendant goes to trial only to press a constitutional challenge to a criminal statute.

The effect of the amended notes read together is that a timely plea of guilty with admission of related conduct will likely result in a sentence reduction, while putting the government to its proof, regardless of other indices of acceptance or responsibility, ordinarily will not. This appears to respond to perceived concerns that there has been disparity in application of the acceptance of responsibility guideline where some defendants, even after going to trial, were given the reduction while others were unaccountably denied the reduction after entry of a guilty plea.[1] The amendment focuses this guideline almost entirely on the reward of a guilty plea.

However, this new focus may not be effective to achieve the multiple purposes of the acceptance of responsibility guidelines. The two-level reduction is seen by many judges as insufficient to encourage plea agreements particularly at higher offense levels. The Commission's own study of past practice showed that the average time served when a conviction results from a guilty plea was 30 to 40 percent below what would otherwise have been served.[2]

Moreover, to receive the reduction the defendant must acknowledge involvement in both the offense of conviction and "related conduct."[3] This makes the incentive especially weak when, in order to qualify, defendants must acknowledge wrongdoing to related conduct that can result in offense level increases of more than two levels. In addition, requiring admissions to related conduct may result in continued disparate application, as it is not always clear what degree of admission of such conduct is required. The Judicial conference therefore recommends that the Commission consider increasing the two-level adjustment for acceptance of responsibility and also give consideration to providing that greater adjustments be available

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[1] For a discussion of different uses of this adjustment in districts in the Eighth Circuit, see United States v. Knight, 905 F.2d 189 No. 89-1799 (June 1, 1990).

[2] The United States Sentencing Commission Supplemental Report on the Initial Sentencing Guidelines and Policy Statements, June 18, 1987, pp. 48-50.

[3] There is a split in the circuits as to whether it is constitutional to require admission of criminal conduct beyond the offense of conviction as a condition of giving the acceptance of responsibility. Compare United States v. Oliveras, 905 F.2d 623, No. 89-1380 (2d Cir. June 4, 1990) and United States v. Perez-Franco, 873 F.2d 455 (1st Cir. 1989), holding that acceptance of responsibility should be assessed solely with respect to actual charges to which the defendant pleads guilty, with United States v. Gordon, 895 F.2d 932 (4th Cir. 1990), holding that the defendant must accept responsibility for all criminal conduct.

for higher offense levels to encourage entries of pleas in cases where defendants, who in anticipation of long periods of incarceration may, without adequate incentive, go to trial.

The amended guideline also reduces the incentive for defendants to take other affirmative actions demonstrating acceptance of responsibility, such as payment of restitution or resignation from the office or position held during the commission of the offense. (See list of factors in the current guideline commentary, section 3E1.1, Application Note 1.) The Judicial Conference recommends that the Commission consider revising this guideline--or adding another--to recognize and encourage affirmative actions demonstrating acceptance of responsibility other than entry of a plea of guilty.

The Judicial Conference also recommends that the Commission reconsider utilizing a range of several offense levels for acceptance of responsibility to provide for more individual consideration of varying degrees and demonstrations of acceptance. We are aware that such an approach was considered by the Commission in its 1987 Revised Draft Sentencing Guidelines but not adopted. We believe such an approach provides much needed flexibility in allowing the court to address the various elements of acceptance of responsibility and does not implicate the 25 percent rule set forth in 28 U.S.C. § 994(b)(2). Section 994(b)(2) provides that "if a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range...shall not exceed the minimum by...25 percent or 6 months." This section addresses the actual imprisonment range, and not the multiple determinations needed to arrive at such a range. Moreover, it is specifically limited to such ranges that include a term of imprisonment indicating that not all determinations be limited by the 25 percent restriction.