06-4819-cr(L)

To Be Argued By:
HAROLD H. CHEN

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 06-4819-cr(L)
06-5095-cr(CON)

UNITED STATES OF AMERICA,
Appellee,

-vs-

RAFAEL ALMONTES, JOSE ADAMES,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

The district court (Stefan R. Underhill, J.) had subject matter jurisdiction over this criminal case under 18 U.S.C. § 3231. Judgment entered on November 1, 2006, and the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on October 26, 2006. This Court has appellate jurisdiction over the challenge to his sentence pursuant to 18 U.S.C. § 3742(a).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court's denial of a motion for downward departure pursuant to U.S.S.G. § 5K2.0 for the third point of acceptance of responsibility under U.S.S.G. § 3E1.1(b) is reviewable on appeal.

2. Whether the district court clearly erred by not granting the defendant's motion for downward departure for the third point of acceptance of responsibility under U.S.S.G. § 3E1.1(b) when the defendant entered a guilty plea after jury selection and immediately before the commencement of trial; when defense counsel represented at sentencing that the government had not acted in bad faith; and when there was no record evidence that the government had acted with an unconstitutional motive.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 06-4819-cr(L)
06-5095-cr(CON)

UNITED STATES OF AMERICA,
Appellee,

-vs-

RAFAEL ALMONTES, JOSE ADAMES,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

On March 17, 2005, a federal grand jury charged Jose R. Adames ("the defendant" or "Adames") and 19 other defendants with conspiring to distribute narcotics in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A). On September 21, 2005, the grand jury returned a superseding indictment that charged three additional defendants, including one who was never apprehended, with the same violation.

By May 5, 2006, 16 of the 22 defendants had pleaded guilty. On the morning of May 5, 2006, immediately before jury selection, two more co-defendants pled guilty. The defendant-appellant, however, proceeded to and participated in jury selection. On May 9, 2006, four days after jury selection and the day immediately before the commencement of evidence in the government's case-in-chief, the defendant entered a plea of guilty. His plea agreement stipulated to a Guidelines range of 210-262 months' imprisonment, but made no reference to acceptance of responsibility. At sentencing, the district court denied the defendant's motions for downward departure, but credited him with a two-level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1(a) and sentenced him within the adjusted Guidelines range to 180 months' imprisonment.

The defendant now appeals, claiming that the district court improperly refused to grant a downward departure that would have awarded him a third point for acceptance of responsibility. The district court's denial of this downward departure, however, is unreviewable on appeal. Morever, even assuming that this Court could review that decision, the record evidence discloses that the government properly declined to file the motion that would have made the defendant eligible for the third acceptance-of-responsibility point under § 3E1.1(b) in light of the defendant's untimely plea.

Statement of the Case

On March 17, 2005, a federal grand jury in Connecticut returned an indictment that charged the defendant and 19 others with, among other offenses, conspiring to possess with intent to distribute five (5) kilograms or more of a mixture or substance containing a detectable amount of cocaine, in violation of 21 U.S.C. §§ 841(b)(1)(A) and 846. (JA 32). On September 21, 2005, the grand jury returned a superseding indictment that charged all twenty original defendants, and three additional individuals, with the same violation as well as various narcotics-trafficking and firearms offenses. (JA 49, 105-18).

On Friday, May 5, 2006, the defendant and three co-defendants participated in jury selection. (JA 68). On the following Tuesday, May 9, 2006, the day immediately before the commencement of the government's case-in-chief, the defendant entered a plea of guilty pursuant to a written plea agreement. (JA 69, 119-25).

On October 20, 2006, following a sentencing hearing, the district court (Stefan R. Underhill, J.) sentenced Adames to a term of 180 months' imprisonment, five years' supervised release, and a special assessment of $100. (JA 88-89, 151-52). Judgment entered on November 1, 2006. (JA 88-89).

A timely notice of appeal was filed on October 26, 2006. (JA 89, 154-55). A timely *pro se* notice of appeal was also filed on October 30, 2006. (JA 90, 156).

The defendant is in custody serving the sentence imposed.

STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THIS APPEAL

A. The Offense Conduct

Jose R. Adames was arrested and indicted along with twenty-two other defendants as the result of an investigation of Alex Luna's drug-trafficking activities by both the Danbury Police Department and the Drug Enforcement Administration dating back to 2002. (Presentence Report ("PSR") ¶ 17). Luna's operation involved the use of hotel rooms to receive, process, and repackage large deliveries of cocaine and cocaine base for street-level distribution. (PSR ¶ 18). Adames, who resided in New York City, was Luna's primary supplier. He would meet Luna in either Danbury or New York to deliver kilogram-sized quantities of narcotics. (PSR ¶¶ 20, 28). The PSR further identified the defendant as a "career drug dealer" who previously trafficked large quantities of narcotics in Brooklyn, New York, during the 1990s. (PSR ¶ 29).

B. The Defendant's Guilty Plea

On January 4, 2006, the court held a status conference with all counsel and set May 5, 2006, for jury selection. (JA 57). By May 5, 2006, 16 of Adames's co-defendants had entered pleas of guilty, 14 of which were entered pursuant to written plea agreements. On the morning of

May 5, 2006, immediately before jury selection, two additional co-defendants, Aaron King and David Melendez, pled guilty.[1] (JA 67-68).

The plea agreements for King and Melendez contained a section entitled "Acceptance of Responsibility" stipulating that the defendants were entitled to the full three points for acceptance of responsibility under U.S.S.G. § 3E1.1. (Government Appendix ("GA") 3, 12). To this end, in both agreements, the government stipulated that it would move at sentencing, pursuant to U.S.S.G. § 3E1.1(b), to credit these defendants with the third point for acceptance of responsibility. (GA 3, 12).

On May 9, 2006, the day before trial and four days after jury selection, Adames entered a guilty plea. (JA 69). In his plea agreement, the defendant agreed that his base offense level under U.S.S.G. § 2D1.1(c)(2) was 36 based on an attributable quantity of 50-150 kilograms of cocaine. (JA 121; PSR ¶ 30). Unlike the plea agreements for King and Melendez, however, Adames's plea agreement made no reference to acceptance of responsibility under U.S.S.G. § 3E1.1, and thus contained no agreement that the government would move for the third point for acceptance of responsibility under § 3E1.1(b).

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[1] The guilty plea of Aaron King began on May 4, 2006, but ultimately concluded on May 5, 2006. (JA 67, 68).

C. The Defendant's Sentencing

On October 20, 2006, the district court sentenced the defendant. Absent objection from Adames and the government, the district court adopted the factual findings of the Presentence Report ("PSR"), including the following: (1) that Adames was the principal supplier of a high-volume narcotics-trafficking conspiracy led by Luna (PSR ¶¶ 17, 28); (2) that the amount of cocaine attributable to Adames was between 50-150 kilograms (PSR ¶ 30); and (3) that Adames was a "career drug dealer" based on his previous involvement in distributing drugs in Brooklyn, New York, during the 1990s (PSR ¶ 29). (JA 160). The district court adopted the PSR's recommendation that Adames receive a two-level downward adjustment for acceptance of responsibility under U.S.S.G. § 3E1.1(b). (PSR ¶ 42; JA 162). Based on a total offense level of 34 and a criminal history category of II, the PSR calculated that the defendant's advisory Guidelines imprisonment range was 168-210 months of imprisonment. (PSR ¶ 83; JA 162).

At the sentencing hearing, Adames moved for, among other things, a downward departure under U.S.S.G. § 5K2.0 based on the government's refusal to move for the third point for acceptance of responsibility. More specifically, he contended that the district court should award him the third point for acceptance of responsibility because the government had not given him sufficient time to plead guilty and had effectively drawn an arbitrary "line . . . in the sand" by conditioning its motion for the third point on a guilty plea before jury selection. (JA 163, 166).

When questioned by the district court whether the government's position constituted bad faith, however, defense counsel stated: "I'm not prepared to sit here and tell this Court that the government acted in bad faith in any part of this process." (JA 169).

The district court rejected the defendant's motion for downward departure for the third point for acceptance of responsibility. (JA 188). In so ruling, the court found that the government's decision to decline to file a motion for the third point for acceptance of responsibility for a defendant who did not plead guilty until after jury selection was "extremely reasonable." (JA 169-70). Furthermore, the court rejected the defendant's argument that the delay in his guilty plea was due to the government's failure to send him a draft plea agreement. Specifically, the court found as follows:

> The circumstances of this case are that there was a very significant amount of time between your arrest and your decision to plead guilty, and the delay, in my mind, is not the result of any bad faith on the part of the government, such that you have been unfairly denied that third point, and I see no need, frankly, to make it up by departing downward under 5K2.0.

(JA 188).

The district court rejected the defendant's other arguments for downward departure (JA 188-90), and sentenced him within his Guidelines range to

imprisonment for 180 months, a period of supervised release for 5 years, and a special assessment of $100. (JA 191-93).

SUMMARY OF ARGUMENT

I. The district court's denial of the defendant's motion for a downward departure under § 5K2.0 for the third point for acceptance of responsibility is unreviewable on appeal. The record reflects that the district judge understood the scope of his authority to depart, and the sentence was not otherwise illegal.

II. The district court's denial of a third point for acceptance of responsibility under U.S.S.G. § 3E1.1(b) was fully proper. Under that section, a defendant is entitled to a third-point reduction for acceptance of responsibility only if the government files a motion requesting that point. As set forth in the Guidelines, this motion should reflect a conclusion by the government that the defendant provided timely notice of his intention to plead guilty, thereby permitting the government to avoid preparing for trial and to conserve its prosecutorial resources. Here, the government declined to file this motion because the defendant pled guilty four days after jury selection and the day before trial. Accordingly, the defendant was not entitled to a third-point reduction and the district court properly declined to award that point.

Furthermore, the record reveals that the government's refusal to file a motion for a third point was based on its

assessment of the timeliness of the defendant's plea. There is nothing in the record to suggest that the government's position was based on an unconstitutional motive or the result of bad faith.

ARGUMENT

I. THE DISTRICT COURT'S DENIAL OF THE DEFENDANT'S REQUEST FOR A DOWNWARD DEPARTURE IS UNREVIEWABLE ON APPEAL

A. Relevant Facts

The relevant facts are set forth above in the Statement of Facts.

B. Governing Law and Standard of Review

In *United States v. Booker*, 543 U.S. 220, 259-65 (2005), the Supreme Court held that although a district court must consider the Sentencing Guidelines along with the other factors listed in 18 U.S.C. § 3553(a), they are no longer mandatory. *See also United States v. Crosby*, 397 F.3d 103, 110-12 (2d Cir. 2005). This Court has further held that in the post-*Booker* sentencing regime, "a refusal to downwardly depart is generally not appealable," and an appeals court may review such a denial only "when a sentencing court misapprehended the scope of its authority to depart or the sentence was otherwise illegal." *United States v. Valdez*, 426 F.3d 178, 184 (2d Cir. 2005); *see also United States v. Stinson,* 465 F.3d 113, 114 (2d Cir.

2006) (per curiam) (refusal to downwardly depart from the guideline range is generally not appealable); *United States v. Hargrett*, 156 F.3d 447, 450 (2d Cir. 1998) (court lacks jurisdiction "to review a district court's refusal to grant a downward departure or the extent of any downward departure that is granted"). "In the absence of 'clear evidence of a substantial risk that the judge misapprehended the scope of his departure authority,' [this Court] presume[s] that a sentenc[ing] judge understood the scope of his authority." *Stinson*, 465 F.3d at 114 (quoting *United States v. Gonzalez*, 281 F.3d 38, 42 (2d Cir. 2002)).

C. Discussion

The district court's denial of the defendant's motion for a downward departure is unreviewable. Here, nothing in the record suggests that the 180-month sentence – a sentence within the advisory Guidelines range – was illegal, or that the district court misunderstood its authority to grant a departure under U.S.S.G. § 5K2.0. To the contrary, the record at sentencing supports the opposite conclusion. Although the district judge comprehended the scope of his departure authority, he simply chose not to exercise that authority based on the facts presented at sentencing. As the district court stated, "[t]he motion under 5K2.0 for what would be the equivalent of a third point for acceptance of responsibility, in my view, is not called for." (JA 188). As the district court further stated:

> The circumstances of this case are that there was a very significant amount of time between your arrest and your decision to plead guilty, and the

> delay, in my mind, is not the result of any bad faith on the part of the government, such that you have been unfairly denied that third point, *and I see no need, frankly, to make it up by departing downward under 5K2.0*.

Id. (emphasis added).

The district court's consideration of the defendant's other grounds for downward departure further confirms that it comprehended the contours of its sentencing authority. For example, when rejecting the defendant's contention that U.S.S.G. § 4A1.3 entitled him to a departure for an over-represented criminal history category, the district court cited *United States v. Mishoe*, 241 F.3d 214 (2d Cir. 2001), the controlling authority for downward departures under U.S.S.G. § 4A1.3, and found that a departure was not warranted here. (JA 189). Similarly, when rejecting the defendant's assertion that his likely deportation was a valid departure ground under U.S.S.G. § 5K2.0, the district court cited the then-leading case for such departures, *United States v. Restrepo*, 999 F.2d 640 (2d Cir. 1993),[2] and found that the defendant's likely deportation was not an exceptional circumstance warranting departure. (JA 190). Finally, the district judge acknowledged his authority to depart based on a combination of these factors, but expressly declined to do so, stating that "[t]hese factors, whether individually or taken together, in my mind, do not call for a departure

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[2] This Court recently reaffirmed *Restrepo* in *United States v. Wills*, 476 F.3d 103, 107-108 (2d Cir. 2007).

from the sentencing guideline range which is a very reasonable range, given the conduct at issue here, which involved between 50 and 150 kilograms of cocaine." (JA 190).

In sum, there is no evidence, let alone clear evidence, that the defendant's sentence was illegal or that there was a "substantial risk that the judge misapprehended the scope of his departure authority." *Stinson*, 465 F.3d at 114. Thus, based on this record, this Court can only "presume that [the] sentenc[ing] judge understood the scope of his authority." *Id*. Accordingly, the denial of the defendant's request for a downward departure is unreviewable.

II. THE DISTRICT COURT DID NOT CLEARLY ERR IN DENYING THE DEFENDANT'S MOTION FOR DOWNWARD DEPARTURE FOR THE THIRD POINT FOR ACCEPTANCE OF RESPONSIBILITY

A. Relevant Facts

The relevant facts are set forth above in the Statement of Facts.

B. Governing Law and Standard of Review

1. Sentencing Guideline § 3E1.1(b)

Section 3E1.1 of the Sentencing Guidelines allows for up to a three-point reduction of a defendant's offense level upon a demonstration of acceptance of responsibility.

Under subsection (a), the first two points are awarded at the discretion of the court. *See* § 3E1.1(a) ("If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels."). To qualify for the third point, however, the defendant must have first qualified for the two-point reduction under § 3E1.1(a), have an original offense level of 16 or greater, and, most significantly, the government must file a motion

> 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 . . . .

§ 3E1.1(b) (emphasis added). Application Note 6 to § 3E1.1 further explains that "*[b]ecause the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial*, an adjustment under subsection (b) may only be granted upon a formal motion by the Government at the time of sentencing." U.S.S.G. § 3E1.1 cmt. n.6 (emphasis added). *See also Hargrett*, 156 F.3d at 452 (§ 3E1.1(b) "does not mandate an automatic reduction in the offense level for those who plead guilty; instead, it allows a reduction for those who actually conserve prosecutorial resources").

In *United States v. Sloley*, 464 F.3d 355, 359 (2d Cir. 2006), this Court interpreted the language, purpose, and history of § 3E1.1(b) to hold that "subject to . . . narrow limitations . . . a government motion is a necessary prerequisite to the additional one-level decrease under Guidelines § 3E1.1(b)." *See also United States v. Moreno-Trevino*, 432 F.3d 1181, 1185-86 (10th Cir. 2005) (third point for acceptance of responsibility only available upon government's motion); *United States v. Wattree*, 431 F.3d 618, 623-24 (8th Cir. 2005) (same); *United States v. Smith*, 429 F.3d 620, 628 (6th Cir. 2005) (same). A prosecutor's discretion on the filing of such a motion is subject "to the same limits to which a prosecutor's discretion under [U.S.S.G.] § 5K1.1 is subject. That is, in all cases, a prosecutor cannot refuse to move on the basis of an unconstitutional motive, such as a defendant's race or religion." *Sloley*, 464 F.3d at 360 (citations omitted). "Moreover, when the terms of a plea agreement leave the discretion to file [an acceptance-of-responsibility] motion solely in the hands of the government," just as with a substantial-assistance motion, this Court's "review of the government's decision is more searching." *Id.* In those cases, this Court "may review the plea agreement to see if the government has made its determination in good faith." *Id*. at 361 (citations and quotations omitted); *see also United States v. Leonard*, 50 F.3d 1152, 1157 (2d Cir. 1995) ("[A] court may review the government's treatment of a plea agreement . . . only to determine whether it has acted in 'good faith.'").

2. Standard of Review

This Court reviews a district court's interpretation of the Sentencing Guidelines *de novo*, and reviews the district court's findings of fact for clear error. *United States v. Rubenstein*, 403 F.3d 93, 99 (2d Cir.), *cert. denied*, 126 S. Ct. 388 (2005); *United States v. Fiore*, 381 F.3d 89, 92 (2d Cir. 2004). When a district court's application of the Guidelines to the facts is reviewed, this Court takes an "either/or approach," under which the Court reviews "determinations that primarily involve issues of law" *de novo* and reviews "determinations that primarily involve issues of fact" for clear error. *United States v. Vasquez*, 389 F.3d 65, 74 (2d Cir. 2004); *see also United States v. Selioutsky*, 409 F.3d 114, 119 (2d Cir. 2005) (court "review[s] issues of law *de novo*, issues of fact under the clearly erroneous standard, [and] mixed questions of law and fact either *de novo* or under the clearly erroneous standard depending on whether the question is predominantly legal or factual") (citations omitted).

C. Discussion

The defendant contends that the district court erred in not making a one-point adjustment for acceptance of responsibility under § 3E1.1(b). Even assuming that this Court could review the denial of a downward departure, this argument is without merit.

The defendant does not argue – because he cannot – that he met the criteria for this adjustment. Because the

government did not file a motion requesting the third point, the defendant was not eligible to receive it. *See Sloley*, 464 F.3d at 359 ("[A] government motion is a necessary prerequisite to the additional one-level decrease" under this section.). *See also* JA 161 (district court recognizing that government must make motion before defendant is eligible for third point).

Furthermore, the government was well within its discretion to decline to move for the third acceptance-of-responsibility point. As the district court recognized, the defendant's case had been pending since indictment on March 17, 2005. (JA 32, 167, 188). On May 9, 2006, four days after jury selection and one day before the commencement of evidence, the defendant pled guilty. (JA 69). This Court and other appellate courts have routinely affirmed district courts that have refused to grant the third point when the defendant pled guilty shortly before trial or when the plea "did not come sufficiently early in the proceedings to allow the court or the government to avoid the burdens of litigating the case." *United States v. Rogers*, 129 F.3d 76, 80-81 (2d Cir. 1997) (upholding denial of third point when the defendant challenged search, thereby forcing government to prepare for "suppression hearing [that] was the main proceeding in th[e] case"); *United States v. Thompson*, 60 F.3d 514, 517 (8th Cir. 1995) (denying third point when defendant did not notify government of intention to plead guilty until Friday before start of scheduled trial, at which time the government had "essentially already completed its preparation for trial"); *United States v. Robinson*, 14 F.3d

1200, 1203 (7th Cir. 1994) (guilty plea filed four days before trial did not entitle defendant to third point).

Here, the record reveals that the government established a reasonable standard for filing motions for acceptance of responsibility. With respect to the defendants who pled guilty before jury selection, including the two who pled guilty immediately before jury selection,[3] the government stipulated in writing to the full three points under § 3E1.1, and agreed to move for the third point under § 3E1.1(b) at the time of sentencing. The plea agreements of Aaron King and David Melendez, who pled guilty the morning before jury selection, confirm the government's position. (GA 3, 12). Notably, Adames's plea agreement lacks either stipulation. (JA at 119-25). In fact, Adames's plea agreement makes no mention of acceptance of responsibility or § 3E1.1. *Id*. The district court found that the government's position on this matter was "extremely reasonable." (JA 169-70).

In response, the defendant asks this Court to "review the factual background of his last-minute plea in order to determine whether the government acted in good faith." (Brief for the Appellant at 9). As a preliminary matter, the defendant's own lawyer at sentencing conceded that the government had not acted in bad faith stating that "I'm not

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[3] The government notes that it did not apply this standard to two other co-defendants who pled guilty before jury selection because those two individuals were involved in behavior the government believed amounted to obstruction of justice.

prepared to sit here and tell this Court that the government acted in bad faith in any part of this process." (JA 163).

Even putting aside this concession, however, the defendant has presented no record evidence demonstrating that the government refused to move for the third point in bad faith.[4] As discussed *supra*, the government's decision to withhold the third point was based on the government's assessment that the defendant failed to timely notify it of his intention to plead guilty. *See* § 3E1.1(b). In other words, "[t]he record shows that the prosecutor was honestly dissatisfied . . . with [the defendant's] acceptance of responsibility." *Sloley*, 464 F.3d at 361 (citation omitted); *but see United States v. Roe*, 445 F.3d 202, 210 (2d Cir. 2006) (vacating sentence and remanding for evidentiary hearing to determine whether government had withheld substantial assistance motion under U.S.S.G. § 5K1.1 in bad faith because government believed the defendant had misrepresented or withheld facts). There is no record evidence to the contrary.

Furthermore, there is no record evidence to suggest that the government's decision to decline moving for the third point was made in bad faith. At sentencing, defense counsel claimed that his client was unable to enter a timely guilty plea because he had encountered difficulty in translating the proposed plea agreement from English to Spanish. As discussed in the government's sentencing

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[4] The defendant makes no argument – because he cannot – that the government's decision was based on an unconstitutional motive.

memorandum, however, defense counsel only raised this argument at sentencing. The record is devoid of any contemporaneous effort by the defendant to communicate this need for translation to the government in a timely fashion before the plea was consummated on May 9, 2006. (JA 144-45). The government's failure to offer more time to the defendant when it was unaware that the defendant needed more time is not bad faith.

In sum, the defendant was ineligible for the third point for acceptance of responsibility because the government did not move to award him that point. The government acted properly and well within its discretion. There is no basis for disturbing the district court's denial of the downward departure on this point.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: July 23, 2007

Respectfully submitted,

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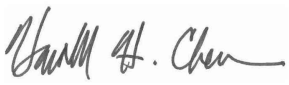

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ADDENDUM

U.S.S.G. § 3E1.1. Acceptance of Responsibility

(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.

(b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and 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, decrease the offense level by 1 additional level.

Commentary:

Application Notes:

1. In determining whether a defendant qualifies under subsection (a), appropriate considerations include, but are not limited to, the following:

(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 under § 1B1.3 (Relevant Conduct). Note 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). 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. However, 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;

(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.

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. Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct). In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct.

3. Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under § 1B1.3 (Relevant Conduct) (see Application Note 1(a)), will constitute significant evidence of acceptance of responsibility for the purposes of subsection (a).

However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility. A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right.

4. Conduct resulting in an enhancement under § 3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§ 3C1.1 and 3E1.1 may apply.

5. The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review.

6. Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease in offense level for a defendant at offense level 16 or greater prior to the operation of subsection (a) who both qualifies for a decrease under subsection (a) and who has assisted authorities in the investigation or prosecution of his own misconduct by taking the steps set forth in subsection (b). The timeliness of the defendant's acceptance of responsibility is a consideration under both subsections, and is context specific. In general, the conduct qualifying for a decrease in offense level under subsection (b)

will occur particularly early in the case. For example, to qualify under subsection (b), the defendant must have notified authorities of his intention to enter a plea of guilty at a sufficiently early point in the process so that the government may avoid preparing for trial and the court may schedule its calendar efficiently.

Because the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial, an adjustment under subsection (b) may only be granted upon a formal motion by the Government at the time of sentencing. *See* section 401(g)(2)(B) of Pub. L. 108-21.

Background: The reduction of offense level provided by this section recognizes legitimate societal interests. For several reasons, a defendant who clearly demonstrates acceptance of responsibility for his offense by taking, in a timely fashion, the actions listed above (or some equivalent action) is appropriately given a lower offense level than a defendant who has not demonstrated acceptance of responsibility.

Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease for a defendant at offense level 16 or greater prior to operation of subsection (a) who both qualifies for a decrease under subsection (a) and has assisted authorities in

the investigation or prosecution of his own misconduct by taking the steps specified in subsection (b). Such a defendant has accepted responsibility in a way that ensures the certainty of his just punishment in a timely manner, thereby appropriately meriting an additional reduction. Subsection (b) does not apply, however, to a defendant whose offense level is level 15 or lower prior to application of subsection (a). At offense level 15 or lower, the reduction in the guideline range provided by a 2-level decrease in offense level under subsection (a) (which is a greater proportional reduction in the guideline range than at higher offense levels due to the structure of the Sentencing Table) is adequate for the court to take into account the factors set forth in subsection (b) within the applicable guideline range.

Section 401(g) of Public Law 108-21 directly amended subsection (b), Application Note 6 (including adding the last paragraph of that application note), and the Background Commentary, effective April 30, 2003.

ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Almontes

Docket Number: 06-4819-cr(L)

I, Louis Bracco, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 7/23/2007) and found to be VIRUS FREE.

Louis Bracco
Record Press, Inc.

Dated: July 23, 2007