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Specific Crime vs. Criminal Ways: Criminal Conduct and Responsibility in Rule 3E1.1

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Specific Crime vs. Criminal Ways: Criminal Conduct and Responsibility in Rule 3E1.1

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I. INTRODUCTION

The United States Sentencing Commission (“Sentencing Commission”) drafted Rule 3E1.1 with an inherent ambiguity, one that concerns both the Rule’s purpose and design. Rule 3E1.1 allows for a reduction in sentence if a criminal “accepts responsibil-

ity" for his offense.¹ As result of the Rule's ambiguous language, prior tensions in interpretation of its meaning have spilled over into the current debate over sentence reductions.

The inherent ambiguity results from the Rule's genesis. The Sentencing Commission enacted the Rule with the purpose of increasing predictability in sentencing by reducing judicial discretion.² Before the enactment of the Rule, mitigating and aggravating circumstances allowed for a great degree of judicial discretion, and it was this lack of uniformity that the Sentencing Commission sought to lessen.³

Rule 3E1.1 also sought to ease the burden on the over-taxed criminal justice system by encouraging guilty pleas.⁴ The Sentencing Commission initially feared, however, that granting an automatic reduction in sentence for pleading guilty would run afoul of the doctrine of unconstitutional conditions.⁵ Thus, their solution was not to encourage criminal defendants to forgo their Sixth Amendment right to trial and plead guilty, but rather to reward them for general cooperation and contrition. By creating a system in which criminal defendants were merely denied a reduction for failing to cooperate with authorities, the Sentencing Commission sought to encourage criminal defendants to plead guilty, while at the same time avoiding the problem of unconstitutional conditions.⁶

The resulting Rule achieved both goals. It encouraged guilty pleas by reducing a defendant's sentence if he "accepted responsibility" for his criminal conduct.⁷ It also increased predictability by

1. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(a) (1998).

2. See 28 U.S.C. § 991(b) (1994) (discussing the establishment and purposes of the United States Sentencing Commission). Congress established the Sentencing Commission, in part, to "provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices." § 991(b)(1)(B).

3. See *id.* § 991(b)(1)(B).

4. See Michael M. O'Hear, *Remorse, Cooperation, and "Acceptance of Responsibility": The Structure, Implementation, and Reform of Section 3E1.1 of the Federal Sentencing Guidelines*, 91 Nw. U. L. Rev. 1507, 1513 (1997); see also U.S. SENTENCING GUIDELINES MANUAL § 3E1.1, Application Note 2. ("This adjustment 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, is convicted, and only then admits guilt and expresses remorse.")

5. See O'Hear, *supra* note 4, at 1513. The doctrine of "unconstitutional conditions" holds "that the government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected [liberties].'" *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996) (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)).

6. See O'Hear, *supra* note 4, at 1513.

7. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(a).

creating an objective list of criteria that district courts would use to determine whether a defendant had in fact "accepted responsibility" for his crime.⁸

The beauty of Rule 3E1.1 is that it has the added benefit of stressing, and perhaps even expediting, the rehabilitation of criminals. It rewards those criminals who undertake such socially redeeming measures as making post-arrest rehabilitative efforts,⁹ cooperating with the police, and compensating victims of crime.¹⁰ Those who fail to demonstrate the acceptable levels of contrition are not punished for their lack of remorse; rather, they simply do not receive the reduction.¹¹

With the Rule's initial inclusion in the United States Sentencing Guidelines ("Sentencing Guidelines") came a fundamental question regarding its very purpose: Did Rule 3E1.1 seek to reward a criminal for accepting responsibility for his *specific crime*, or did it instead look to reward a criminal for accepting responsibility for his *criminal ways in general*? Indeed, the circuits were divided as to whether a defendant could earn the reduction only by admitting to every criminal wrongdoing of which he was aware, or whether the Rule allowed the reduction if he simply admitted only to the offense for which he was charged.¹²

Faced with the split, the Sentencing Commission sought to clarify Rule 3E1.1 in a 1992 amendment that changed the wording of the Rule.¹³ The Sentencing Commission altered the Rule to require that a criminal only accept responsibility for his charged offense, as opposed to his general acts of criminal conduct.¹⁴ As a re-

8. *Id.* For a list of these factors, see *infra* text accompanying note 37.

9. The Guidelines themselves recognize drug treatment and counseling as the two forms of rehabilitative efforts that satisfy Rule 3E1.1. See U.S. SENTENCING GUIDELINES MANUAL § 3E1.1, Application Note 1(g). The effort must be proactive in some way; merely "staying out of trouble" after an offense does not satisfy this requirement. See *Lettieri v. United States*, No. 96 C 4370, 1999 WL 116205, at *3 (N.D. Ill. Mar. 2, 1999) ("We do not believe, however, that staying out of trouble in prison is the kind of rehabilitative effort that indicates acceptance of responsibility within the meaning of the sentencing guidelines.").

10. See UNITED STATES SENTENCING GUIDELINES §3E1.1, Application Note 1(g).

11. See, e.g., *United States v. Gordon*, 895 F.2d 932, 936-37 (4th Cir. 1990) (holding that a defendant is not penalized for failing to accept responsibility, since the reduction may be considered as a mitigating factor).

12. Compare *id.* at 936 (holding that a defendant may only earn the reduction by accepting responsibility for all his criminal conduct), with *United States v. Oliveras*, 905 F.2d 623, 625 (2d Cir. 1990) (holding that a defendant need only accept responsibility for those crimes with which he is charged in order to earn the reduction).

13. UNITED STATES SENTENCING GUIDELINES, ACCEPTANCE OF RESPONSIBILITY WORKING GROUP 1 (1998).

14. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(a).

sult, this change implied that a criminal need not admit to all his crimes in order to receive the reduction.¹⁵

Despite the Sentencing Commission's attempt at clarification, the controversy surrounding the meaning of Rule 3E1.1 remains today, if in different form. Indeed, the new debate centers around the Application Notes following the Rule. One of the objective indicia of acceptance of responsibility is a criminal defendant's "voluntary termination or withdrawal from criminal conduct or associations."¹⁶ This factor focuses on whether a criminal defendant commits a crime between the time of his conviction or guilty plea and the time of his sentencing. Mirroring the previous debate, the current question centers around whether this Rule applies to *all* crimes committed by the defendant after conviction and before sentencing, or simply to those crimes that are related to the offense with which the defendant has been charged.¹⁷

The majority of circuits have held that any crime that takes place between plea and sentencing may be used in the acceptance-of-responsibility calculation.¹⁸ Conversely, the Sixth Circuit alone has held that "voluntary termination or withdrawal from criminal conduct" means that only those crimes which are "related to the underlying offense" may be used to determine acceptance of responsibility.¹⁹

This Note seeks to demonstrate that the Sixth Circuit's approach is correct, and that only those crimes reasonably related to an individual's underlying offense should be used in determining a defendant's acceptance of responsibility under Rule 3E1.1. The Sixth Circuit based its decision on the premise that acceptance of responsibility is inherently discrete. Under the Rule, criminals must accept responsibility only for those crimes with which they are presently charged, and not for additional crimes, future crimes, or for their criminal dispositions in general.²⁰ Moreover, since these defendants are not accepting responsibility for future or unrelated

15. See *United States v. Pace*, 17 F.3d 341, 344 (11th Cir. 1994) ("[T]he change in [Rule] 3E1.1(a) . . . was made to ensure that the district court did not deny a defendant a decrease solely because the defendant did not voluntarily admit to all criminal conduct.").

16. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1, Application Note 1(b).

17. See *United States v. Ceccarani*, 98 F.3d 126, 129 (3d Cir. 1996) (noting the Sixth Circuit's holding that acceptance of responsibility considers only conduct related to the charged offense, while other circuits have held that any crime may be considered).

18. See *infra* text accompanying notes 58-63.

19. *United States v. Morrison*, 983 F.2d 730, 735 (6th Cir. 1993).

20. See *id.*

crimes, only a repetition of the same crime would demonstrate a failure to accept responsibility and thereby negate the reduction.

This Note first shows that the concept followed by the Sixth Circuit is clearly implied in the Sentencing Guidelines themselves. Prior to the 1992 amendment of Rule 3E1.1, the circuits were divided as to whether a criminal must accept responsibility for any crime of which he was aware, or only for the specific crime for which he was charged.²¹ The wording of Rule 3E1.1 was amended in 1992 to settle the question—criminals need only accept responsibility for the crime for which they are charged, and not for any other criminal activity in which they are involved.²² This amendment reflects the view that when a defendant accepts responsibility for his criminal conduct, he is owning up only to the instant crime with which he is charged. As a result, only the criminal's repetition of the same underlying crime should indicate a failure to accept responsibility.

This Note then examines the underlying policies behind Rule 3E1.1. The Rule itself contains several explicit limitations that buttress the logic of the Sixth Circuit. The Application Notes following the Rule limit the scope of what a judge may consider in the acceptance of responsibility determination. These Application Notes all focus on post-arrest conduct that is, in some manner, reasonably related to the underlying offense.²³ Furthermore, the Application Notes following Rule 3E1.1 also reward (and therefore promote) both contrition and cooperation on the part of the criminal defendant.²⁴ The approach of the Sixth Circuit is consistent with those policies, and this consistency may ultimately advance the Rule's goals.

This Note concludes with the argument that the approach of the Sixth Circuit is more consistent with the overall purpose and aim of the Sentencing Guidelines. The Sentencing Guidelines were created in an effort to reduce disparities in judicial sentencing practices and to treat similarly situated criminals alike.²⁵ This Note argues that the Sixth Circuit's approach promotes greater predictability in sentencing. With a clear standard detailing what subsequent behavior may be used in the acceptance of responsibility de-

21. See *infra* text accompanying notes 76-82.

22. See U.S. SENTENCING GUIDELINES MANUAL § 3E1.1, Application Note 1(a) (1998).

23. See *id.*

24. See O'Hear, *supra* note 4, at 1512.

25. See 28 U.S.C. § 991(b)(1)(B) (1994) (stating that the purpose of the Guidelines is to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct).

termination, sentencing judges will be more inclined to treat like criminals alike. As such, the Sixth Circuit approach may also reduce instances of abuse of judicial discretion. Criminals who plead guilty in reliance on a reduction will be less likely to lose that reduction for committing minor or petty crimes. In essence, this Note concludes that the approach of the Sixth Circuit adds vital consistency and predictability to sentencing determinations.

II. LEGAL BACKGROUND

A. *The Structure of the Guidelines*

Sentencing for crimes in federal jurisdictions is carried out pursuant to the Sentencing Guidelines.²⁶ The Sentencing Guidelines were designed to serve as a rational, objective structure that would eliminate much disparity in sentencing while still leaving room for judicial discretion in select circumstances.²⁷

Under the Sentencing Guidelines, sentences are determined according to a point system.²⁸ Points are calculated through the use of a sentencing table—a grid containing 258 boxes.²⁹ On the horizontal axis is the “Criminal History Category,” which adjusts the severity of the sentence based on the offender’s past conviction record.³⁰ The vertical axis is labeled the “Offense Level,” and it “reflects a base severity score for the crime committed, as further adjusted for those aspects of the crime that the Guidelines deem relevant to sentencing.”³¹ In total, the grid contains forty-three offense levels and six criminal history categories.³² The potential sentence is determined by the box at which the “Offense Level” axis and the “Criminal History” axis intersect.³³

26. See U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(a). The creation of the Sentencing Guidelines was authorized by the Sentencing Reform Act of 1984. See 28 U.S.C. § 991 (1994).

27. See Chantale LaCasse & A. Abigail Payne, *Federal Sentencing Guidelines and Mandatory Minimum Sentences: Do Defendants Bargain in the Shadow of the Judge?*, 42 J.L. & Econ. 245 (1999).

28. See U.S. SENTENCING GUIDELINES MANUAL, pt. A (“Introduction”).

29. See James M. Anderson et al., *Measuring Interjudge Sentencing Disparity: Before and After the Sentencing Guidelines*, 42 J.L. & Econ. 271, 277 (1999).

30. *Id.*

31. *Id.*

32. See U.S. SENTENCING GUIDELINES MANUAL, pt. A, § 4(h) (“Introduction”).

33. Anderson et al., *supra* note 29, at 278.

Rule 3E1.1 is one of only a few ways in which a judge may depart from the sentence arrived at in using the grid.³⁴ Under Rule 3E1.1, a judge may reduce a defendant's "score" based on a variety of mitigating factors.³⁵ The Rule allows for a reduction of two points from the defendant's final score in the event that he accepts responsibility for his criminal offense.³⁶ The Application Notes to the Rule list eight factors that should be weighed by the sentencing judge in order to determine whether a defendant has accepted responsibility.³⁷ These factors include:

(a) truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable . . . ; (b) voluntary termination or withdrawal from criminal conduct or associations; (c) voluntary payment of restitution prior to adjudication of guilt; (d) voluntary surrender to authorities promptly after commission of the offense; (e) voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense; (f) voluntary resignation from the office or position held during the commission of the offense; (g) post-offense rehabilitative efforts (e.g., counseling or drug treatment); and (h) the timeliness of the defendant's conduct in manifesting the acceptance of responsibility.³⁸

While the drafters of the Sentencing Guidelines viewed these factors as "appropriate considerations," a judge is not necessarily limited to the factors in his or her determination of acceptance of responsibility.³⁹ The Application Notes suggest that if a defendant pleads guilty and takes "one or more of [these] actions . . . (or some equivalent action)," he is then entitled to a reduction under the Rule.⁴⁰

B. The Split in Interpretation: The Meaning of Voluntary Termination from Criminal Conduct

Section (b) of the Application Notes lists "voluntary termination or withdrawal from criminal conduct or associations" as a means of earning the reduction.⁴¹ As such, the statutory meaning

34. Section 3 of the Sentencing Guidelines details adjustments to sentencing scores. Section 3A details victim related adjustments, section B provides for adjustments related to the defendant's role in the offense, section C details adjustments related to whether the defendant has engaged in obstruction, and section D provides for adjustments when the defendant is convicted of multiple counts of a crime. U.S. SENTENCING GUIDELINES MANUAL, §§ 3A, 3B, 3C, 3D.

35. See U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(a).

36. *Id.* Part (b) of Rule 3E1.1 also allows for an additional decrease of one level if the defendant has qualified for a reduction under part (a) and has an offense level greater than sixteen. *Id.* § 3E1.1(b).

37. *Id.* § 3E1.1, Application Note 1.

38. *Id.*

39. See *id.*

40. *Id.*

41. See *id.* § 3E1.1, Application Note 1(b).

accorded this section has been the source of division among the circuits. The minority view regarding the extent to which criminal activity between plea and sentencing may be used to determine acceptance of responsibility appeared first in the case of *United States v. Morrison*.⁴² The defendant in *Morrison* had previously been convicted of a felony, and was arrested for violating a federal handgun law prohibiting felons from owning firearms.⁴³ In the time between his guilty plea⁴⁴ and his sentencing, police again arrested the defendant and charged him with attempted theft.⁴⁵ Moreover, the defendant also tested positive for drug use at this time.⁴⁶ During sentencing for his federal handgun violation, the defendant sought a reduction under Rule 3E1.1.⁴⁷ The defendant claimed that he had taken responsibility for his violation of the federal handgun law.⁴⁸ The district court denied the defendant's request on the grounds that his criminal conduct between the time of his plea and the time of his sentencing indicated that he had not accepted responsibility for the federal handgun violation.⁴⁹

The Court of Appeals for the Sixth Circuit subsequently focused on the district court's denial of a reduction under Rule 3E1.1.⁵⁰ In doing so, the Court addressed the larger issue of whether crimes unrelated to the original offense may properly be considered in determining acceptance of responsibility.⁵¹ The court held that "voluntary termination or withdrawal from criminal conduct' [referred only] to that conduct which [was] related to the underlying offense."⁵² The court interpreted the sentence to mean voluntary termination or withdrawal from that type of criminal conduct. The conduct could be the "same type as the underlying offense, . . . the motivating force behind the underlying offense, related to actions toward government witnesses concerning the underlying offense, . . . or otherwise [having a] strong link with the

42. *United States v. Morrison*, 983 F.2d 730 (6th Cir. 1993).

43. *Id.* at 731.

44. The defendant entered into a plea agreement with federal prosecutors. *Id.*

45. *Id.* at 733.

46. *Id.*

47. *Id.* at 731.

48. *Id.* The defendant asserted in his appeal that "he was candid about his actions, was cooperative with authorities, and pleaded guilty." *Id.* at 733.

49. *Id.*

50. *Id.*

51. *See id.* at 733-34.

52. *Id.* at 735 (quoting U.S. SENTENCING GUIDELINES MANUAL § 3E1.1, Application Note 1(a) (1998)).

underlying offense.”⁵³ Hence, criminal conduct unrelated to the original offense may not be used to determine whether the defendant has accepted responsibility for his crime.⁵⁴

The underlying foundation of the *Morrison* court’s logic was that Rule 3E1.1 only requires that a criminal accept responsibility for the specific crime with which he is charged, and not for his “criminal disposition” or for his illegal conduct in general.⁵⁵ The court was persuaded by the rationale that “an individual may be truly repentant for one crime yet commit other unrelated crimes.”⁵⁶ The court’s requirement that the additional offense be related to the underlying crime allows for a case-by-case analysis of the defendant’s contrition, while also precluding generalizations in determining the reduction.⁵⁷ To count any criminal activity in the acceptance of responsibility calculation would force sweeping judgments as to the defendant’s actual contrition as well as to his criminal predilection. Indeed, the Sixth Circuit felt that “either the defendant is no longer of a criminal disposition, or he still is.”⁵⁸

In his separate opinion, Judge Kennedy concluded that the broad language of Rule 3E1.1 made no specific reference to any requirement that the crime be related to the underlying offense.⁵⁹ Kennedy felt that the district court should have sole discretion in determining whether a crime committed between plea and sentencing illustrates a failure to accept responsibility for the underlying offense.⁶⁰

Other circuits have disagreed with the *Morrison* approach. In *United States v. McDonald*, the Seventh Circuit held that any criminal activity that occurs between plea and sentencing is evi-

53. *Id.*

54. *See id.* The Sixth Circuit recently held that failing to appear at the sentencing proceedings and resisting arrest are both reasonably related to an underlying offense of federal drug violations. *United States v. Scott*, No. 98-5792, 1999 WL 701899, at *3 (6th Cir. Sept. 2, 1999) (unpublished table decision).

55. *See Morrison*, 983 F.2d at 735.

56. *Id.*

57. *See id.* at 734.

58. *Id.*

59. *Id.* at 736 (Kennedy, J., concurring in part and dissenting in part) (“[Rule 3E1.1] does not include the word ‘related’ before the phrase ‘criminal conduct,’ which could quite easily have been done had that been the Sentencing Commission’s intent. Instead, the clear import of the language is to include *all* criminal conduct and associations.”).

60. *Id.* (“This is not to say a murderer caught stealing gum cannot receive the acceptance of responsibility reduction. It is simply to state that a district court might or might not find the theft of chewing gum in particular circumstances illuminative of whether the murderer has accepted responsibility for her actions. I believe such a determination should rest with the district court.”).

dence of defendant's failure to accept responsibility for his crime.⁶¹ Likewise, the Third Circuit in *United States v. Ceccarani*,⁶² the Fourth Circuit in *United States v. Farley*,⁶³ the First Circuit in *United States v. O'Neil*,⁶⁴ the Eleventh Circuit in *United States v. Pace*,⁶⁵ and the Fifth Circuit in *United States v. Watkins*⁶⁶ all held that any criminal activity between plea and sentencing may be used in determining acceptance of responsibility. Each court reasoned that the broad language of Rule 3E1.1 makes no specific reference to any requirement that subsequent crimes be reasonably related to the underlying offense.⁶⁷ Hence, under the majority view, any crime committed between plea and sentencing may be used in the acceptance of responsibility calculation.⁶⁸

The Sixth Circuit has repeatedly affirmed its view from *Morrison* that "voluntary . . . withdrawal from criminal conduct" requires that any subsequent crime be reasonably related to the underlying offense.⁶⁹ For instance, the court has held that repeated drug use while awaiting sentencing for a drug conviction and repeated assault while awaiting sentencing for an assault conviction are both reasonably related to their underlying crimes, thus precluding the defendant from earning the Rule 3E1.1 reduction.⁷⁰

61. *United States v. McDonald*, 22 F.3d 139, 144 (7th Cir. 1994) (holding that the defendant's use of marijuana while awaiting trial indicated that he had not accepted responsibility for his crime of aiding and abetting counterfeiting).

62. *United States v. Ceccarani*, 98 F.3d 126, 130 (3d Cir. 1996) (holding that defendant's drug use indicated failure to accept responsibility for his crime of unlawful possession and disposal of a firearm).

63. *United States v. Farley*, No. 94-5624, 1995 WL 298096, at *1 (4th Cir. May 17, 1995) (unpublished table decision) (holding that defendant's drug use indicated failure to accept responsibility for his crime of conspiracy).

64. *United States v. O'Neil*, 936 F.2d 599, 600 (1st Cir. 1991) (holding that a defendant's subsequent drug use indicated a failure to accept responsibility for his crime of mail fraud).

65. *United States v. Pace*, 17 F.3d 341 (11th Cir. 1994) (holding that defendant's subsequent drug use indicated failure to accept responsibility for his crime of conspiracy to commit fraud).

66. *United States v. Watkins*, 911 F.2d 983, 985 (5th Cir. 1990) (determining that defendant's subsequent drug use indicated a failure to accept responsibility for his crime of passing forged treasury checks).

67. See, e.g., *Ceccarani*, 98 F.3d at 130 (holding that the language of Rule 3E1.1 is general and does not specify that the appropriate considerations include only conduct related to the underlying offense).

68. See *Pace*, 17 F.3d at 343 (noting that the "voluntary withdrawal from criminal conduct" factor "is phrased in general terms and does not specify that the defendant need only refrain from criminal conduct associated with the offense of conviction in order to qualify for the reduction").

69. For the original proposition, see *Morrison*, 983 F.2d at 735.

70. See *United States v. Askew*, No. 97-6278, 1999 WL 236187, at *1 (6th Cir. Apr. 14, 1999) (unpublished table decision) (holding that use of cocaine while awaiting sentencing was reasonably related to the underlying crime of cocaine possession); *United States v. Smith*, No. 94-6113,

The Sixth Circuit has, however, broadened its definition of what crimes are "reasonably related" to the underlying offense. In *United States v. Bordayo*, the court held that the defendant's commission of several alcohol related crimes while awaiting sentencing was reasonably related to the underlying offense of conspiracy to import marijuana.⁷¹ The court justified its result by noting that *Morrison* divided crimes committed while awaiting sentencing into two categories: those which are "wholly distinct" from the underlying offense, and those which are not.⁷² Thus, because the court found that the alcohol-related crimes were not "wholly distinct" from the drug-related conviction, it held that the defendant had not voluntarily withdrawn himself from criminal conduct.⁷³ Despite this broadening notion of "reasonably related" crimes, however, the Sixth Circuit has given no indication that it will formally change its interpretation of Rule 3E1.1 as delineated in *Morrison*.⁷⁴

III. SPECIFIC CRIME VS. CRIMINAL WAYS IN RULE 3E1.1

At first glance, it appears that the Sixth Circuit's decision in *Morrison* is a curious one. As the majority of circuits have pointed out, the language in Application Note 1(b) following Rule 3E1.1 clearly states that "voluntary withdrawal from criminal conduct or associations" is a relevant factor in determining whether a defendant has accepted responsibility.⁷⁵ There is no indication within the plain meaning of the text that only those crimes that are reasonably related to the underlying offense may be considered by the court.⁷⁶

Despite this clear language to the contrary, the Sixth Circuit gave only a cursory explanation of its conclusion in *Morrison*. The court briefly states, "[w]e hold that acceptance of responsibility, as

1996 WL 20501, at *1-2 (6th Cir. Jan. 18, 1996) (unpublished table decision) (holding that defendant's assault on a roommate while awaiting sentencing was reasonably related to the underlying crime of assaulting a national park ranger). Both of these cases illustrate the Sixth Circuit's focus on the secondary crimes themselves and not on the extrinsic details surrounding the crimes.

71. *United States v. Bordayo*, No. 93-1654, 1994 WL 198187, at *2 (6th Cir. May 19, 1994).

72. *Id.*

73. *See id.*

74. *See, e.g., id.*

75. *See, e.g., United States v. Ceccarani*, 98 F.3d 126, 129 (3d Cir. 1996) ("[Application] note 1(b) is phrased in general terms and should be interpreted to include criminal conduct committed since the underlying offense, even of a different character.").

76. *See supra* text accompanying note 38.

contemplated by the United States Sentencing Commission, is 'acceptance of responsibility for his offense' . . . not for 'illegal conduct' generally."⁷⁷ By so holding, the Sixth Circuit adopted the idea that, in order for a defendant to earn a reduction under Rule 3E1.1, he need only accept responsibility for the specific crime with which he was charged.⁷⁸ Under the Sixth Circuit's view, a reduction under Rule 3E1.1 does not hinge on whether a criminal defendant accepts responsibility for his criminal nature in general, but instead depends on whether the defendant consciously and affirmatively accepts responsibility for the specific offense with which he is charged.⁷⁹ Only a repetition of this offense would indicate that the defendant has not accepted responsibility for his crime.⁸⁰

In spite of the court's cursory explanation of its methodology, the means by which the Sixth Circuit arrived at this understanding of Rule 3E1.1 were not through judicial fancy. Rather, the Sixth Circuit's conclusion resulted from both the major split among the circuits as to the core meaning of Rule 3E1.1 and the eventual amendment to the Rule itself.

A. *The Background for the Sixth Circuit's Decision*

Prior to 1992, a split existed among the circuits as to the fundamental meaning and requirements of Rule 3E1.1. Before its amendment, the Rule had allowed a sentencing reduction "[i]f a defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his *criminal conduct*."⁸¹ The circuits were divided as to whether the Rule required a defendant to accept responsibility for crimes other than those to which he had plead guilty or been found guilty.⁸² In application, the courts questioned whether they were required to deny a defendant a reduction if he refused to admit to any and all crimes with which he had not

77. *United States v. Morrison*, 983 F.2d 730, 735 (6th Cir. 1993).

78. *See id.*

79. *See id.*

80. *See id.*

81. U.S. SENTENCING GUIDELINES MANUAL, app. C ("Amendments to the Sentencing Guidelines Manual of October of 1987") (1998) (emphasis added).

82. *Compare* *United States v. Oliveras*, 905 F.2d 623, 629 (2d Cir. 1990) (interpreting Rule 3E1.1 as applying to defendants who accept responsibility "for conduct included in those counts to which he has pled guilty") *with* *United States v. Gordon*, 895 F.2d 932, 936 (4th Cir. 1990) (holding that a defendant must accept responsibility for all his criminal conduct in order to earn a reduction under 3E1.1).

yet been charged.⁸³ The First Circuit in *United States v. Perez-Franco*,⁸⁴ the Second Circuit in *United States v. Oliveras*,⁸⁵ and the Ninth Circuit in *United States v. Piper*⁸⁶ all determined that the acceptance of responsibility reduction of Rule 3E1.1 only required individuals to accept responsibility for those crimes with which they had been charged. These courts reasoned that criminals enjoy a Fifth Amendment privilege against self-incrimination in sentencing.⁸⁷ To condition the receipt of a benefit (in this case, a reduction in sentence) on the refusal to invoke one's Fifth Amendment privileges violated the doctrine of unconstitutional conditions.⁸⁸ These three circuits found that the scope of judicial inquiry in a Rule 3E1.1 reduction was necessarily limited to a determination of whether the defendant had accepted responsibility for the instant offense. The *Piper* court summed up the circuits' conclusion when it held that "a defendant must show contrition for the crime of which he was convicted, but he need not accept blame for all crimes of which he may be accused."⁸⁹

Other circuits disagreed. Both the Fourth Circuit in *United States v. Gordon* and the Fifth Circuit in *United States v. Mourning* viewed Rule 3E1.1 as requiring a criminal defendant to accept responsibility for all his criminal conduct, regardless of whether he had been charged with the crime.⁹⁰ The courts reasoned that denying a mitigating factor in sentencing was not the same as withholding a benefit and, therefore, such a denial did not violate the

83. See *United States v. Perez-Franco*, 873 F.2d 455, 459 (1st Cir. 1989) ("If a defendant's 'criminal conduct' is interpreted to mean literally 'all of his criminal conduct,' then not only does it include counts for which he was indicted and to which he has not pleaded guilty, but also must include criminal activity relating to the current offense for which he may not have been indicted, as well as any past criminal conduct. This reading could not possibly have been what the drafters intended.")

84. See *id.*

85. *Oliveras*, 905 F.2d at 629.

86. *United States v. Piper*, 918 F.2d 839 (9th Cir. 1990).

87. See, e.g., *Perez-Franco*, 873 F.2d at 462 ("The [Fifth Amendment] privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used.") (quoting *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924)).

88. See *id.* at 463 (noting that withholding a benefit for invoking one's Fifth Amendment right is identical to imposing a penalty for invoking the same right, an action invalidated by the Supreme Court).

89. *Piper*, 918 F.2d at 841.

90. *United States v. Mourning*, 914 F.2d 699, 705 (5th Cir. 1990) ("We hold that, before a defendant is entitled to a reduction for acceptance of responsibility, he must first accept responsibility for all of his relevant criminal conduct."); *United States v. Gordon*, 895 F.2d 932, 936 (4th Cir. 1990) ("We believe the approach taken by the Second and Fifth Circuits is correct and hold that in order for [Rule] 3E1.1 of the guidelines to apply, a defendant must first accept responsibility for all of his criminal conduct." (emphasis added)).

unconstitutional conditions doctrine.⁹¹ These courts believed that for a criminal to earn a reduction under Rule 3E1.1, he must first accept responsibility for any and every crime with which he was associated.⁹²

The Sentencing Commission was aware of the split among the circuits.⁹³ To find a solution, the Sentencing Commission created a working group to study the split.⁹⁴ As a result, the Acceptance of Responsibility Working Group addressed the problem and proposed various solutions.⁹⁵ More specifically, the Working Group suggested three possible solutions to the split: "(1) No change; (2) [r]ewrite the guideline so that it explicitly requires a defendant to accept responsibility for only the offense of conviction; and (3) [r]ewrite the guideline so that it explicitly requires a defendant to accept responsibility for the offense and all relevant conduct."⁹⁶

The Commission's chosen result became the 1992 amendment, which altered the guideline to allow a reduction "[i]f the defendant clearly demonstrates acceptance of responsibility for his offense."⁹⁷ The Sentencing Commission changed Rule 3E1.1 so as to explicitly exclude the concept that all criminal conduct should be considered in the acceptance of responsibility calculus.⁹⁸ In doing so, the Sentencing Commission actively limited the entire scope of Rule 3E1.1 as well as the conduct it sought to reward.

B. The Instant Decision: The Morrison Court's Rationale

It was this fundamental change in the scope and nature of Rule 3E1.1 that the *Morrison* court considered in formulating its new interpretation of the "voluntary termination or withdrawal from criminal conduct" factor.⁹⁹ *Morrison* was based on the concept that when a criminal defendant accepts responsibility under Rule 3E1.1, it is only for the offense for which he has been found guilty,

91. *E.g., Gordon*, 895 F.2d at 936.

92. *See, e.g., id.* ("[I]n order for [Rule] 3E1.1 of the guidelines to apply, a defendant must first accept responsibility for all of his criminal conduct.")

93. *See* ACCEPTANCE OF RESPONSIBILITY WORKING GROUP, UNITED STATES SENTENCING COMMISSION, ACCEPTANCE OF RESPONSIBILITY WORKING GROUP REPORT (1991) [hereinafter WORKING GROUP REPORT].

94. *See id.*

95. *See id.*

96. *Id.*

97. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(a) (1998).

98. WORKING GROUP REPORT, *supra* note 93.

99. *See United States v. Morrison*, 983 F.2d 730, 735 n.1 (6th Cir. 1993).

and not for any tangential criminal conduct with which he was associated.¹⁰⁰ The amendment, in the view of the *Morrison* court, deliberately shifted the focus of the acceptance of responsibility determination.¹⁰¹

With the change in wording from "criminal conduct" to "offense," the Rule now focuses on whether a criminal demonstrates true remorse for that specific crime with which he was charged, and not whether the criminal demonstrates contrition for his criminal disposition in general.¹⁰² The *Morrison* court concluded that if Rule 3E1.1 required only that an individual accept responsibility for the instant offense, he should not lose the reduction for failing to accept responsibility for additional, unrelated crimes.¹⁰³

The extension of this concept to Application Note 1(b) is evident. The logic of the *Morrison* court was that the amendment of Rule 3E1.1 was not simply a change in the Rule's wording, but rather a radical shift in the Rule's focus and scope. As such, this fundamental change should naturally apply to all elements of the Rule, including the Application Notes.¹⁰⁴ Hence, the *Morrison* court logically concluded that "voluntary termination or withdrawal from criminal conduct or associations" should also apply only to the instant offense. The court reasoned that since the defendant could only be asked to demonstrate remorse for the crime with which he was charged, only the commission of a similar crime would demonstrate a true lack of remorse and a failure to accept responsibility.¹⁰⁵ In other words, since a criminal was only asked to

100. See *id.* at 735.

101. See *id.* ("We note that [Rule] 3E1.1(a) was recently amended, effective November 1, 1992 While we do not necessarily interpret this amendment as a change from a 'criminal disposition' rationale to a 'case-by-case' rationale, we find that it helps clarify the issue in a manner that supports our point of view.")

102. See *United States v. Bordayo*, No. 93-1654, 1994 WL 198187, at *2 (6th Cir. May 19, 1994) (unpublished table decision) (noting that the *Morrison* holding was based on the concept that Rule 3E1.1 should reward "true remorse for specific criminal behavior").

103. *Morrison*, 983 F.2d at 735.

104. This is a logical assumption given the wording of the Application Notes. Of the eight suggested indicia indicating acceptance of responsibility, four specifically refer to conduct surrounding the instant "offense." U.S. SENTENCING GUIDELINES MANUAL § 3E1.1, Application Notes 1(a)-(h) (1998).

105. See *Morrison*, 983 F.2d at 735. The fundamental counter-argument espoused by the majority of circuits centers around the significance of subsequent crimes and what they represent. The majority view is that even if a defendant may only be asked to accept responsibility for his underlying offense, the commission of *any* crime demonstrates a fundamental lack of contrition. *E.g.*, *United States v. Ceccarani*, 98 F.3d 126, 130 (3d Cir. 1996) ("Continual criminal activity, even differing in nature from the convicted offense, is inconsistent with an acceptance of responsibility and an interest in rehabilitation."). Essentially, if a defendant commits any crime, he cannot be truly sorry for his underlying offense. This approach has two flaws. First, it tends to

accept responsibility for crime *X*, then only a subsequent crime which exhibited his failure to actually accept responsibility for crime *X* should void the reduction. It is therefore possible, both psychologically and statutorily, for a criminal defendant to be "truly repentant for one crime yet commit other unrelated crimes."¹⁰⁶

C. Support Within the Rule: Other Elements of Rule 3E1.1 That Point Towards the Morrison Approach

The *Morrison* court listed few reasons for their limitation of "voluntary termination or withdrawal of criminal conduct," relying mainly on the amendment of the Rule 3E1.1 for its justification.¹⁰⁷ Despite this lack of explicit justification, there are other factors within Rule 3E1.1 that buttress the *Morrison* court's approach. Indeed, the scope and wording of several of the Application Notes following the Rule lend support to the *Morrison* court's view that only those subsequent crimes that are reasonably related to the underlying offense may be used in the acceptance of responsibility calculation.¹⁰⁸

Application Note 1(a) affirmatively limits the scope of judicial inquiry in acceptance of responsibility determinations by stating, in part, that "a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a)."¹⁰⁹ The Note proceeds by stating that "[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."¹¹⁰

This Application Note supports the logic of the *Morrison* court. Indeed, the Note makes it clear that a defendant is only asked to act consistently with accepting responsibility for the charged offense. If a defendant is not required to accept responsibility for anything other than the charged offense, then a random or

lead to greater judicial discretion and variation in sentencing, two elements seen as undesirable by the Sentencing Commission. See *infra* notes 137-144 and accompanying text. Under the majority view, one defendant could lose his reduction because of a speeding ticket, while a defendant convicted of an identical underlying offense could retain his. Second, this approach misconstrues the fundamental nature of the acceptance of responsibility determination. Rule 3E1.1 is not a general mitigating or aggravating determination, nor is it a parole revocation proceeding. Rule 3E1.1 requires unique considerations wholly dissimilar to other types of proceedings.

106. See *Morrison*, 983 F.2d at 735.

107. See *id.*

108. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1, Application Note 1(a).

109. *Id.*

110. *Id.*

unrelated crime does not indicate a failure to accept responsibility. Thus, only a crime similar to the underlying offense demonstrates a failure to accept responsibility.

Note 1(a) goes on to define the scope of the conduct that a defendant must accept in order to earn the reduction. More specifically, it requires that a defendant truthfully admit any conduct that is relevant to his offense under Rule 1B1.3 of the Sentencing Guidelines.¹¹¹ Rule 1B1.3 defines relevant conduct as “all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant . . . that occurred during the commission of the offense of conviction.”¹¹² Thus, the inclusion of Rule 1B1.3 in Application Note 1(a) is yet another limitation on the scope of the acceptance of responsibility determination. The *Morrison* approach becomes logical, given the explicit limitation found in Note 1(a). The defendant cannot be asked if he has committed additional, unrelated crimes, and his reduction cannot be lost if he has in fact committed unrelated crimes. Given this explicit limitation, it is logical to assume that unrelated, post-offense crimes cannot suddenly become cogent in the sentencing determination of a discrete offense.

Other Application Notes also support the *Morrison* approach.¹¹³ These supportive Notes all focus on post-plea activity that is somehow related to the underlying offense. For example, a defendant can earn the reduction if he voluntarily pays restitution to the victims of the crime, assists the authorities in recovering the instrumentalities of the offense, or takes rehabilitative steps such as counseling for his offense.¹¹⁴ These factors all focus on actions that are reasonably related to the underlying offense—actions that demonstrate that a defendant is sorry for his specific crime. Defendants are not asked to make general contributions to a victim restitution fund, nor are they asked to turn in the instrumentalities of other offenses. The scope of the Application Notes is limited to post-arrest behavior based on the underlying offense.

The Application Notes demonstrate that Rule 3E1.1 is not the federal equivalent to the mitigating or aggravating factor determination in typical state sentencing. Instead, it is a narrowly and carefully tailored calculation used to determine whether a defendant cooperates with authorities and demonstrates appropriate

111. *Id.*

112. *Id.* § 1B1.3(a)(1).

113. See *infra* text accompanying notes 117-19.

114. See U.S. SENTENCING GUIDELINES MANUAL § 3E1.1, Application Notes.

contrition for the crime with which he is charged. Hence, the Rule's limited construction and focus bolster *Morrison's* more narrow interpretation.

IV. UNDERLYING POLICIES IN RULE 3E1.1: THE *MORRISON* APPROACH AS CONSISTENT WITH REQUIREMENTS OF COOPERATION AND CONTRITION

Courts have recently begun to interpret Rule 3E1.1 as containing two distinct elements.¹¹⁵ One component of the Rule promotes and rewards defendants who cooperate with law enforcement and with the prosecution in arriving at an expedited guilty verdict. The other component promotes and rewards defendants who demonstrate to the court remorse and contrition for their actions.

Within the actual Rule itself, there is little indication of this inherent tension between the two elements. The Rule simply reads, "[i]f the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels."¹¹⁶ Within the Application Notes, however, the tension becomes more apparent. The Notes following the Rule list eight indicia that a court may use in determining whether a defendant has accepted responsibility.¹¹⁷ These indicia are evenly divided into the two themes. Four of the indicia reflect the focus on cooperation with authorities in securing a guilty verdict: truthfully admitting the conduct comprising the offense, voluntary surrender to authorities, voluntary assistance in the recovery of the instrumentalities of the offense, and doing all such acts in a timely manner.¹¹⁸ The other four reflect a focus on genuine remorse and post-arrest good deeds: payment of restitution to the victim, cessation of criminal conduct, resignation from any office held during the commission of the offense, and post-offense rehabilitative efforts such as counseling.¹¹⁹ Because it maintains the primacy of the cooperation prong and also because its increased predictability may actually encourage contrition, the *Morrison* court's interpretation of "voluntary termination or withdrawal from criminal conduct" is consistent with both themes of Rule 3E1.1.

115. *E.g.*, *United States v. De Leon Ruiz*, 47 F.3d 452, 455 (1st Cir. 1995) (noting the two elements pervade Rule 3E1.1, "recogniz[ing] a defendant's sincere remorse *and* . . . reward[ing] a defendant for saving the government from the trouble and expense of going to trial" (emphasis added)).

116. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(a).

117. *See id.* § 3E1.1(a), Application Notes 1(a)-(h).

118. *Id.*

119. *Id.*

While it may not have originally been the chief concern of the Sentencing Commission,¹²⁰ the question of whether a defendant has cooperated with authorities in securing a conviction has assumed a degree of prominence in the acceptance of responsibility calculation.¹²¹ Accordingly, a defendant who has consistently refused to cooperate with authorities—either by contesting his guilt, refusing to furnish the instrumentalities of the offense, or failing to surrender in a timely manner—has little chance of earning the reduction.¹²² Though the Notes clarify that a guilty plea is not absolutely required for a reduction, they also stipulate that the “adjustment 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.”¹²³ From a functional standpoint, therefore, cooperation with authorities is the key foundation on which courts base the reduction.

The *Morrison* approach is also consistent with the Rule’s focus on cooperation with authorities.¹²⁴ Under the *Morrison* interpretation, the primacy of the cooperation prong remains unchanged. The question of whether a defendant has cooperated with the authorities and facilitated a guilty plea remains a pivotal inquiry. A defendant who has contested his guilt, refused to surrender himself promptly to authorities, or declined to furnish the instrumentalities of the offense will, under *Morrison*, still presumably fail to earn the reduction.¹²⁵ The court’s limitation of “voluntary termination or withdrawal from criminal conduct” to those crimes that are reasonably related to the underlying offense does not alter what appears to be the primary mission of Rule 3E1.1: to speed and facilitate guilty pleas.

120. See O’Hear, *supra* note 4, at 1524-25.

121. See *id.*

122. See U.S. SENTENCING GUIDELINES MANUAL § 3E1.1, Application Note 6 (noting that the reduction is intended to apply to defendants who assist the authorities in the investigation or prosecution of his own misconduct).

123. *Id.* § 3E1.1, Application Note 2.

124. It is important to note that the “cooperation” element applies only to a defendant’s cooperation in and up to the securing of a guilty verdict. See *id.* There are no indications from the Rule or the Application Notes that post-arrest cooperation is a relevant consideration. Post-arrest behavior listed by the Application Notes tends to fall into the category of “remorse.” See *supra* text accompanying notes 38-39.

125. The Sixth Circuit has recently made this clear in a series of cases. See, e.g., *United States v. Maxwell*, No. 98-5815, 2000 WL 178387, at *2 (6th Cir. Feb. 8, 2000) (unpublished table decision) (holding that a failure to appear at a hearing was sufficient lack of cooperation to justify a denial of reduction under Rule 3E1.1); *United States v. Chapa*, No. 98-6158, 1999 WL 1253088, at *4 (6th Cir. Dec. 17, 1999) (unpublished table decision) (holding that defendant’s decision to contest the level of her involvement in a crime justified a denial of reduction under Rule 3E1.1).

The second prong of Rule 3E1.1 involves contrition. As evidenced by the Application Notes, a defendant can demonstrate acceptance of responsibility for his crime by showing a certain degree of remorse.¹²⁶ This remorse takes the form of certain positive, socially encouraged post-offense actions.¹²⁷ It "calls for an inquiry into the defendant's state of mind and is thought to reward an appropriate attitude."¹²⁸ Though not as fundamental an inquiry as cooperation,¹²⁹ the contrition element nevertheless plays an important role in the decisions of many courts.¹³⁰

The *Morrison* approach comports with the contrition prong of Rule 3E1.1, albeit in a more limited way. The *Morrison* court formulated its opinion around the premise that "an individual may be truly repentant for one crime yet commit other unrelated crimes."¹³¹ Under the *Morrison* standard, defendants are still required to show contrition for their offense in order to earn a departure.¹³² *Morrison* simply limits the extent to which contrition functions as a factor. As the majority of courts have stated, repeated criminal activity may be regarded as an indication of a lack of overall, general contrition.¹³³ The *Morrison* approach adopts a narrower, more specific view of the contrition prong. It reasonably assumes that if the question to be put to a criminal defendant is whether he is sorry for his underlying offense and no more, then subsequent inquiries must be limited to acts related to that offense.

Furthermore, the *Morrison* standard, by increasing predictability, may actually encourage cooperation, and, by doing so, better

126. See U.S. SENTENCING GUIDELINES MANUAL § 3E1.1, Application Notes.

127. These are "voluntary termination or withdrawal from criminal conduct or associations," "voluntary payment of restitution prior to adjudication of guilt," "voluntary resignation from the office or position held during the commission of the offense," and "post-offense rehabilitative efforts." *Id.* § 3E1.1, Application Notes 1(b), (c), (f), (g).

128. O'Hear, *supra* note 4, at 1511.

129. Several sections of the Commentary indicate that cooperation with authorities is fundamental to acceptance of responsibility. See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 3E1.1, Application Note 1(a) ("[A] defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility."); Application Note 6 (noting that the reduction is intended to apply only to defendants who assist the authorities in the investigation or prosecution of his own misconduct).

130. See, e.g., *United States v. O'Neil*, 936 F.2d 599, 600 (1st Cir. 1991) (holding that post-arrest conduct could shed light on the sincerity of a defendant's remorse).

131. *United States v. Morrison*, 983 F.2d 735, 735 (6th Cir. 1993).

132. See, e.g., *United States v. Rudolph*, 190 F.3d 720, 726 (6th Cir. 1999) (holding that rehabilitative efforts may be the basis of a reduction, but they must be sincere and exceptional efforts); *United States v. Van Shutters*, 163 F.3d 331, 340-41 (6th Cir. 1998) (affirming a denial of a Rule 3E1.1. reduction because the defendant had consistently failed to demonstrate any remorse), *cert. denied*, 526 U.S. 1077 (1999).

133. See, e.g., *United States v. Ceccarani*, 98 F.3d 126, 130 (3d Cir. 1996).

serve the fundamental, underlying elements of the Rule. A major focus of Rule 3E1.1 is to encourage criminals to plead guilty, thereby saving federal prosecutors the time and expense of trials.¹³⁴ It is likely that more defendants may cooperate and plead guilty if they are assured that they will not lose their reduction over a minor, unrelated offense. The *Morrison* approach ensures that only those crimes that are reasonably related to the underlying offense will be used in the determination,¹³⁵ while the majority approach reserves the right to count (or discount) any subsequent crime. For Rule 3E1.1 to function properly, it must treat like acts alike. Rule 3E1.1 must deliver its grant or reduction uniformly, since "an effective incentive structure must deliver its rewards in [a] clear . . . [and] predictable manner."¹³⁶ The approach of the Sixth Circuit encourages greater cooperation from criminal defendants by increasing the degree of predictability in the sentencing process.

V. UNIFORMITY AND PREDICTABILITY: THE *MORRISON*
APPROACH'S CONSISTENCY WITH THE OVERALL PURPOSE OF
THE GUIDELINES

The Sentencing Reform Act of 1984 primarily sought to create a system of guidelines that provided "certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct."¹³⁷ The Act envisioned some flexibility, though only enough to "permit individualized sentences when warranted by mitigating or aggravating factors."¹³⁸ Yet despite this reference to flexibility, the legislative history surrounding the Act indicates that its core objective was to create consistency and eliminate the incongruity resulting from judicial discretion in sentencing.¹³⁹ The Sentencing Guidelines sought to create a predictable system whereby an individual's crime, rather than "the identity of the sentencing judge and the nature of his sentencing philosophy," would determine his sentence.¹⁴⁰

134. See U.S. SENTENCING GUIDELINES MANUAL § 3E1.1, Application Notes (1998) ("This adjustment 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, is convicted, and only then admits guilt and expresses remorse.").

135. *Morrison*, 983 F.3d at 735.

136. O'Hear, *supra* note 4, at 1546.

137. 28 U.S.C. § 991(b)(1)(B) (1994).

138. *Id.*

139. See S. REP. NO. 98-225, at 52 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3235.

140. *Id.* at 161, reprinted in 1984 U.S.C.C.A.N. 3182, 3344.

The *Morrison* approach comports with the Sentencing Guidelines' focus on predictability, and it also avoids the disparities inherent in the majority approach. Under *Morrison*, a court may only consider those crimes (committed between plea or conviction and sentencing) that are reasonably related to the underlying offense in the acceptance of responsibility determination.¹⁴¹ Thus, the commission of a dissimilar crime in between plea and sentencing could not be used to determine that the defendant had failed to accept responsibility for his previous crime.¹⁴² Under the majority approach, judges have sole discretion to decide whether the commission of a crime indicates a failure to accept responsibility for a past crime.¹⁴³ This indicates that, in some instances, a judge may find that continued criminal activity does not preclude an individual from receiving a reduction for acceptance of responsibility.¹⁴⁴ In other instances, however, a judge may hold that any crime, regardless of how minor, may result in a loss of the acceptance of responsibility reduction.¹⁴⁵ This increase in judicial discretion thus limits the uniformity in sentencing that the Sentencing Guidelines sought to implement.

The *Morrison* approach reduces this fundamental disparity in judicial sentencing. By creating a definitive standard for determining what crimes may be considered when deciding whether to grant a reduction, the court limits the possible range of reductions that could be handed down by the court. The *Morrison* standard increases the probability that similar criminals will receive consistent, predictable sentences for committing the same crime, while it decreases the probability that a criminal will be subject to unreasonable sentence stringency based on "the identity of the sentencing judge and the nature of his sentencing philosophy."¹⁴⁶

More specifically, the *Morrison* approach limits the potential for abuse of judicial discretion in sentencing.¹⁴⁷ Under the majority

141. *United States v. Morrison*, 983 F.2d 735, 735 (6th Cir. 1993).

142. *Id.* at 733-35.

143. *United States v. McDonald*, 22 F.3d 139, 144 (7th Cir. 1994).

144. *See, e.g., Morrison*, 983 F.2d at 736 (Kennedy, J., concurring in part and dissenting in part) (noting, hypothetically, that "a murderer caught stealing gum" could receive the acceptance of responsibility reduction).

145. *See id.* (noting that a district court might find "the theft of chewing gum in particular circumstances illuminative of whether the murderer has accepted responsibility for her actions").

146. S. REP. NO. 98-225, at 161 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3344.

147. The danger of judicial abuse of discretion in acceptance of responsibility determination is heightened by the degree of deference afforded to sentencing judges. Application Note 5 of Rule 3E1.1 states that "the determination of the sentencing judge is entitled to great deference on review." U.S. SENTENCING GUIDELINES MANUAL § 3E1.1, application note 5 (1998).

view, a criminal convicted in federal court of mail fraud could lose his reduction under Rule 3E1.1 for any conceivable misdemeanor, such as speeding, jay-walking, or loitering.¹⁴⁸ Yet in the adjacent courtroom, a criminal convicted of the same crime could earn a reduced sentence despite the commission of a more severe subsequent crime, depending on the sentencing philosophy of the judge. With its heightened degree of latitude, the majority standard subverts the fundamental purpose of the Sentencing Guidelines.

The *Morrison* standard, by contrast, is less prone to such judicial discretion. By creating a framework in which only related crimes will trigger a loss in reduction, the Sixth Circuit has lessened the disparity in sentences that initially caused Congress to create the Guidelines.

Critics of the *Morrison* approach may argue that the determination of whether a crime is "reasonably related" entails as much, if not more judicial discretion than the majority approach. While it is true that the question of whether a crime is "reasonably related" to the underlying offense may seem discretionary in the abstract, courts have in fact already developed tests specifically to use with the Sentencing Guidelines that determine whether a subsequent offense is similar to a previous offense. Rule 4 of the Sentencing Guidelines outlines the procedure for calculating a defendant's criminal history score.¹⁴⁹ The Sentencing Guidelines require sentencing judges to add points onto a defendant's sentencing score if he has a record of prior criminal convictions.¹⁵⁰ Rule 4A1.2(c),

148. The posture adopted by many of the courts in the majority when determining acceptance of responsibility bears a resemblance to the posture adopted by courts in probation revocation proceedings. See, e.g., *United State v. Ceccarani*, 98 F.3d 126, 130 (3d Cir. 1996) ("One of these [bail] conditions obligated the defendant not to commit *any offense* in violation of federal, state or local law . . . [This] was an express condition . . . and, when violated, constituted grounds for revocation of bail." (emphasis added)). Treating a 3E1.1 determination like a parole revocation proceeding is flawed for one principal reason. In parole revocation, probation officers may exercise discretion by refusing to report those crimes that are minor or not of a continuing pattern. See UNITED STATES GUIDELINES MANUAL § 7B1.2; see also *United States v. McNuckles*, 948 F. Supp. 345, 349 (D. Del. 1996). Probation officers, therefore, act as a kind of buffer, insuring that criminal defendants do not necessarily lose their parole because of a trivial criminal act. In the parole revocation proceedings themselves, courts correctly consider any crime committed by the defendant, since reported crimes must have filtered through the probation officer, insuring that only serious criminal activity gets reported. No such buffer exists in a 3E1.1 determination. It is illogical, therefore, for a court to adopt the posture of a parole revocation proceeding when making its 3E1.1 determination, since the procedural safeguards are dissimilar.

149. See U.S. SENTENCING GUIDELINES MANUAL § 4.

150. See *id.* § 4A1.2(c). For example, judges are required to "(a) add 3 points for each prior sentence of imprisonment exceeding one year and one month . . . (b) [a]dd 2 points for each prior sentence of imprisonment of at least sixty days and not counted in (a) . . . [and] (c) [a]dd 1 point

however, allows judges to exclude certain prior offenses from the criminal history score.¹⁵¹ The Rule lists several crimes, such as reckless driving, contempt of court, prostitution, and resisting arrest, the prior violation of which may not be used to contribute to a defendant's criminal history score. Significantly, the Rule notes that crimes *similar* to the listed crimes may also be excluded from a defendant's criminal history score.¹⁵²

In response to uncertainty at the trial court level as to the meaning of "similar," the majority of circuits have adopted comprehensive tests to determine whether one offense is "similar" to another for purposes of sentencing.¹⁵³ These tests vary in stringency. In the "multifactor approach" adopted by the Fifth Circuit, trial courts must examine "a comparison of punishments imposed for the listed and unlisted offenses, the perceived seriousness of the offense . . . the elements of the offense, the level of culpability involved, and the degree to which the commission of the offense indicates a likelihood of recurring criminal conduct."¹⁵⁴ An alternate approach exclusively focuses on the degree of commonality between the elements of the two offenses.¹⁵⁵

Regardless of which approach gains ultimate acceptance, the mere existence of such standards creates a framework in the majority of circuits from which a trial judge may determine "similarity." Admittedly, these tests are not wholly objective, and trial judges must still rely on some subjective indicia to determine

for each prior sentence not counted in (a) or (b), up to a total of 4 points for this item." *Id.* § 4A1.1 (emphasis removed).

151. *See id.* § 4A1.2(c).

152. "Sentences for all felony offenses are counted. Sentences for misdemeanor and petty offenses are counted, except as follows: (1) Sentences for [the listed prior offenses] and offenses similar to them, by whatever name they are known, are counted only if (A) the sentence was a term of probation of at least one year or a term of imprisonment of at least thirty days, or (B) the prior offense was similar to the instant offense." *Id.* (emphasis added).

153. *See, e.g.,* United States v. Martinez-Santos, 184 F.3d 196, 204-05 (2d Cir. 1999) (adopting a "multifactor" approach); United States v. Sandoval, 152 F.3d 1190, 1192 (9th Cir. 1998) (applying two different approaches, focusing first on whether both crimes share the same general characteristics and second on whether the activity underlying the two offenses is similar), *cert. denied*, 525 U.S. 1086 (1999); United States v. Boyd, 146 F.3d 499, 501-02 (7th Cir. 1998) (refusing to adopt a specific test but applying a multifactor approach in practice); United States v. Harris, 128 F.3d 850, 854-55 (4th Cir. 1997) (adopting a more limited approach based on whether the two crimes have common elements); United States v. Elmore, 108 F.3d 23, 26-27 (3d Cir. 1997) (same); United States v. Unger, 915 F.2d 759, 762-63 (1st Cir. 1990) (same).

154. United States v. Hardeman, 933 F.2d 278, 281 (5th Cir. 1991).

155. *See Harris*, 128 F.3d at 854-55 (adopting a strict approach whereby trial courts look to whether there are common elements between the two crimes).

whether the two crimes are similar.¹⁵⁶ But adoption of this approach would succeed in adding another level of predictability to the sentencing process, while at the same time reducing judicial discretion. Whereas the majority interpretation of Rule 3E1.1 allows trial judges to rely on almost any criteria¹⁵⁷ to determine whether a subsequent criminal act disallows the reduction, a combination of the *Morrison* approach and the "similarity tests" used for Rule 4A1.2(c) would create both a less discretionary and more predictable test for trial judges.

Use of Rule 4A1.2(c) tests also provides the advantage of familiarity. Trial judges have invariably used the tests adopted by their circuits, and are no doubt familiar with their requirements.

VI. CONCLUSION

In spite of its limited scope, Rule 3E1.1 plays a vital role in sentence calculation. In 1997, approximately 86 percent of all criminal cases reported to the Sentencing Commission received a reduction under Rule 3E1.1.¹⁵⁸ Among federal circuit courts, the third-highest number of appeals comes from disputes over the application of Rule 3E1.1.¹⁵⁹ As a result, ambiguities in construction and disagreements in interpretation take on heightened importance.

The *Morrison* approach does much to solve the Rule's ambiguity, while also enhancing predictability and uniformity in the sentencing process. By defining which post-plea criminal activities can be used in determining acceptance of responsibility, the *Morrison* approach creates a clear standard that sentencing judges can easily follow. Simply stated, under the *Morrison* standard, like criminals are treated alike. Sentences become predictable and uniform—two traits sought by the Sentencing Commission. Moreover, such a standard may actually encourage cooperation, since defendants may be more likely to plead guilty when the parameters of

156. See *Hardeman*, 933 F.2d at 281 (listing one of the elements of the test as "the degree to which the commission of the offense indicates a likelihood of recurring criminal conduct").

157. Rule 5H1 of the Sentencing Guidelines prohibits trial judges from considering the following factors in any discretionary sentencing actions: race, creed, religion, socioeconomic status, disadvantaged upbringing, drug or alcohol dependence, and economic hardship. U.S. SENTENCING GUIDELINES MANUAL §§ 5H1.2-1.12.

158. Of the 41,735 cases reported to the Sentencing Commission in 1997, 36,853 received a reduction under Rule 3E1.1. UNITED STATES SENTENCING COMMISSION, 1997 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 42 (1997).

159. O'Hear, *supra* note 4, at 1512 n.14.

the reduction are made clear. Only by creating clear standards in sentencing can judges conform to the Sentencing Guidelines' goal of predictability and uniformity.

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