

## APPENDIX A

848 Fed.Appx. 353 (Mem)

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3. United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,  
v.

Robert William KNOPPING, Defendant-Appellant.

No. 19-50322

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Submitted May 18, 2021 \*

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FILED May 24, 2021

Appeal from the United States District Court for the Southern District of California, [Larry A. Burns](#), District Judge, Presiding, D.C. No. 3:18-cr-04451-LAB-1

#### Attorneys and Law Firms

Shital Thakkar, Assistant U.S. Attorney, [Daniel Earl Zipp](#), Assistant U.S. Attorney, [Jaclyn Briana Stahl](#), Office of the US Attorney, San Diego, CA, for Plaintiff-Appellee

[Marisa Conroy](#), Law Office of Marisa L. D. Conroy, Encinitas, CA, for Defendant-Appellant

Before: [CANBY](#), [FRIEDLAND](#), and [VANDYKE](#), Circuit Judges.

#### \*354 MEMORANDUM \*\*

Robert William Knopping appeals from the district court's judgment and challenges the 90-month sentence and several conditions of supervised release imposed following his guilty-plea conviction for importation of methamphetamine, in violation of [21 U.S.C. §§ 952](#), [960](#). We have jurisdiction under [28 U.S.C. § 1291](#). We affirm in part, vacate in part, and remand.

Knopping first contends that, when calculating his Guidelines range, the district court erred by declining to reduce his offense level by a third point for acceptance of responsibility

under [U.S.S.G. § 3E1.1\(b\)](#). We review the district court's application of the Guidelines to the facts for abuse of discretion. *See United States v. Herrera*, 974 F.3d 1040, 1045 (9th Cir. 2020). The district court did not abuse its discretion by concluding that Knopping's failure to appear at the initial sentencing and subsequent decision to abscond for several months were inconsistent with complete acceptance of responsibility. *See U.S.S.G. § 3E1.1* cmt. n.6 ("The timeliness of a defendant's acceptance of responsibility is a consideration under both subsections [of the Guideline], and is context specific."); *United States v. Tuan Ngoc Luong*, 965 F.3d 973, 991 (9th Cir. 2020) (acceptance of responsibility adjustment turns on whether defendant expressed "personal contrition" and "a genuine acceptance of responsibility for his actions" (internal quotation marks omitted)).<sup>1</sup> Though not necessary to our analysis, we also note that the district court granted a substantial downward variance of 172 months from the bottom of the applicable Guidelines range and fully explained why a greater variance was not warranted.

Knopping also contends that the written judgment's inclusion of the mandatory and standard conditions of supervised release conflicts with the district court's oral pronouncement of sentence, which did not include these conditions. However, imposition of mandatory and standard conditions is "implicit in an oral sentence imposing supervised release." [United States v. Napier](#), 463 F.3d 1040, 1043 (9th Cir. 2006).

Contrary to Knopping's argument, nothing in [Napier](#) requires the district court to state at sentencing that it will be imposing the standard conditions. *See id.*

Finally, Knopping contends that four of the special conditions in the written judgment \*355 contain additional restrictions that must be stricken because they were not included in the oral pronouncement. We agree as to three of the conditions. Specifically, the district court's oral pronouncement of sentence did not include: (1) the requirement in Special Condition 1 that Knopping "comply with both United States and Mexican immigration laws;" (2) the requirements in Special Condition 2 that Knopping "[a]llow for reciprocal release of information between the probation officer and the treatment provider," and "[m]ay be required to contribute to the costs of services rendered in an amount to be determined by the probation officer, based on ability to pay;" and (3) the requirement in Special Condition 5 that Knopping "warn any other residents that the premises may be subject to searches pursuant to this condition." We therefore vacate the judgment

and remand so the district court can enter a corrected written judgment that does not contain the foregoing clauses. *See United States v. Jones*, 696 F.3d 932, 938 (9th Cir. 2012).

We disagree that the language of Special Condition 3 in the written judgment conflicts with the court's oral pronouncement. Rather, the phrase "or in which you have an interest" clarifies what it means for Knopping to own a vehicle for the purposes of reporting it to his probation officer.

*See*  *Napier*, 463 F.3d at 1043 (later written sentence

controls when it "merely clarifies an ambiguity in the oral pronouncement").

**AFFIRMED in part, VACATED in part, and REMANDED.**

**All Citations**

848 Fed.Appx. 353 (Mem)

## Footnotes

- \* The panel unanimously concludes this case is suitable for decision without oral argument. See [Fed. R. App. P. 34\(a\)\(2\)](#).
- \*\* This disposition is not appropriate for publication and is not precedent except as provided by [Ninth Circuit Rule 36-3](#).
- 1 Though the district court did not impose it, the government recommended at sentencing that, because Knopping absconded, he should receive a two-level upward adjustment for obstruction of justice. Conduct resulting in an obstruction of justice enhancement "ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct."  [U.S.S.G. § 3E1.1](#) cmt. n.4.

## APPENDIX B

FILED

OCT 4 2019

CLERK US DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
DEPUTYUNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
UNITED STATES OF AMERICA  
v.

ROBERT WILLIAM KNOPPING (1)

**JUDGMENT IN A CRIMINAL CASE** 80  
(For Offenses Committed On or After November 1, 1987)

Case Number: 3:18-CR-04451-LAB

Amrutha N. Jindal

Defendant's Attorney

USM Number 72245-298

 -

## THE DEFENDANT:

 pleaded guilty to count(s) One of the Superseding Information was found guilty on count(s) \_\_\_\_\_  
after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offense(s):

<b>Title and Section / Nature of Offense</b>	<b>Count</b>
21:952, 960 - Importation Of Methamphetamine (Felony)	1s

The defendant is sentenced as provided in pages 2 through 5 of this judgment.  
The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) \_\_\_\_\_

Count(s) remaining are dismissed on the motion of the United States.

Assessment: \$100.00

JVTA Assessment\*: \$ \_\_\_\_\_

\*Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

 No fine  Forfeiture pursuant to order filed \_\_\_\_\_, included herein.

IT IS ORDERED that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of any material change in the defendant's economic circumstances.

September 30, 2019

Date of Imposition of Sentence

HON. LARRY ALAN BURNS  
CHIEF UNITED STATES DISTRICT JUDGE

AO 245B (CASP Rev. 1/19) Judgment in a Criminal Case

DEFENDANT: ROBERT WILLIAM KNOPPING (1)  
CASE NUMBER: 3:18-CR-04451-LAB

Judgment - Page 2 of 5

**IMPRISONMENT**

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: Ninety (90) months as to Count 1s

- Sentence imposed pursuant to Title 8 USC Section 1326(b).
- The court makes the following recommendations to the Bureau of Prisons:
  - Defendant be designated to a facility in the Western Region as close to San Diego or Los Angeles as possible.
  - Defendant be designated to a facility that offers vocational training in the field of welding.
  - Defendant participate in Residential Drug Abuse Program.
- The defendant is remanded to the custody of the United States Marshal.
- The defendant must surrender to the United States Marshal for this district:
  - at \_\_\_\_\_ A.M. on \_\_\_\_\_
  - as notified by the United States Marshal.
- The defendant must surrender for service of sentence at the institution designated by the Bureau of Prisons:
  - on or before
  - as notified by the United States Marshal.
  - as notified by the Probation or Pretrial Services Office.

**RETURN**

I have executed this judgment as follows:

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_  
at \_\_\_\_\_, with a certified copy of this judgment.

UNITED STATES MARSHAL

By \_\_\_\_\_ DEPUTY UNITED STATES MARSHAL

AO 245B (CASP Rev. 1/19) Judgment in a Criminal Case

DEFENDANT: ROBERT WILLIAM KNOPPING (1)  
 CASE NUMBER: 3:18-CR-04451-LAB

Judgment - Page 3 of 5

**SUPERVISED RELEASE**

Upon release from imprisonment, the defendant will be on supervised release for a term of:  
 Five (5) years

**MANDATORY CONDITIONS**

1. The defendant must not commit another federal, state or local crime.
2. The defendant must not unlawfully possess a controlled substance.
3. The defendant must not illegally possess a controlled substance. The defendant must refrain from any unlawful use of a controlled substance. The defendant must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter as determined by the court. Testing requirements will not exceed submission of more than 4 drug tests per month during the term of supervision, unless otherwise ordered by the court.
 

The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (check if applicable)
4.  The defendant must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. (check if applicable)
5.  The defendant must cooperate in the collection of DNA as directed by the probation officer. (check if applicable)
6.  The defendant must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where the defendant resides, works, is a student, or was convicted of a qualifying offense. (check if applicable)
7.  The defendant must participate in an approved program for domestic violence. (check if applicable)

The defendant must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

AO 245B (CASP Rev. 1/19) Judgment in a Criminal Case

DEFENDANT: ROBERT WILLIAM KNOPPING (1)  
 CASE NUMBER: 3:18-CR-04451-LAB

Judgment - Page 4 of 5

## STANDARD CONDITIONS OF SUPERVISION

As part of the defendant's supervised release, the defendant must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for the defendant's behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in the defendant's conduct and condition.

1. The defendant must report to the probation office in the federal judicial district where they are authorized to reside within 72 hours of their release from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when the defendant must report to the probation officer, and the defendant must report to the probation officer as instructed.
3. The defendant must not knowingly leave the federal judicial district where the defendant is authorized to reside without first getting permission from the court or the probation officer.
4. The defendant must answer truthfully the questions asked by their probation officer.
5. The defendant must live at a place approved by the probation officer. If the defendant plans to change where they live or anything about their living arrangements (such as the people living with the defendant), the defendant must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. The defendant must allow the probation officer to visit them at any time at their home or elsewhere, and the defendant must permit the probation officer to take any items prohibited by the conditions of their supervision that he or she observes in plain view.
7. The defendant must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment the defendant must try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about their work (such as their position or their job responsibilities), the defendant must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. The defendant must not communicate or interact with someone they know is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, they must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If the defendant is arrested or questioned by a law enforcement officer, the defendant must notify the probation officer within 72 hours.
10. The defendant must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. The defendant must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant must comply with that instruction. The probation officer may contact the person and confirm that the defendant notified the person about the risk.
13. The defendant must follow the instructions of the probation officer related to the conditions of supervision.

AO 245B (CASP Rev. 1/19) Judgment in a Criminal Case

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DEFENDANT: ROBERT WILLIAM KNOPPING (1)  
CASE NUMBER: 3:18-CR-04451-LAB

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**SPECIAL CONDITIONS OF SUPERVISION**

1. Not enter or reside in the Republic of Mexico without permission of the court or probation officer, and comply with both United States and Mexican immigration laws.
2. Participate in a program of drug or alcohol abuse treatment, including drug testing and counseling, as directed by the probation officer. Allow for reciprocal release of information between the probation officer and the treatment provider. May be required to contribute to the costs of services rendered in an amount to be determined by the probation officer, based on ability to pay. The defendant shall be tested three times a month for one year. The probation officer may modify testing after one year if no tests are reported.
3. Report all vehicles owned or operated, or in which you have an interest, to the probation officer.
4. Resolve all outstanding warrants within 120 days.
5. Submit your person, property, residence, office or vehicle to a search, conducted by a United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; the defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.
6. Seek and maintain full time employment and/or schooling or a combination of both.

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## APPENDIX C

## PART E – ACCEPTANCE OF RESPONSIBILITY

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### §3E1.1. Acceptance of Responsibility

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- (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. 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, but the fact that a defendant's challenge is unsuccessful does not necessarily establish that it was either a false denial or frivolous;
  - (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 Public Law 108–21. The government should not withhold such a motion based on interests not identified in §3E1.1, such as whether the defendant agrees to waive his or her right to appeal.

If the government files such a motion, and the court in deciding whether to grant the motion also determines 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, the court should grant the motion.

**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

## §3E1.1

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 first sentence of the second paragraph of that application note), and the Background Commentary, effective April 30, 2003.

<i>Historical Note</i>	Effective November 1, 1987. Amended effective January 15, 1988 (amendment 46); November 1, 1989 (amendment 258); November 1, 1990 (amendment 351); November 1, 1992 (amendment 459); April 30, 2003 (amendment 649); November 1, 2010 (amendments 746 and 747); November 1, 2013 (amendment 775); November 1, 2018 (amendment 810).
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## APPENDIX D

## 5. PROPOSED AMENDMENT: ACCEPTANCE OF RESPONSIBILITY

**Synopsis of Proposed Amendment:** *This proposed amendment and issue for comment address two circuit conflicts involving the guideline for acceptance of responsibility, §3E1.1 (Acceptance of Responsibility). A defendant who clearly demonstrates acceptance of responsibility receives a 2-level reduction under subsection (a) of §3E1.1. The two circuit conflicts both involve the circumstances under which the defendant is eligible for a third level of reduction under subsection (b) of §3E1.1. Subsection (b) provides:*

(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.*

*This is the language of the guideline after it was directly amended by Congress in section 401(g) of the PROTECT Act, Public Law 108–21, effective April 30, 2003. The PROTECT Act also directly amended Application Note 6 (including adding the last paragraph of that application note), and the Background Commentary. Section 401(j)(4) of the PROTECT Act states, "At no time may the Commission promulgate any amendment that would alter or repeal the amendments made by subsection (g) of this section."*

### Whether the Court Has Discretion to Deny the Third Level of Reduction

*Circuits have disagreed over whether the court has discretion to deny the third level of reduction for acceptance of responsibility when the government has filed a motion under subsection (b) and the defendant is otherwise eligible.*

*The Seventh Circuit recently held that if the government makes the motion (and the other two requirements of subsection (b) are met, i.e., the defendant qualifies for the 2-level decrease and the offense level is level 16 or greater), the third level of reduction must be awarded. See United States v. Mount, 675 F.3d 1052 (7th Cir. 2012).*

*The Fifth Circuit has held to the contrary, that the decision whether to grant the third level of reduction "is the district court's — not the government's — even though the court may only do so on the government's motion." See United States v. Williamson, 598 F.3d 227, 230 (5th Cir. 2010).*

*The proposed amendment adopts the approach of the Fifth Circuit by recognizing that the court has discretion to deny the third level of reduction. Specifically, it amends Application Note 6 to §3E1.1 by adding a statement that "The court may grant the motion if the court determines 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. In such a case, the 1-level decrease under subsection (b) applies."*

*An issue for comment is also provided on whether the Commission should instead resolve this issue in a different manner.*

*Whether the Government Has Discretion to Withhold Making a Motion*

*Circuits have also disagreed over whether the government has discretion to withhold making a motion under subsection (b) when there is no evidence that the government was required to prepare for trial. An issue for comment is also provided on whether the Commission should resolve this circuit conflict and, if so, how it should do so.*

**Proposed Amendment:**

**§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 Public Law 108–21. The court may grant the motion if the court determines 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. In such a case, the 1-level decrease under subsection (b) applies.

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 first sentence of the last paragraph of that application note), and the Background Commentary, effective April 30, 2003.

### **Issues for Comment:**

#### **1. Whether the Court Has Discretion to Deny the Third Level of Reduction**

The Commission seeks comment on whether it should resolve this circuit conflict in a manner other than that provided in the proposed amendment. If so, how should the conflict be resolved and how should the Commission amend the guidelines to do so?

#### **2. Whether the Government Has Discretion to Withhold Making a Motion**

Circuits have also disagreed over whether the government has discretion to withhold making a motion

under subsection (b) when there is no evidence that the government was required to prepare for trial.

The Second and Fourth Circuits have held that the government may withhold the motion only if it determines that it has been required to prepare for trial. See United States v. Lee, 653 F.3d 170, 173-174 (2d Cir. 2011) (government withheld the motion because it was required to prepare for a Fatico hearing; court held this was "an unlawful reason"); United States v. Divens, 650 F.3d 343, 346 (4th Cir. 2011) (government withheld the motion because the defendant failed to sign an appellate waiver; court held the defendant was "entitled" to the motion and the reduction).

The majority of circuits, in contrast, have held that §3E1.1 recognizes that the government has an interest both in being permitted to avoid preparing for trial and in being permitted to allocate its resources efficiently, see §3E1.1(b), and that both are legitimate government interests that justify the withholding of the motion. See, e.g., United States v. Collins, 683 F.3d 697, 704-708 (6th Cir. 2012) (government withheld the motion because it was required to litigate pretrial motion to suppress evidence; court held the government did not abuse its discretion); United States v. Newson, 515 F.3d 374 (5th Cir. 2008) (government withheld the motion because the defendant refused to waive right to appeal; court held the government did not abuse its discretion); United States v. Johnson, 581 F.3d 994 (9th Cir. 2009) (same).

The Commission seeks comment on whether it should resolve this circuit conflict and, if so, how it should do so.