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**Nuñez-Rodriguez and a Defendant’s Acceptance of Responsibility: A Jailbreak from the Confinement of the Federal Sentencing Guidelines?**

**BY JOHN N. WINSTEAD***

**INTRODUCTION**

On a summer evening in 1994, José Antonio Nuñez-Rodriguez ("Nuñez") and four associates planned to break two prisoners out of a Puerto Rican jail. Part of their plan was to steal a vehicle with government license plates to ease their entrance into the jail. Nuñez and two others drove around San Juan several hours that evening before spotting José Jamie Pierlusisi-Urrutia unloading the trunk of his car. Nuñez and an associate brandishing a handgun confronted Pierlusisi, who relinquished the car without argument. As Nuñez prepared to drive away, his associate killed Pierlusisi, execution style, with a single shot to the back of the head.¹

Nuñez soon surrendered to the FBI and eventually pled guilty to the crime. However, his sentence of life imprisonment plus sixty months did not include any reduction as a reward for his admission of guilt. The sentencing court found that Nuñez’s refusal to name his accomplices in the crime was evidence he had not truly accepted responsibility for his actions, and the court reasoned that he was therefore undeserving of a lesser sentence.²

The Court of Appeals for the First Circuit upheld the sentencing court’s consideration of Nuñez’s failure to name his accomplices as

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* J.D. expected 1998, B.A., B.S. 1991, University of Kentucky. The author wishes to thank Professor Sarah Welling for her help in identifying this issue as a subject for a Note.

¹ See United States v. Nuñez-Rodriguez, 92 F.3d 14, 16 (1st Cir. 1996). Pierlusisi happened to be the brother of the Secretary of Justice of the Commonwealth of Puerto Rico and his car had government license plates. See id.

² See id. at 16-17
within the bounds of the Federal Sentencing Guidelines. This ruling is contrary to other circuits which have held that the naming of accomplices cannot be considered as a factor in deciding whether a defendant has “accepted responsibility.” These circuits hold that the Guidelines dictate that the naming of accomplices can be considered only in determining whether a defendant is entitled to a sentence reduction based on a provision rewarding “substantial assistance to the government” and not on the separate issue of acceptance of responsibility.

This Note analyzes the decision in *Núñez-Rodríguez* and the resulting circuit split in the context of the inherent struggle in federal sentencing between the congressional objective of uniformity on the one hand and a desire for discretion by individual sentencing courts on the other. In Part I, the Note reviews the major objectives and operation of the Guidelines with an emphasis on the tension between uniformity and discretion. Part I also highlights the special roles of adjustments and departures from the assigned sentencing ranges within the overall structure of the Guidelines. Next, Part II shows that the First Circuit’s interpretation in *Núñez-Rodríguez* restores to sentencing courts a measure of the discretion they enjoyed prior to the adoption of the Guidelines. This decision is contrasted with other circuits’ interpretation of the same provisions. In conclusion, this Note finds that *Núñez-Rodríguez* permits discretion beyond that allowed by the clear language of the Guidelines. However, the level of discretion sought for sentencing courts by the First Circuit is a reasonable policy objective and should be achieved by the

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3 *See id.* at 22. The First Circuit did, however, remand the case for clarification and possible resentencing based on the wording of the district court’s sentencing decision that a defendant must “always” inform on his accomplices where an offense results in death in order to demonstrate acceptance of responsibility under section 3E.1.1 of the *Federal Sentencing Guidelines Manual* (1995). The First Circuit’s holding specifically limited the naming of accomplices as *one factor* to be considered within the totality of the facts and not a requirement in order to qualify for a downward adjustment in sentencing under section 3E.1.1. *See Núñez-Rodríguez*, 92 F.3d at 23-24.

4 *See United States v. Leonard*, 50 F.3d 1152 (2d Cir. 1995); *United States v. Vance*, 62 F.3d 1152 (9th Cir. 1995); *United States v. McKinney*, 15 F.3d 849 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 162 (1995). *See also infra* notes 87-102 and accompanying text.

5 *See infra* notes 9-82 and accompanying text.

6 *See infra* notes 83-107 and accompanying text.

7 *See infra* notes 108-25 and accompanying text.
Sentencing Commission through the existing amendment process to the Guidelines.

I. FEDERAL SENTENCING GUIDELINES OVERVIEW

A. Congressional Objectives

The primary purposes of the Sentencing Reform Act of 1984 were the elimination of disparities and the restoration of "honesty" in sentencing. The latter objective was summarily accomplished by the elimination of all federal parole. The former objective was to be achieved through the work of the United States Sentencing Commission. The Commission was charged with creating a comprehensive system of sentencing guidelines for federal crimes, the use of which would be mandatory for all federal judges. From the outset, the Commission struggled to resolve the conflict between uniformity and individual sentencing court discretion. Congressional instructions to the Commission were to develop a sentencing system which simultaneously avoided "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct

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8 See infra notes 126-33 and accompanying text.
11 See id. With the abolition of federal parole, an offender serves the entire length of the sentence he receives with the exception of fifty-four days of time awarded for good behavior for each year served after the first year. See id.
12 See id.
13 See id. The statute authorizing the Sentencing Commission instructed the Commission to complete its work on the sentencing guidelines by April 1987. The guidelines would take effect six days later unless Congress specifically passed another law to the contrary. See id.
14 Breyer uses the terms uniformity and proportionality to describe the conflicting goals of the sentencing system. Uniformity goes to punishing similar crimes alike. Proportionality goes to considering the unique circumstances of every case and offender. As proportionality becomes more the focus of the Guidelines, the less uniform and the less manageable any set of guidelines becomes. See Breyer, supra note 10, at 13.
while maintaining sufficient flexibility to permit individualized sentences when warranted.

B. Basic Guidelines Structure

The tension between uniformity and individual court discretion is evidenced by the distinctions between a "real offense" or a "charge offense" sentencing system. A real offense system looks to the circumstances of the specific criminal offense in determining punishment. Such a system allows the aggravating or mitigating circumstances of each crime and offender to be considered. A charge offense system, in contrast, bases punishment purely on the underlying statutory violation. In a pure charge offense system, everyone convicted of bank robbery, regardless of the circumstances, would receive the same sentence. The Commission made a choice to bridge the gap between a charge offense and real offense system by creating a hybrid system combining elements of both.

The Guidelines themselves center on a "grid" containing forty-three offense levels on its vertical axis and six criminal history categories on its horizontal axis. To use this grid, an "operator’s" manual, some

16 See Breyer, supra note 10, at 8-9.
17 See id. at 8-10. The federal system prior to enactment of the Guidelines can be considered a real offense system in which the judge relied on the facts surrounding the offense in determining the severity of the punishment. See id. at 11.
18 See id.
19 See id. at 9.
20 See id.
22 Congress suggested but did not mandate that the Guidelines use a grid format that compares offense and offender characteristics. See 28 U.S.C. §§ 994(c)(1)-(7), 994(a)(1)-(11) (1988); see also Breyer, supra note 10, at 5.
23 Bruce M. Selya & Matthew Kipp, An Examination of Emerging Departure Jurisprudence Under the Federal Sentencing Guidelines, 67 NOTRE DAME L. Rev 1, 6 (1991). The criminal history category is a hybrid unto itself; it is nominally based on the "real factor" of the offender's criminal record, but only the "charged offenses" the offender has formally been convicted of are used as factors in determining this value. See id. at 10.
four hundred pages in length with step-by-step instructions, is provided to the sentencing court. The Guidelines first assign a base level of punishment, or base offense level, for the crime or crimes for which an offender faces sentencing. This base offense level varies based on the "specific offense characteristics [of the crime] (such as amount of money involved in cases of fraud, the use of a firearm in a robbery, and so forth)." Next, a points system, based on the number and type of the particular offender's prior convictions, determines the criminal history category of the offender. After the base offense level and criminal history category have been determined, all that remains is for the sentencing court to find the intersection of these two components of the grid and issue a sentence within the range of months listed at the point of intersection. The high point of the sentencing range listed will never "exceed the low point by more than twenty-five percent or six months, whichever is greater."

Beyond this basic operating structure, however, two distinct and detailed mechanisms, adjustments and departures, are incorporated into the Guidelines to enhance the "real offense" effect in the sentencing process.

C. Adjustments

Chapter Three of the Guidelines provides for upward and downward adjustments to the base offense level based on additional characteristics of the offense. Part A of Chapter Three details victim-related adjustments. For example, if the offender knew the victim of the crime was particularly vulnerable due to age or other problems, there is a two
increment increase to the base offense level. Part B provides adjustments based on the particular role the offender played in the crime. Considerations in this section include the size of the criminal organization, the offender's overall culpability, and whether the offender was in a leadership position in criminal enterprise.

Part C provides for enhancement of the sentence if the offender willfully interferes with criminal proceedings or recklessly creates a risk of injury to another by fleeing from law enforcement officers. Part D details how Parts A through C apply in the case of multiple counts of conviction and gives instructions on how "multiple counts are grouped and how to adjust the offense level accordingly." Finally, and of most significance in Nuñez-Rodriguez, is Part E, which provides a downward adjustment to the base offense level if the offender demonstrates "acceptance of responsibility" for the crime.

D. Departures

The Commission's overall approach in the creation of the Guidelines has been described as "carving out a heartland, a set of typical cases." Appreciating that even the addition of upward and downward adjustments to the base offense level might not adequately reflect "all factors relevant to sentencing," the Guidelines provide that a sentencing court may "depart" below or above the range of punishment obtained from application of the Guidelines' procedures. However, only in those cases outside of the heartland may a sentencing court consider departing from the Guidelines. In practice, two substantial hurdles must be overcome in order to find a case outside of the heartland.

33 See USSG, supra note 24, § 3A1.1(b).
34 See id. §§ 3B1.1-1.4.
35 See id., see also Walton, supra note 32, at 395-96.
36 See USSG, supra note 24, §§ 3C1.1-1.2.
37 Walton, supra note 32, at 396; see also USSG, supra note 24, §§ 3D1.1-1.5.
38 See USSG, supra note 24, § 3E1.1. See infra notes 66-74 and accompanying text.
39 Selya & Kipp, supra note 23, at 11.
40 See Selya & Massaro, supra note 15, at 802.
41 See id. at 801-02.
1. Guidelines' Limiting Language Regarding Departures

The Guidelines require that, before considering a departure from a calculated sentence, a sentencing court show that the Commission did not "adequately consider [ ] a certain circumstance" that the sentencing court believes warrants a departure. In making that determination, the Guidelines limit the sentencing court's examination exclusively to "the Guidelines, policy statements [within the Guidelines], and official commentary of the Commission." Within these restricted areas, the Guidelines specifically grant a sentencing court the power to reduce a sentence based on an offender providing "Substantial Assistance to Authorities." Otherwise, the Guidelines provide only a general listing of issues likely to raise the question of departure by the sentencing court. That list of issues includes references to: death resulting from the crime; the victim's wrongful conduct; coercion or blackmail of the offender; national security or public health; possession by the offender of a high capacity, semi-automatic firearm; and the participation of the offender in a violent street gang.

Despite the wide range of this list, the Guidelines disfavor departure. The Guidelines specifically state that cases in which a departure is justified will be "extremely rare" and that "dissatisfaction with the available sentencing range or a preference for a different sentence than that authorized by the guidelines [based on the particular circumstances of the case before the sentencing court] is not an appropriate basis for a sentence outside the applicable guideline range."

42 Selya & Kipp, supra note 23, at 11.
43 Id.
44 USSG, supra note 24, § 5K1.1. See infra notes 77-82 and accompanying text.
45 USSG, supra note 24, §§ 5K2.0-2.18.
46 See id. § 5K2.1.
47 See id. § 5K2.10.
48 See id. § 5K2.12.
49 See id. § 5K2.14.
50 See id. § 5K2.17.
51 See id. § 5K2.18.
52 Id. § 5K2.0 (commentary).
2. Appellate Review of Departures

A sentencing court must also provide sufficient justification in the record for its departure in order to withstand appellate court review of its decision. The Sentencing Reform Act of 1984 not only created the Guidelines, but also "radically expanded the role of Courts of Appeal in reviewing sentencing decisions." The appellate courts are guardians of the Guidelines' integrity and any departure above or below the sentencing range established in the Guidelines is expressly subject to review by the appellate courts. Prior to enactment of the Guidelines, sentencing courts had extremely wide latitude and their discretion was generally beyond the review of appellate courts so long as the sentence was within the particular statutory limits attached to the offense for which the offender had been convicted.

Under the Guidelines, most appellate courts use a standard of review adopted by the First Circuit in United States v. Diaz-Villanfane. In

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53 See 18 U.S.C. § 3553(c) (sentencing court must provide statement of reasons if sentence imposed is outside of the specified range).
57 See id. The government can appeal a sentence below the specified range and the offender can appeal a sentence above. A sentence within the specified range is not normally appealable by either side. See id.
58 See Breyer, supra note 10, at 4-5. If a statutory sentence associated with bank robbery was 5-20 years, for example, any sentence within this range was beyond review (based solely on the length of the sentence imposed) by an appellate court. See id.
59 See Selya & Kipp, supra note 23, at 18-22. The Sixth, Eighth, Tenth, and Eleventh Circuits have adopted the same standard as the First Circuit. See United States v. Weaver, 920 F.2d 1570, 1573 (11th Cir. 1991); United States v. Lang, 898 F.2d 1378, 1379-80 (8th Cir. 1990); United States v. White, 893 F.2d 276, 277 (10th Cir. 1990); United States v. Rodriguez, 882 F.2d 1059, 1067 (6th Cir. 1989), cert. denied, 493 U.S. 1084 (1990). The Third and Ninth Circuits have developed a similar, though not identical, standard. See United States v. Lira-Barraza, 941 F.2d 745, 751 (9th Cir. 1991); United States v. Kikumura, 918 F.2d 1084, 1098 (3d Cir. 1990).
order to uphold sentencing decisions outside prescribed ranges, the reviewing court must first determine that the circumstances used to justify a departure by the sentencing court were sufficiently atypical to warrant a departure. Second, it must be shown that those unusual circumstances actually existed in the case under review. And third, the appellate court must find that the "direction and degree of departure" taken by the sentencing court was reasonable.61

In applying this standard of review, appellate courts have agreed that "departures can only be condoned when based on sufficiently unusual circumstances."62 The circumstances of the case "must have weight, [they] must be sufficiently portentous to move the case out of the heartland for the offense of conviction."63 The First Circuit summarized this approach and its justification by stating: "If the Guidelines are to provide a coherent system of criminal sentencing, the trial court's right to depart, up or down, must be restricted to those few instances where some substantial atypicality can be demonstrated."64

Because of the restrictive nature of the language of the Guidelines and the narrow circumstances in which appellate courts will uphold departures, sentencing courts rarely use the unexpected or unique circumstances of a particular case to justify their use of departures.65 Sentencing courts are left looking for other means to "introduce play into the joints of the guidelines structure."66 The means used by the sentencing court in Nuñez-Rodriguez to add flexibility and enhance its discretion was the acceptance of responsibility adjustment provision, section 3E1.1 of the Guidelines.

E. Section 3E1.1. Acceptance of Responsibility

The central adjustment mechanism in Nuñez-Rodriguez was section 3E1.1, which provides for a reduction in the base offense level if the offender demonstrates to the sentencing court that he or she has accepted responsibility for his or her crimes.67 This section was included in the

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61 Id., see also Selya & Kipp, supra note 23, at 19.
62 Selya & Kipp, supra note 23, at 22.
63 United States v. Sklar, 920 F.2d 107, 115 n.7 (1st Cir. 1990).
64 United States v. Williams, 891 F.2d 962, 967 (1st Cir. 1989).
65 See Selya & Kipp, supra note 23, at 22.
66 Selya & Massaro, supra note 15, at 803.
67 See USSG, supra note 24, § 3E1.1.
Guidelines because, traditionally, offenders who displayed true remorse for their acts received less severe sentences.  

Specifically, section 3E1.1 provides an offender with a two level decrease⁶⁹ to his or her base offense level for "clear[ ] acceptance of responsibility."⁷⁰ If the offender qualifies under this provision, an additional one level decrease is available for providing assistance to the "authorities in the investigation or prosecution of his own misconduct" either by timely providing complete information to the government concerning his or her own involvement in the offense or by notifying the government of an intention to plead guilty in order to save the government the time and expense of preparing for a trial.⁷¹

The commentary to section 3E1.1 states:

appropriate considerations [for a sentencing court to use in deciding whether to award the two level reduction] include, but are not limited to, truthfully admitting the conduct comprising the offense(s) of conviction, voluntary termination from criminal conduct, payment of restitution, surrender to authorities, assistance to authorities in the recovery of the fruits and instrumentalists of the offense, resignation from office held during the commission of the offense, rehabilitative efforts, the timeliness of the defendant's conduct in manifesting the acceptance of responsibility.⁷²

Neither the body nor commentary to section 3E1.1 mentions the naming of accomplices by the offender. Moreover, the commentary specifically states: "A defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction; a defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection."⁷³

In order to avoid a situation where an offender would be automatically awarded a reduction in sentence if he or she pled guilty, but would be

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⁶⁸ See Breyer, supra note 10, at 28-29.
⁶⁹ Each crime covered in the Guidelines is assigned a base offense level number. As an example, bribery in procurement of a bank loan is assigned a base offense level of eight; acceptance of responsibility for this particular crime would reduce the base offense level to six. See USSG, supra note 24, § 2B4.1(a).
⁷⁰ Id. § 3E1.1(a).
⁷¹ See id. § 3E1.1(b).
⁷² Id. § 3E1.1(a)-(h) (commentary) (emphasis added).
⁷³ Id. § 3E1.1(1)(a) (commentary).
denied that reduction if he or she chose a trial by jury, the Commission left section 3E1.1 with some ambiguity regarding the discretion available to the sentencing court. The Commission expressly rejected a proposal to automatically award a fixed reduction for a plea of guilty Section 3E1.1 leaves the sentencing court to decide if the offender has truly accepted responsibility for his or her crime. A guilty plea is only one factor among those listed above to be considered. The questions for the First Circuit in Nuñez-Rodriguez were whether there are limits to the discretion allowed by the language of section 3E1.1 and whether section 5K1.1 of the Guidelines take precedence over section 3E1.1.

F  Section 5K1.1 Substantial Assistance to Authorities

The departure provision under section 5K1.1 also played an important role in Nuñez-Rodriguez. Section 5K1.1 provides: "Upon motion of the government stating that the defendant has provided

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74 See id. § 3E1.1(2) (commentary). While not in contention in Nuñez-Rodriguez and, thus, beyond the scope of this Note, there has been significant controversy surrounding section 3E1.1. Even as it is now written, section 3E1.1 offers a not too subtle reward to a defendant to plead guilty and thus punishes a defendant who forces the government to go to trial. See generally Ellen M. Bryant, Comment, Section 3E1.1 of the Federal Sentencing Guidelines: Bargaining with the Guilty, 44 CATH. U. L. REV 1269 (1995); Luke T. Dokla, Note, Section 3E1.1 Contrition and Fifth Amendment Incrimination: Is There an Iron Fist Beneath the Sentencing Guidelines' Velvet Glove?, 65 ST. JOHN'S L. REV 1077 (1991).


76 See id. at 192.

77 See USSG, supra note 24, § 5K1.1.

78 There is controversy over the fact that a prosecutor rather than the sentencing court is allowed to indirectly determine the sentence of an offender by deciding not to file a motion stating that the offender has provided sufficient assistance to warrant consideration for a downward adjustment. See generally Selya & Massaro, supra note 15 (The government has control over whether to initiate a downward departure by filing a motion for reduction of sentencing level based on substantial assistance; but the court has control over whether to grant the motion. "Thus, the government motion requirement provides prosecutors only half a loaf of control. While a prosecutor can largely rule out the possibility of a departure, she cannot conceive one unless the district court agrees
substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

The level of adjustment is to be based on a non-inclusive list of considerations including the timeliness, significance, truthfulness, and nature of the information given, as well as the risk incurred by the offender or his or her family in providing the information. In the application notes to this section, the Guidelines state:

The sentencing reduction for assistance to authorities shall be considered independently of any reduction for acceptance of responsibility. Substantial assistance is directed to the investigation and prosecution of criminal activities by persons other than the defendant, while acceptance of responsibility is directed to the defendant's affirmative recognition of responsibility for his own conduct.

This language is critical in the First Circuit's decision in Nuñez-Rodriguez because other appellate courts have used these words to confine the issue of the naming of accomplices solely to section 5K1.1 determinations.

II. ACCEPTANCE OF RESPONSIBILITY AND LIMITS TO DISCRETION

A. The First Circuit's Interpretation of Section 3E1.1

The day after the murder of Pierluisi, upon learning that the FBI was inquiring into his whereabouts, Nuñez turned himself in to the FBI and admitted his involvement in the murder and carjacking. Nuñez, however, claimed he was kidnapped by the others and was forced at gunpoint to participate in the affair. After his indictment, Nuñez refused to cooperate with the government unless he was granted total immunity from prosecution. It was not until seven months after his confession that, without the benefit of any plea agreement, Nuñez finally pled guilty to the charges, but still refused to name or identify his accomplices.
The sentencing court apparently denied Nuñez a downward adjustment to his base offense level because of his six-month delay in pleading guilty and because of his inconsistent versions of the events. The First Circuit, however, relied on statements made by the judge during the sentencing hearing and denied Nuñez a downward adjustment to his base offense level on the grounds that his refusal to name his accomplices indicated he had not genuinely accepted responsibility for his crime.84

At sentencing, the judge stated:

"A defendant who accepts responsibility must do more than [claim he was forced to participate against his will] He must come forward and identify and help authorities get the other people [a]nd therefore for those reasons I’m not accepting the two-points downward adjustment for acceptance of responsibility when he comes forward and identifies the other people, if he does that, then that might be a different story. But he’s protecting others and that’s why he has done all these things [i.e., claim he does not know and cannot identify the others involved]."85

Later, the sentencing court summarized its decision:

"[M]y point is that if anyone commits a crime with one or more persons, knowing those persons, does not come forward to the authorities, giving the names of those persons, then you cannot have a full acceptance of responsibility because that entails precisely a catharsis, a full remorse by disclosing the whole thing, being truthful and not concealing any information."86

Nuñez claimed on appeal that the sentencing court wrongly denied him a downward adjustment to his sentence because in evaluating the section 3E1.1 adjustment, the court used considerations which are relevant only to section 5K1.1.87 The First Circuit noted the disagree-

84 See id. at 17, 18.
85 Id. at 18 (quoting the trial transcript) (emphasis added by First Circuit).
86 Id. (quoting the trial transcript) (emphasis added by First Circuit).
87 See id. at 19. Nuñez also claimed he was entitled to the additional one level downward adjustment available under section 3E1.1(b) for saving the government the expense and trouble of preparing for trial by pleading guilty early in the process. This claim was rapidly dismissed by the First Circuit as frivolous based on the six month time delay between Nuñez’s indictment and his guilty plea. See id. at 17 n.2.
ment among the circuits as to the proper role of the informer criterion\textsuperscript{88} in determining an offender’s acceptance of responsibility under the Guidelines.\textsuperscript{89} The court looked to the commentary to section 3E1.1 and held that by imposing a “nonexhaustive” listing of factors to be considered by a sentencing court in determining an offender’s true acceptance of responsibility, the Commission “left sentencing courts the latitude to consider all reliable, probative indicia tending to demonstrate, or countervail, the genuineness of the particular defendant’s remorse.”\textsuperscript{90} The naming of accomplices cannot be the conclusive factor in a sentencing court’s considerations, but, must be considered as part of the “totality of the circumstances in assessing a defendant’s true motives for ‘informing’ or not ‘informing.’”\textsuperscript{91} Thus, a sentencing court would remain free to grant an offender the acceptance of responsibility adjustment if it found that his or her refusal to name accomplices was the result of genuine fear of retaliation or genuine inability to inform rather than a lack of true remorse.\textsuperscript{92} The court found no prohibition in the language of section 3E1.1 that would exclude an offender’s refusal to name his or her accomplices as a factor for consideration.

The court, however, then discussed exclusion under section 5K1.1 and admitted that “at first blush” the language of the section did not appear to lend support to its interpretation regarding consideration of the naming of accomplices.\textsuperscript{93} The court addressed the commentary to section 5K1.1 which states:

\begin{quote}
The sentencing reduction for assistance to authorities shall be considered independently of any reduction for acceptance of responsibility. Substantial assistance is directed to the investigation and prosecution of criminal activities by persons other than the defendant, while acceptance of responsibility is directed to the defendant’s affirmative recognition of responsibility for his own conduct.\textsuperscript{94}
\end{quote}

\textsuperscript{88} The First Circuit uses the term “informer criterion” as an alternative to the phrase “naming of accomplices.” Substantively, both mean the same for purposes of this Note.
\textsuperscript{89} See Núñez-Rodríguez, 92 F.3d at 19-20.
\textsuperscript{90} Id. at 20.
\textsuperscript{91} Id.
\textsuperscript{92} See id.
\textsuperscript{93} See id. at 21.
\textsuperscript{94} USSG, supra note 24, § 5K1.1 (application note 2).
This language appears to confine consideration of the naming of accomplices to determinations of whether the offender has provided substantial assistance. The court side-stepped this language by finding that the commentary acts only to require two “sequential inquiries” under sections 3E1.1 and 5K1.1, each with independent criteria. Through this analysis of the Guidelines, the sentencing court is not prohibited from balancing an offender’s naming of accomplices among several consistent and inconsistent factors demonstrative of true remorse by the offender merely because the same factor is also a criterion in another adjustment section. As an example of the reasonableness of this interpretation, the court noted an offender may name accomplices, but not in a manner or to an extent that will cause the government to petition for a section 5K1.1 reduction. In this case, it is perfectly acceptable to consider naming of accomplices as evidence of acceptance of responsibility, despite the fact that there is no consideration of a reduction to sentence based on providing substantial assistance to the authorities.

The First Circuit also addressed the fact that the 1988 version of the Guidelines specifically allowed a sentencing court “to deny a section 3E1.1 adjustment where the defendant did not identify accomplices because his criminal associations were ongoing.” This language, however, was deleted from the Guidelines by amendment in 1989. The court interpreted the 1989 change not as a shift in policy by the Commission, but rather as a recognition by the Commission that the language in sections 3E1.1 and 5K1.1 “was sufficiently clear without further elaboration” so as to negate the necessity for the original language. Despite supporting the sentencing court’s consideration of

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95 See Nuñez-Rodriguez, 92 F.3d at 21.
96 See id.
97 See id.
98 The Guidelines are published annually and reflect changes and amendments adopted by the Commission during the preceding year.
99 Id. at 22.
100 See id.
101 The court noted an earlier decision where it stated “[a] court should presume that [the] Commission did not intend substantive change where guideline amendments are unaccompanied by language declaring intention to abandon earlier sentencing practice.” Id. (citing United States v Campbell, 61 F.3d 976, 985-86 (1st Cir. 1995), cert. denied, 116 S. Ct. 1556 (1996)).
102 Id. at 22. Other circuits have not specifically addressed the change in the Guidelines’ language although there is a clear argument that the change reflects an intention by the Commission not to have the naming of accomplices as part
the naming of accomplices in a section 3E1.1 adjustment determination, the First Circuit vacated Nuñez's sentence and remanded for resentencing on the grounds that the language of the lower court "remain[s] open to the plausible understanding that a defendant must always 'inform' on his accomplices in order to qualify for a section 3E1.1 adjustment, regardless of any other circumstances in the case." The First Circuit explained that, while the naming of accomplices is a factor which may be considered as evidence of genuine acceptance of responsibility, it cannot be used as a mandatory requirement or as the sole determinant.

The First Circuit's interpretation of section 3E1.1 is supported by the Fifth Circuit. In United States v. Tellez, the Fifth Circuit upheld the sentencing court's denial of a downward adjustment on the grounds that by failing to identify the person who had hired him, the offender demonstrated a lack of "'personal responsibility for the criminal conduct.'" However, that court has not addressed the specific language of sections 3E1.1 or 5K1.1, or in any detail, justified its interpretation of the Guidelines regarding these sections.

B. Other Interpretations of Section 3E1.1

The Ninth Circuit in United States v. McKinney was faced with the same issue as the First Circuit in Nuñez-Rodriguez. McKinney confessed to police his involvement in a bank robbery, but refused to name anyone else involved in the crime. The Ninth Circuit reversed

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103 Id. at 22-23, 25.
104 See id. at 23.
105 United States v Tellez, 882 F.2d 141 (5th Cir. 1989).
106 Id. at 143.
107 See id., see also United States v Barreto, 871 F.2d 511, 513 (5th Cir. 1989) ("[R]efusal to identify the sources of the cocaine demonstrate the inadequacies in [defendant's] asserted acceptance of accountability for his criminal activity").
109 See id. at 850. In McKinney, the defendant tried, but was denied an opportunity by the trial court to plead guilty before his trial began. The Ninth Circuit found that section 3E1.1 clearly can be applied to offenders even if they do not plead guilty if they show adequate acceptance of responsibility. See id. at 850-53.
the sentencing court's refusal to grant a two level reduction to the offender. It declared that section 3E1.1 "focuses on the defendant's sincere remorse for his own conduct, not his assistance to authorities in incriminating others" and "[i]ncrimination of codefendants is not the focus of section 3E1.1 acceptance of personal responsibility is." The court added: "A defendant's degree of assistance in the prosecution of a codefendant is relevant only to his entitlement for a departure for substantial assistance under § 5K1.1." The Ninth Circuit repeated this position in United States v. Vance. Vance pled guilty to importing methamphetamines, but refused to cooperate any further with law enforcement authorities. In reversing the sentencing court's refusal to award a three level reduction under section 3E1.1, the court said:

Had Vance agreed to discuss the offense conduct with law enforcement authorities, and perhaps revealed and agreed to testify against his supplier, he might have earned a prosecutor's recommendation for a downward departure [under section 5K1.1] That is not closely related to contrition however. A cunning but not contrite defendant may buy his way out of trouble by providing evidence against someone else, and an entirely contrite defendant may out of fear, ignorance or other reason fail to provide assistance.

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10 See id. at 855.
11 Id. at 854.
12 Id. at 854 n.10.
13 Id. at 854. In the next sentence the court says: "Where the defendant's refusal to assist authorities in the prosecution of his codefendants does not detract from his clear contrition for his own actions, he is still entitled to the acceptance of responsibility reduction." Id. (emphasis added). The First Circuit implied this phrase may leave room to find Núñez-Rodríguez compatible with McKinney; however, it is clear that the court recognized the main thrust of the Ninth Circuit's position was contrary to its own. See United States v. Núñez-Rodríguez, 92 F.3d 14, 22 (1st Cir. 1996).
14 United States v. Vance, 62 F.3d 1152, 1157 (9th Cir. 1995).
15 See id. at 1156-57
16 Id. at 1158. The First Circuit addressed the latter part of this statement directly by attributing to the sentencing court the ability to look to an offender's legitimate or illegitimate reasons for naming an accomplice so as to avoid rewarding a "cunning" offender or punishing a genuinely remorseful, but fearful, offender. See Núñez-Rodríguez, 92 F.3d at 20.
In *United States v. Leonard*, the Second Circuit agreed with the Ninth Circuit that the language of section 5K1.1 affirmatively limits the discretion of the sentencing court in the factors it may consider in determining the genuineness of an offender's acceptance of responsibility. Leonard was denied a section 3E1.1 reduction in sentence because, after truthfully admitting his own role in the affair, he gave misleading information about others involved in a heroine trafficking conspiracy. The court rejected this use of section 3E1.1 and held that the section "refers only to the defendant's 'own misconduct' and his 'own involvement'". Once it is determined that a defendant has completely and truthfully disclosed his criminal conduct, the inquiry with respect to section 3E1.1(b)(1) is complete.

The Sixth Circuit is undecided as to the amount of discretion available to the sentencing court. In *United States v. Cross*, the court said with regard to the naming of accomplices or sources, "we are uncertain that this is an appropriate consideration in determining whether to award a two-point level reduction for acceptance of responsibility. It may be more properly considered in section 5K1.1." The Seventh Circuit, while generally supporting the McKinney interpretation, has likewise been vague in its interpretation of section 3E1.1. In *United States v. Escobar-Mejia*, the court remanded a cocaine distribution case for "more formal findings in light of the difference between § 3E1.1 and § 5K1.1" because it was unclear if the sentencing court had mistakenly "confused the standards of § 5K1.1 with those of § 3E1.1" in a section 3E1.1 reduction determination. However, in the next paragraph, the court said: "Demand for information about sources and colleagues also may be consistent with the proper implementation of § 3E1.1."

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117 United States v. Leonard, 50 F.3d 1152 (2d Cir. 1995).
118 See id. at 1154, 1158. The Second Circuit remanded the case for further proceedings on Leonard’s contention that the government wrongly failed to file a section 5K1.1 motion on his behalf. See id. at 1156–58.
119 Id. at 1159 (citing United States v. McKinney, 15 F.3d 849, 854 (9th Cir. 1994)).
120 United States v. Cross, 900 F.2d 66 (6th Cir. 1990).
121 Id. at 70 n.1.
122 United States v. Escobar-Mejia, 915 F.2d 1152 (7th Cir. 1990).
123 Id. at 1154.
124 Id. at 1153.
125 Id. (citing United States v. Tellez, 882 F.2d 141, 143 (5th Cir. 1989); United States v. Gordon, 895 F.2d 932, 935 (4th Cir. 1990)). The court's
CONCLUSION

The tension inherent in balancing the goals of discretion by individual courts and uniformity in the federal sentencing system is at the heart of Núñez-Rodriguez and the resulting circuit split. The First Circuit finds in the Guidelines a grant of discretion to the sentencing court to use the facts before it to decide whether an offender is truly remorseful for his crimes. Other circuits find that the language of the Guidelines limits the sentencing court more narrowly in determining acceptance of responsibility; discretion is thus displaced in favor of the Guidelines' requirement for uniformity.

Since their adoption in the late 1980s, the Guidelines have been a source of frustration for many federal sentencing courts. These courts feel the Guidelines unnecessarily restrict their discretion to make the punishment fit the offense and the offender. Sentencing courts rightly resist becoming "judicial accountants" who uncritically implement unbending formulas and grids. Because a sentencing court is in the best position to understand the facts and circumstances of a particular case, it is a reasonable grant of discretion to allow that court to consider an offender's naming of his or her accomplices as evidence of true acceptance of responsibility. The goal underlying the First Circuit's decision in Núñez-Rodriguez is thus desirable sentencing policy. The First Circuit achieved this policy goal by expanding the words "not limited to" in section 3E1.1 to allow the naming of accomplices to be an element in determining an offender's sincerity in accepting responsibility.

Apparent meaning is that if a defendant claims as evidence of his genuine remorse that he had little role in the criminal affair, it is fair for the court to ask about the others involved so they might confirm or deny the truth of this statement. Similarly, in McKinney the Ninth Circuit acknowledged that a refusal to fully cooperate may "detract from [a defendant's] clear contrition for his own actions." United States v. McKinney, 15 F.3d 849, 854 (9th Cir. 1994), cert. denied, 116 S. Ct. 162 (1995). See supra notes 111 & 113.

But see generally MacCarthy & Murnaghan, supra note 56 (arguing that the Guidelines are not as inherently negative toward departures as is widely believed).


USSG, supra note 24, § 3E1.1 (application note 1).
The First Circuit, however, ignored the plain language of both section 3E1.1 — "[a] defendant may remain silent in respect to relevant conduct beyond the offense of conviction"129 — and section 5K1.1 — "acceptance of responsibility is directed to the defendant's affirmative recognition of responsibility for his own conduct."130

With the enactment of the Guidelines, Congress demonstrated its desire to establish uniform sentences in the federal criminal justice system. The Sentencing Commission, through its creation of the Guidelines, sought to strike a balance between uniformity and discretion. To do so, the Guidelines contain features, such as adjustments and departures, which require the interpretation and best judgment of the courts in order to be effectively implemented. Ultimately, however, if the Guidelines are to maintain their legitimacy, limits must be placed on the range of interpretation available in individual cases. The clear language of the Guidelines must be respected. The First Circuit's interpretation of the provisions of the Guidelines in Nuñez-Rodriguez is beyond the clear language of the Guidelines and so threatens the intent of uniform federal sentencing. The First Circuit's interpretation should be rejected as contrary to the plain language of the statute. The interpretation given by the Ninth Circuit in McKinney regarding application of sections 3E1.1 and 5K1.1 is the more natural reading of the language of the Guidelines. In the future, courts interpreting the relationship of sections 3E1.1 and 5K1.1 should follow the Ninth Circuit's rule.

There remains, though, a means to grant discretion to a sentencing court in determining an offender's sincerity in acceptance of responsibility. Regardless of the conflicting goals of the Guidelines, one of their design strengths is that they are not static and can evolve through amendment by the Commission.131 Congress intended that the Commission would collect data on the Guidelines' use in practice. This data would be analyzed and used to revise the Guidelines.132 The Commission should use its authority to amend the Guidelines to allow sentencing courts the discretion to use the naming of accomplices in determining section 3E1.1 adjustments.133 Such an amendment would provide a reasonable degree of discretion to sentencing courts to determine whether an offender has truly accepted responsibility for his or her crimes. It

129 Id. § 3E1.1 (application note 1(a)) (1995).
130 Id. § 5K1.1 (application note 2) (1995) (emphasis added).
132 See Breyer, supra note 10, at 8.
133 See id.
would also end the current lack of uniformity in sentencing resulting from
the circuit split regarding the interpretation of section 3E1.1. The kind of
disparity which now exists in sentencing-based on the jurisdiction in
which the offender is sentenced is, of course, the very situation the
Guidelines were designed to avoid.