IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 94-50236
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN R. QUITONI,

Defendant-Appellant.

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Appeal from the United States District Court for the
Western District of Texas
(EP 90 CR 86 10)

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July 7, 1995

Before GARWOOD HIGGINBOTHAM and DAVIS, Circuit Judges.[*]

PER CURIAM:

Following a jury trial, defendant-appellant John R. Quitoni (Quitoni) was convicted in 1990 of one count of conspiracy to export more than 1,000 kilograms of marihuana and one count of conspiracy to possess marihuana with intent to distribute it. Some time after his conviction, Quitoni began cooperating with the

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[*] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

government, pursuant to an immunity agreement, and provided substantial assistance, as a result of which the government moved for a downward departure under section 5K1.1 of the sentencing guidelines. Pursuant to motions by Quitoni and the government, sentencing was postponed until May 1993. At sentencing, the district court granted the government's section 5K1.1 motion for departure 40% below the low end of the guideline range, but denied Quitoni's request for adjustment for acceptance of responsibility, and sentenced Quitoni to concurrent prison terms of 175 months and 60 months. Quitoni appeals, claiming only that the district court erred in denying his requested adjustment for acceptance of responsibility. We affirm.

The probation officer determined Quitoni's base offense level as 38, based on 36,288 kilograms of marihuana. *See* U.S.S.G. § 2D1.1(c)(1). The probation officer added two levels for Quitoni's role in the offense. The probation officer determined that Quitoni did not merit a downward adjustment for acceptance of responsibility because he chose to remain silent during his interview with the probation officer and had maintained his innocence at trial. The probation officer determined Quitoni's offense level as 40. Quitoni's criminal history score was zero, placing him in criminal history category I. Quitoni's guideline sentencing range therefore was 292-365 months. Section 5A, Sentencing Table.

The government moved for a downward departure of forty percent form the low end of the guideline sentencing range. At the sentencing hearing, the government initially voiced agreement with

Quitoni that Quitoni deserved a downward adjustment for acceptance of responsibility. After discussion among the attorneys and the district court, the government changed its position. The district court denied Quitoni the adjustment for acceptance of responsibility. The district court granted Quitoni a forty percent downward departure from the guideline sentencing range.

Quitoni contends that the district court mistakenly believed that it lacked discretion to grant him an adjustment for acceptance of responsibility. Quitoni contends that he may have pleaded not guilty and proceeded to trial in order to preserve for appeal the district court's rulings on suppression issues. Quitoni argues that the district court could have exercised its discretion to grant the downward adjustment.

The sentencing guidelines provide a two-level downward adjustment for a defendant who "clearly demonstrates acceptance of responsibility for his offense[.]" Section 3E1.1(a). The defendant bears the burden of showing that he merits the adjustment. *United States v. Mourning*, 914 F.2d 699, 705 (5th Cir. 1990). This Court has "not ultimately defined what standard applies in reviewing a district court's refusal to credit acceptance of responsibility. [This Court has] applied varying standards: (1) clearly erroneous, (2) without foundation, and (3) great deference[.] There appears to be no practical difference between the three standards." *United States v. Cartwright*, 6 F.3d 294, 304 (5th Cir. 1993), *cert. denied*, 115 S.Ct. 671 (1994).

Generally, a defendant who denies his guilt, proceeds to trial, and puts the government to its proof is not entitled to an

adjustment for acceptance of responsibility. A defendant who proceeds to trial to preserve issues unrelated to factual guilt, however, may be entitled to the adjustment. Section 3E1.1, comment. (n.2).

The district court discussed the possibility of an acceptance of responsibility adjustment at length with the attorneys. The critical portion of the discussion is as follows:

> "THE COURT: I think this is a legal question. It's not, it's not a factual question. That is to say, that is to say, there is no doubt that there was a trial, there is no doubt that prior to that trial there was no cooperation, there is no doubt that he was convicted, and, . . . that only after the conviction there was cooperation.
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> . . . .
>
> And if you read the entire, if you read the entire section hereSQ
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> MR. D'ALMEIDA: Which is effective if a person goes to trial is not determinative.
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> THE COURT: It's not, in and of itself.
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> MR. D'ALMEIDA: It's not determinative.
>
> THE COURT: It's not in and of itself.
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> . . . .
>
> And then look at 2,
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> '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 is convicted, and only then admits guilt and expresses remorse.'
>
> Now, it does have that qualifier that it doesn't, it doesn't exclude it.
>
> But, I think, I think that this is notSQin other words, what I'm trying to say is, this ruling by the court, where the objection, that objection is overruled, does not preclude a fairly substantial 5K1 reduction,

depending on what the evidence is."

The district court's comments indicate that the court understood that a defendant did not necessarily forfeit an acceptance of responsibility adjustment by proceeding to trial. The district court's comments also indicate that the court made factual findings regarding the timing of Quitoni's cooperation and concluded that his cooperation was untimely to merit a downward adjustment for acceptance of responsibility, as distinguished from the section 5K1.1 reduction. We find no error in the district court's interpretation of the guidelines in this respect, nor any abuse of discretion in their application.

Quitoni asserts that he "may" have proceeded to trial because he wished to preserve his suppression issues for appeal. However, he does not assert that he in fact did proceed to trial for that reason, or point to anything in the record (beyond the suppression motions which were overruled) so indicating. Nothing is pointed to suggesting that he offered to plead guilty if the government would agree to a Rule 11(a)(2) conditional plea, or that his posture at trial was other than to put the government to its full proof of his guilt on all factual elements of the offenses charged. In short, we are pointed to nothing tending to indicate that Quitoni does not squarely fit the first sentence of application note 2 to section 3E1.1 or that suggests that he is within the potential exception there referenced for those who go to trial to assert and preserve issues that do not relate to factual guilt or within any other arguable exception to the first sentence.

Quitoni's appeal presents no reversible error. The judgment

of conviction and sentence is in all things AFFIRMED.