

**THE GOVERNMENT’S REFUSAL TO MOVE FOR A ONE LEVEL
REDUCTION PURSUANT TO § 3E1.1 IS REVIEWABLE BY THIS COURT.**

[language of plea agreement]

As the Court is aware, the guideline governing acceptance of responsibility, § 3E1.1, has been amended recently. Under the new provision, a defendant whose offense level is 16 or greater qualifies for an additional one level reduction for acceptance of responsibility if:

upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently.

U.S.S.G. § 3E1.1(b).¹

The amendment altered the previous version of the guideline by making the additional level for acceptance of responsibility contingent upon a government motion. In addition, as is set forth in the footnote below, the former version of § 3E1.1(b) contained two criteria for determining acceptance of responsibility. The amendment deleted subsection (b)(1) – involving providing information to the government concerning involvement in the offense, but left the criterion for determining acceptance of responsibility in subsection (b)(2) – involving timely notification of an intent to plead guilty – unchanged. Thus, the amended provision does not

¹ The prior version of § 3E1.1(b) provided for an additional one level reduction for a defendant with an offense level greater than 16 where the defendant had:

assisted authorities in the investigation or prosecution of his own misconduct by taking one or more of the following steps:

- (1) timely providing complete information to the government concerning his own involvement in the offense; or
- (2) timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently.

require anything more on the part of a defendant in order to be eligible for the additional one level reduction than the previous version of § 3E1.1(b)(2) required.

Moreover, while the Government must now move the court for the additional one level reduction, its refusal to do so is not immune from judicial scrutiny. Section 5K1.1 of the Sentencing Guidelines, governing departures for substantial assistance to authorities, also conditions a reduction in offense level upon a Government's motion. However, in such cases, courts may review the Government's refusal to move for a reduction under this section to ensure the refusal: (1) is not based on an unconstitutional ground, such as race, religion, or gender; or (2) is not arbitrary and capricious, but rather is rationally related to a legitimate Government objective. *Wade v. United States*, 504 U.S. 181, 185-87 (1992); *United States v. LeRose*, 219 F.3d 335, 342 (4th Cir. 2000). If the court determines that the Government's refusal is either based on an unconstitutional ground or is not rationally related to a legitimate Government end, it must grant the defendant relief. *Id.*²

The defendant's acceptance of responsibility in this case meets the criteria set forth in forth in § 3E1.1. Notwithstanding the defendant's compliance with the strictures of this guideline,

² Of course, the court also has the authority to review the Government's refusal to ensure that it is not in breach of the plea agreement. As the Supreme Court noted in *Santobello v. New York*, 404 U.S. 257, 262 (1971), "when a [guilty] plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Cf. United States v. Beltran-Ortiz*, 91 F.3d 665, 669 (4th Cir. 1996)(holding that Government breached plea agreement, reasoning that "when the Government promises in a plea agreement to debrief a defendant, it may not thereafter simply refuse to do so and then, having deprived the defendant of his best opportunity for attempting to obtain favorable treatment, argue that the defendant is not entitled to sentencing under the safety valve provision); *United States v. Ringling*, 988 F.2d 504, 506 (4th Cir. 1993)(holding that Government breached plea agreement by refusing to debrief defendant even though it was under no obligation to move for a departure under § 5K1.1); *United States v. Dixon*, 998 F.2d 228, 231 (4th Cir. 1993)(holding that Government breached plea agreement by withholding substantial assistance departure).

the Government is refusing to move for an additional one point reduction in his/her offense level. As demonstrated below, this refusal is not rationally related to any legitimate Government objective. Accordingly, the Court should not countenance the Government's refusal and should grant the defendant's request for a three point reduction in his offense level based on his timely acceptance of responsibility for the conduct underlying the offense of conviction.

THE DEFENDANT SHOULD RECEIVE A THREE-LEVEL REDUCTION IN HIS/HER OFFENSE LEVEL FOR ACCEPTANCE OF RESPONSIBILITY UNDER § 3E1.1.

Fact-specific.

Language of plea agreement

If Government maintains that it had to prepare for motions, point out plain language of guideline which refers only to trial preparation. *See United States v. Ochoa-Gaytan*, 265 F.3d 837 (9th Cir. 2001)(holding that it was error to deny acceptance of responsibility adjustment where defendant challenged admissibility of statement on Miranda grounds, noting that “[o]n remand, the district court should determine whether [the defendant] has shown contrition for his offense, notwithstanding the fact that he exercised his constitutional rights”)(citation omitted).

No rational relationship between refusal and legitimate governmental end – compare prosecutors' action in previous cases involving same level of acceptance of responsibility.

Results in unwarranted sentencing disparity – one of the evils the guidelines sought to address in the first place.