

COMMITTEE ON CRIMINAL LAW AND PROBATION ADMINISTRATION

OF THE

JUDICIAL CONFERENCE OF THE UNITED STATES

19813 UNITED STATES COURTHOUSE

601 MARKET STREET

PHILADELPHIA, PA 19106

JUDGE EDWARD R. BECKER
CHAIRMAN

8-597-8642 (FTS)
818-887-8642 (COMM.)

IV. § 3E Acceptance of Responsibility

The Commission has requested comments concerning a number of aspects of this guideline. I have made revision to this guideline an agenda topic for the June 1990 meeting of our Committee, because of the strong and widespread feeling among the district judges all across the nation that there needs to be discretion to reduce the offense level for acceptance of responsibility by more than two levels in order to accommodate a number of rigidities and inequities in the guidelines. Consequently, while we are not prepared to provide comment regarding this provision by the public comment deadline of March 30, 1990, we will be in contact with the Commission after our next meeting with suggestions with respect to acceptance of responsibility and a number of other facets in the guidelines, all with a view to increasing flexibility in their administration.

TESTIMONY BY PAUL D. BORMAN, CHIEF FEDERAL DEFENDER, LEGAL AID AND DEFENDER ASSOCIATION OF DETROIT, ON BEHALF OF THE FEDERAL DEFENDERS, TO THE U.S. SENTENCING COMMISSION, MARCH 15, 1990, RE PROPOSED GUIDELINE AMENDMENTS (THE POSITION PAPER IN FINAL FORM WILL BE SUBMITTED BY MARCH 30, 1990).

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We believe that this Guideline may well apply when it is first evidenced after adjudication of guilt.

We believe that there should be a presumptive application of this Guideline when a defendant pleads guilty.

We believe that a minimum of three points should be provided for acceptance of responsibility because of the relevance with regard to future criminal behavior. Further, we believe that where the base offense level is over 20, there should be a five level reduction for acceptance of responsibility to appropriately reflect the impact of the acknowledgment of guilt.

STATEMENT OF

SAMUEL J. BUFFONE, CHAIRPERSON
U.S. SENTENCING COMMISSION COMMITTEE
CRIMINAL JUSTICE SECTION

Item 58. The A.B.A. endorses an acceptance of responsibility guideline that accords more weight to a defendant's decision to plead guilty. At the very least, there should be a presumptive discount for pleading guilty.



Washington, D.C. 20530

STATEMENT

OF

PAUL L. MALONEY
DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

Acceptance of Responsibility

The first area I would like to address is the guideline for acceptance of responsibility, guideline §3E. The Commission has asked whether the guideline should be amended expressly to provide that a reduction for acceptance of responsibility is not warranted when the defendant first evidences such acceptance after adjudication of guilt. Amendment No. 58. We believe very strongly that the guideline should be amended to establish a deadline for acts evidencing an acceptance of responsibility but would establish an earlier deadline than the time at which guilt is adjudicated, as suggested by the Commission. Specifically,



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the guideline should require that a defendant enter a plea or conditional plea of guilty or nolo contendere prior to the commencement of the trial in order to be eligible for the guideline reduction based on acceptance of responsibility.

It is clear to us that there is a pressing need to fine-tune the guideline relating to acceptance of responsibility. From discussions with prosecutors throughout the country, we have learned that too many judges grant the two-level reduction as a matter of course to defendants who proceed to trial, are adjudicated guilty, and then merely state that they accept responsibility for the offense. It is difficult to reconcile an asserted acceptance of responsibility for committing an offense with a defendant's decision to proceed to trial in order to challenge the government's case. For this reason we believe that the guideline authorizing a reduction for acceptance of responsibility should require the guilty or nolo plea before the commencement of trial rather than simply before the adjudication of guilt. To allow a defendant to assess the strength of the government's case during the trial and remain eligible for the acceptance reduction would undermine the intent of the guidelines



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to grant a lower sentence to a defendant for whom the need for punishment and incapacitation is reduced by a sincere acknowledgement of wrongdoing.

The role of the conditional plea of guilty is important in this context. A conditional plea may be entered only with the approval of the court and the consent of the government, and the

plea is subject only to the right to appeal any adverse determination of a pretrial motion and, if successful, to withdraw the plea. Rule 11(a)(2), Federal Rules of Criminal Procedure. It is used to litigate legal issues, such as the constitutionality of a search and seizure, in connection with an offense charged. If a defendant insists upon proceeding to trial in order to litigate such an issue, his or her decision would appear inconsistent with a true acceptance of responsibility. Such a defendant could have availed himself of the conditional plea and thereby have manifested an acceptance of responsibility for the acts charged, subject to the resolution of the legal issue.



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We recognize that there are some situations in which a court may wish to depart from a guideline that requires a defendant to enter a guilty or nolo plea prior to the commencement of the trial in order to be eligible for the reduction for acceptance of responsibility, and the Commission may wish to acknowledge factors relevant to such a departure. However, an asserted acceptance occurring after the commencement of the trial should not simply reflect a calculated decision by the defendant to express regret for the offense after assessing the strength of the government's case and should be consistent with the reduced need for punishment generally reflected by the acceptance guideline. A court may determine that a departure is warranted, for example, when a defendant changes his plea soon after the commencement of the trial upon advice of newly appointed counsel. In general, if the courts authorize departures for acts



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demonstrating acceptance of responsibility after the commencement of the trial, any unwarranted departures by the courts could be appealed by the government, subject to a reasonableness standard. See 18 U.S.C. §3742.

We also believe that assertions of acceptance of responsibility before an adjudication of guilt are distinguishable from those that occur after such an adjudication and that limitations on the reduction, even based on departure, must be more stringent for the latter than the former. We would suggest that the Commission clearly preclude the application of the acceptance reduction, even by way of departure, to a defendant adjudicated guilty except in the rare case of a defendant whose conditional plea is approved by the government but not by the court. In the case of such a defendant who proceeds to trial after rejection of a conditional plea, a downward departure, not to exceed two levels, may be warranted because the defendant accepted responsibility through his attempt to enter a conditional plea.



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The Commission has also asked whether it should more clearly indicate the weight that should be assigned to the entry of a guilty plea. We believe that the entry of a guilty or nolo plea should be considered significant evidence of acceptance of responsibility, and the Commission should so state in its commentary to the acceptance guideline. However, mere entry of a guilty or nolo plea should not guarantee a reduction.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

CHAMBERS OF
JON O. NEWMAN
U. S. CIRCUIT JUDGE
480 MAIN STREET
HARTFORD, CONN. 06103

C. Amendment 58. My overall impression is that the acceptance of responsibility guideline should not be changed at all, at least not until sufficient experience demonstrates serious defects. If changes are to be made, I think it would be a serious mistake to try to indicate more clearly the weight to be accorded a guilty plea. As the Commission knows, there are serious constitutional issues lurking in this area, and there is little point in precipitating more constitutional attacks on the guidelines by making exercise of the right to a trial a basis for an automatic increase in punishment. Also, I strongly oppose any effort to give different weights to different indicia of acceptance of responsibility, if by this suggestion the Commission means to assign precise weights to particular forms of contrition. The Commission might wish to consider a revision that simply authorizes the sentencing judge to reduce the offense level anywhere from one to three levels, depending on the judge's assessment of the defendant's acceptance of responsibility. This avoids excessive fact-finding and might ameliorate some of the alleged reductions in guilty pleas.

STATEMENT OF
BENSON WEINTRAUB
ON BEHALF OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

58. Regarding the adjustment for Acceptance of Responsibility, USSG §3E1.1, the guidelines should not be amended to

preclude such adjustment when a Defendant exercises his or her rights incorporated into the Fifth and Sixth Amendments to the United States Constitution. Clearly, a Defendant may manifest conduct and a contrition of spirit warranting adjustment under this section following a trial. Second, NACDL believes that there should be an automatic adjustment under this section for pleading guilty. Where the base offense level is between 1-24, a 3 level downward adjustment should apply. Where the base offense level is 25 or higher, a 4 level downward adjustment should apply. This would take into account the impact of the sentencing guidelines on an ever increasing prison population. It would also serve to reinforce the values sought to be furthered by this section. Finally, recognizing different indicia of accepting responsibility, post offense conduct, including rehabilitative efforts, should be taken into consideration and rewarded through a graduated scale.